IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 517
3154423 & 3154621

	BETWEEN	KARL MALCOLM & 4 ORS Applicants
	AND	THE CHIEF EXECUTIVE OF DEPARTMENT OF CORRECTIONS AND 4 ORS Respondents

Member of Authority:	Rachel Larmer
Representatives:	Greg Bennett, counsel/advocate for the Applicants Susan Hornsby-Geluk, counsel for the Respondents
Investigation Meeting:	On the papers
Submissions Received:	Not received from the Applicants 10 November 2021 from the Respondents
Date of Determination:	23 November 2021

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicants applied to have their entire matter removed to the Employment Court under section 178(1) of the Employment Relations Act 2000 (the Act). Their application did not succeed. The Authority also concluded that it did not have any substantive claims before it that were capable of being removed to the Employment Court under section 178(1) of the Act.

[2] The Authority issued its determination on the Applicants' removal application on 5 November 2021.[1]

[3] The Respondents' challenges to the Authority's jurisdiction over the various claims identified in the Applicants' Amended Statement of Problem dated 2 November 2021 was successful.

[4] As the wholly successful party in these proceedings, the Respondents are entitled to a contribution towards their actual legal costs. The Respondents now seek a costs award of $7,500 in their favour. The Respondents say that their actual legal costs were significantly greater than the $7,500 they are seeking.

[5] The Applicants failed to file any costs submissions in accordance with the timetable advised in the removal determination, and they have not sought an extension of time within which to do so.

[6] The principles that apply to an award of costs by the Authority are so well established that they do not need to be set out again here. The Authority usually adopts a 'notional daily tariff' based approach to assessing costs. The notional daily tariff for a matter that involves a one day investigation meeting is currently $4,500.

[7] This matter was deal with as an urgent matter that, by agreement, was determined 'on the papers'. The Authority considers that the notional starting point for assessing costs in this matter is $3,375, being 75% of the notional daily tariff. The Authority must then go on to consider whether there are any factors that should result in the notional starting tariff being adjusted.

[8] The Authority is not aware of any factors that should result in a reduction of the notional starting tariff, and the parties did not identify any. Accordingly, the Authority considers that there are no factors that should result in the notional starting tariff of $3,375 being reduced.

[9] In terms of factors that should result in an increase being made to the notional starting tariff, the Authority agrees with the Respondents that the Applicants' conduct of these proceedings unreasonably and unnecessarily increased the Respondents' actual legal costs.

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1 *Malcolm & 4 Ors v Chief Executive of Department of Corrections & 4 Ors* [2021] NZERA 489.

[10] The Authority finds that the manner in which the Applicants elected to progress these proceedings created significant additional work for the Respondents, specifically:

(a) The Applicants provided a draft "*statement of claim*" to counsel for the First Respondent on 29 October 2021, that included one named Applicant together with 1,300 other un-named Applicants, which the Respondents were unable to identify, and for which no authorities to act could be provided;

(b) The Applicants were required to file an Amended Statement of Problem by the Authority on two separate occasions, as serious deficiencies identified in the Statement of Problem meant that it could not be lodged with the Authority on the basis that it could not be validated;

(c) The parties were required to attend three case management conferences, during which the Authority assisted the representatives for the Applicants to correctly file their Statement of Problem, and to establish a valid authority to act;

(d) Each iteration of the Amended Statement of Problem changed the named Applicants, from as high as 2,000 Applicants down to the resulting five Applicants who were parties to the removal application.

(e) This continual changing of names of the Applicant parties required the Respondents each time to determine whether they had authority to accept service, to seek instructions, and to confirm whether employment relationships existed between the newly named Applicants and the Respondents;

(f) The Applicants originally sought injunctive relief and subsequently changed the remedies sought and therefore the nature of the claim at short notice;

(g) The Applicants sought urgency in respect of the removal matter. Counsel for the Respondents diverted significant resources in order to meet the very tight timeframes set by the Authority, so that the removal matter could be heard urgently. However, the Applicant failed to meet a number of filing deadlines set by the Authority, unnecessarily delaying the progression of this matter;

(h) The Applicants continued to pursue claims against the Prime Minister and the Minister of Covid-19, even though it was indicated at an early case management conference that they did not have employment relationships with any of the Applicants, so therefore lacked jurisdiction;

(i) Detailed submissions and submissions in reply were required in support of the strikeout application given the nature of the claims made by the Applicants; and

(j) The Applicants' fundamentally changed the core basis of their claims during the course of proceedings, after the timetable directions had been agreed by the parties but prior to the Respondents filing their submissions, requiring the Respondents to address the 'new case' the Applicants appeared to be advancing.

[11] The Authority finds that the manner in which the Applicants conducted their case is a factor that needs to be reflected by increasing the notional starting tariff, to reflect that the Applicants put the Respondents to unnecessary and additional expense.

[12] The Authority considers that the notional starting tariff of $3,375 should be doubled to reflect the additional expense that the Respondents were put to as a direct result of the Applicants' inefficient and unreasonable actions/conduct.

[13] The Authority therefore concludes that the Applicants must pay the Respondents $6,750 towards their actual legal costs.

[14] Because there are five Applicants, who each have a different Respondent employer, it is necessary to equally apportion the total costs that have been awarded to the Respondents, in accordance with the following costs orders:

(a) Karl Malcolm is ordered to pay the Department of Corrections $1,350 towards its actual legal costs;

(b) Carol Waring is ordered to pay Counties Manukau District Health Board $1,350 towards its actual legal costs;

(c) Philippa McDermott is ordered to pay Waikato District Health Board $1,350 costs;

(d) Rebecca Mildren is ordered to pay Bay of Plenty District Health Board $1,350 costs; and

(e) Julie Kerr is ordered to pay the Capital and Coast District Health Board $1,350.

[15] The costs that each Applicant has been ordered to pay to their employer Respondent must be paid within 28 days of the date of this determination.

[16] The Authority further notes, that now costs on the removal application have been determined, that resolves all issues under file numbers 3154423 (substantive matter) and 3154621 (removal application). Because there are currently no matters over which the Authority has jurisdiction, both of these matters (3154423 & 3154621) have now been closed.

Rachel Larmer
Member of the Employment Relations Authority