

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 533
3117894

BETWEEN	QUENTIN RAUHIHI Applicant
AND	CONSTRUCTION LABOUR HIRE LIMITED First Respondent
AND	MULHOLLAND CONSTRUCTION LIMITED Second Respondent

Member of Authority: Trish MacKinnon

Representatives: Kevin Smith, counsel for the Applicant
Paul McBride and Emma Rose Luxton, counsel for the Respondents

Submissions Received: 22 October 2021 from the Respondents
12 November 2021 from the Applicant

Date of Determination: 29 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In my determination of 3 September 2021 I found that Quentin Rauhihi was an independent contractor engaged by Construction Labour Hire Limited (CLH) and not an employee as he claimed.¹ Accordingly I had no jurisdiction to consider his claims further.

¹ [2021] NZERA 386.

[2] CLH and Mulholland Construction Limited (Mulholland Construction), which Mr Rauhihi had sought to be joined as a party to the proceedings, now seek a contribution to the costs each incurred in defending the claims.

[3] Counsel for the Respondents submits that each of the Respondents is entitled to an award of costs, as each is a separate entity which was separately sued. In counsel's submission an appropriate award to CLH would be at, or above, the daily tariff normally applied by the Authority and an award in the vicinity of \$1,500 would be appropriate for Mulholland Construction.

[4] Counsel for Mr Rauhihi accepts that the claims made against both Respondents were dismissed but resists a separate award of costs to each of them. He notes the Authority's practice note on costs does not seek to differentiate where there is more than one respondent.² Counsel also submits the Authority's hearing was limited to the single issue of "contractor versus employee" which did not require extensive legal research, and observes that the hearing took less than one full day.

Discussion

[5] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Awards of costs are discretionary and it is up to the Authority to decide if they should be awarded and, if so, in what amount. Underpinning the award of costs in the Authority are well-known principles that were referred to with approval by the full Court of the Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.³ The principles were revisited and confirmed in 2015 by the full Court in *Fagotti v Acme & Co Limited*.⁴

[6] The principles include that the discretion to award costs is to be exercised in accordance with principle, not arbitrarily. Costs usually follow the event which, in most cases results in the successful party being entitled to a reasonable contribution to its actual costs from the unsuccessful party. Costs should be modest and are to be considered in the light of the particular circumstances. They are frequently judged against a notional daily tariff.

² "Practice Note 2: Costs in the Employment Relations Authority (30 June 2016).

³ [2005] ERNZ 808 (EmpC).

⁴ [2015] EmpC 135.

[7] In applying that tariff, the Authority should have regard to the particular characteristics of the case. If a party's conduct has unnecessarily increased costs, that factor may be taken into account in the award of costs that is made but costs are not to be used as a punishment or as an expression of disapproval of a party's conduct.

[8] Having considered the principles against the particular circumstances of this case I find it appropriate that an award of costs be made to the Respondents as the successful parties in the matter. The starting point is the daily tariff which currently sits at \$4,500 for the first day of an investigation meeting.

[9] In this instance, as counsel for Mr Rauhihi correctly observed, the Authority's investigation occupied less than one full day, having been completed by 2 p.m. It is appropriate that be reflected in the starting point, which is accordingly reduced to \$3,000.

[10] Counsel for the Respondents advised that they invited Mr Rauhihi to make a realistic proposal as to costs but did not receive a realistic response, and that this imposed further costs on the Respondents through having to make application to the Authority. I do not regard that as a reason for an uplift to the tariff, nor do I consider there is any other factor warranting an uplift.

[11] I accept counsel for the Respondents' submission that it is appropriate to apply costs to each Respondent separately on the basis that different claims were made against each. That that will be achieved by an appropriate allocation to each Respondent from one costs award.

Orders

[12] Taking all factors into account, I consider it appropriate for Mr Rauhihi to contribute \$3,000 in total to the costs incurred by the Respondents. He is ordered to pay:

- (a) Construction Labour Hire Ltd \$2,000 as a contribution to its costs; and
- (b) Mulholland Construction Ltd \$1,000 as a contribution to its costs.

Trish MacKinnon
Member of the Employment Relations Authority