

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 168  
3065033

BETWEEN

WEI JACK HU  
Applicant

AND

TOPSTAR NEW ZEALAND  
TRADING LIMITED  
Respondent

Member of Authority: Marija Urlich

Investigation Meeting: On the papers

Representatives: Paul Young, for the Applicant  
Bao Ma, for Respondent

Determination: 28 April 2021

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**DETERMINATION OF THE AUTHORITY**

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[1] The Authority issued a determination on 4 March 2021 which found Mr Hu had not raised a personal grievance within the statutory timeframe and declined to allow him to raise a grievance outside that timeframe. The Authority found Mr Hu had breached obligations owed to Topstar under the employment agreement and reserved the determination of its claim for damages arising from those breaches and penalties. The issue of costs was reserved and no timetable was set.<sup>1</sup>

[2] By minute dated 19 March the Authority set a timetable for filing information and comment regarding costs. For the sake of clarity the minute is set out in full:

By email dated 18 March 2021 and further to the seventh minute of the Authority dated 11 March 2021, Ms King advises:

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<sup>1</sup> *Wei Jack Hu v Topstar New Zealand Trading Limited* [2021] NZERA 85.

(i) the parties have agreed Topstar will withdraw its claims for damages and penalties against Mr Hu and penalties against Mr Young on the basis costs to lie where they fall in relation to Topstar's counterclaim (3088052); and

(ii) the issue of costs in respect of 3065033 is unresolved and Topstar says the daily tariff is appropriate for the two-day investigation meeting (24 and 25 November).

3088052

[2] The Authority has considered the correspondence provided and is satisfied all matters in respect of 3088052 are resolved between the parties. This file is to be closed.

3065033

[3] In respect of costs for 3065033 Topstar to clarify if it is seeking \$4500.00 (the daily tariff) as a total costs award for the two day hearing. A costs memorandum may be filed.

[4] Mr Hu to provide any further information or comment on costs within 5 working days of Topstar clarifying its costs claim.

[5] The Authority will then determine the issue of costs on the papers.

[6] Though the Authority understands Mr Young no longer acts for Mr Hu he (Mr Young) has not sought leave to withdraw. A copy of this minute therefore is to be sent to Mr Young.

[3] The clarification sought was not provided and was followed up:

On 6 April the Authority asked Top Star its position regarding costs. This has not occurred. Mr Hu has not had an opportunity to file reply submissions.

The matter is now before the Court on challenge.

Costs are reserved. Parties to advise when they are ready for this issue to be determined.

[4] On 13 April Bao Ma emailed the Authority that Topstar sought a total contribution to costs of \$4500. By this stage Ms King had advised she no longer had instructions to act for Topstar.

[5] On 14 April Mr Hu filed a submission opposing Topstar's claim of \$4500.00 costs because:

- Topstar has not complied with timeframes set by the Authority for filing costs memoranda;
- his claim to bring a personal grievance was barred for failure to comply with timeframe; and

- he has challenged the Authority determination including the costs award of \$4,500.00.

[6] The parties were advised the Authority would move to determine costs.

### **Costs principles**

[7] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.<sup>2</sup>

### **Costs analysis**

[8] Topstar was the successful party and it is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs. It is accepted Topstar has incurred actual costs in respect of this matter. It should receive a contribution to costs incurred.

[9] The notional daily tariff is a starting point. The applicable daily tariff is \$4,500.00 with subsequent days \$3,500.00. This matter involved two full hearing days. Costs for one day are sought. This is understood to be because the parties have resolved the counterclaim that is, in effect, half the hearing time. No issues for uplift or decrease of the daily tariff are apparent.

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<sup>2</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.

[10] The issues raised by Mr Hu have been considered. The timeframes he refers to are not analogous – one involves a statutory framework, the other a timetable proposed by the Authority to resolve the issue of costs between the parties. The challenge does not act as a stay and it is usual for the Authority to determine costs in such circumstances.

[11] Mr Hu is ordered to pay Topstar \$4500.00 as a contribution to its costs within 21 days of the date of this determination.

Marija Urlich  
Member of the Employment Relations Authority