IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 119
3124454

	BETWEEN	REUNITED EMPLOYEES ASSOCIATION INCORPORATED Applicant
	AND	NELMAC LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Anjela Sharma, counsel for the Applicant Nick Mason, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	13 December 2021 from the Respondent 21 January 2022 from the Applicant
Date of Determination:	1 April 2022

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] I have issued two determinations in this matter. The first dated 3 June 2021 and the second dated 26 November 2021.[1]

[2] In the first determination I ordered the parties to attend facilitation. After the facilitation there was a breakdown in bargaining, despite an agreement having been reached in that facilitation.

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[1] *Reunited Employees Association Incorporated v Nelmac Limited* [2021] NZERA 241; *Reunited Employees Association Incorporated v Nelmac Limited* [2021] NZERA 530.

[3] In the second determination, I found Reunited Employees Association (REA) had breach the duty of good faith in bargaining – this related to the post facilitation conduct and the breakdown in bargaining. In terms of remedies, I declined to award a penalty for the breach, but I fixed the terms of a new collective agreement between REA and Nelmac Limited.

[4] I also reserved costs so that the parties could try to agree costs.

Application for costs

[5] Counsel for Nelmac seeks an award of costs on an indemnity basis, that is that REA pay its full costs incurred in the two claims of $72,724.80 with disbursements of $9,093.75.

[6] Counsel for REA says costs should lie where they fall, that is I should not make an award of costs for either party.

Analysis

Costs in the Authority

[7] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*[2] and other relevant Employment Court and Court of Appeal decisions.[3]

[8] I must follow the principles set out in *Da Cruz*, when setting costs awards. These include:

(a) There is discretion as to whether costs would be awarded and in what amount.

(b) The discretion is to be exercised in accordance with principle and not arbitrarily.

(c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

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[2] *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

[3] *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4; *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28; *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135; and *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127.

(d) Equity and good conscience are to be considered on a case by case basis.

(e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

(f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

(g) That costs generally follow the event.

(h) That without prejudice offers can be taken into account.

(i) That awards will be modest.

(j) That frequently costs are judged against a notional daily rate.

(k) The nature of the case can also influence costs, and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[9] The first principles to consider as they relate to Nelmac's application for costs, are that costs will normally be awarded on the basis of a notional daily rate and that costs are not a punishment for a party's behaviour but there may be circumstances in which costs can be awarded on an increased basis, including on an indemnity basis.

[10] Nelmac's argument, in seeking indemnity costs, is that:

(a) REA advanced a claim against Nelmac that had no basis.

(b) REA defended Nelmac's claim against it for breach of good faith, yet I found convincingly in favour of Nelmac.

(c) REA's assertions regarding the agreement reached at facilitation that underpinned its overall approach to both fixing applications, including the terms it proposed for fixing, was not arguable and could not be substantiated.

(d) I fixed the terms of the new collective agreement on the basis of Nelmac's proposed wording as set out in what is says was the agreement reached in facilitation.

[11] In terms of awarding indemnity costs I must be satisfied that REA's conduct in progressing its claims and responding to Nelmac's claims meets the standard for awarding indemnity costs set out in *Bradbury v Westpac Banking Corp.*[4] In short, this is where a party has behaved badly or very unreasonably; this requires exceptionally bad behaviour to be shown. The key point is that this relates to behaviour in terms of the conduct of any claim or response and includes misconduct that causes loss of time to the court or the other party, commencing a claim for an ulterior motive, and making allegations that should never have been made or prolonging a case by groundless contentions (known as the hopeless case test).

[12] I have reviewed REA's conduct of this claim and overall, I conclude that there is no basis to award indemnity costs. The behaviour complained of does not meet the standard set out by the Court of Appeal in *Bradbury*. In particular I note:

(a) REA's claim for breach of good faith by Nelmac, as it's basis for seeking fixing, had two parts and whilst I described one part as having no basis, the other – relating to specific bargaining tactics and behaviour - had a factual basis but fell short of amounting to a breach of good faith. Overall, I conclude that REA's claims were not groundless, they were not advanced for an ulterior motive, and REA's conduct in advancing the claims does not amount to misconduct – in fact REA's conduct of its claim and its response to Nelmac's claim was, at times, pragmatic in light of various issues impacting on the investigation meeting time that was available.

(b) REA's response to Nelmac's claim were not hopeless; they were unsustainable on the basis of the documents and the evidence but that became clear on investigation, and it appears that REA firmly believed in its position regarding the agreement reached at facilitation.

[13] Finally on the question of indemnity costs, that Nelmac was almost completely successful in its allegations of breach of good faith against REA and in the fixing it sought is

[4] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234.

not a basis to award indemnity costs – in any event, I also record that Nelmac was not successful is obtaining penalties for the breach of good faith nor did I fix the terms of the new collective agreement entirely on the proposal it put forward.

[14] Nelmac's success does, however, support an application for costs to be awarded in its favour based on the principle that costs generally follow the event. In this regard REA says I should depart from applying this principle and order that costs lie where they fall. REA's argument is based on:

(a) Costs should not be seen as a punitive measure; particularly not in relation to the actions found to inform the underlying claim.

(b) The events that occurred, which gave rise to the Authority applications, show there is a power imbalance between REA and Nelmac, with Nelmac having the resources and ability to be combative in its approach to REA, and this approach shows that the breakdown in the relationship, which ultimately led to the need to fix the terms of the new collective agreement, was equally caused by Nelmac.

[15] I am not persuaded by these arguments. Refusing to award costs to Nelmac on the basis that it contributed to the dysfunction that led to the parties being unable to agree the terms of the new collective agreement, which ultimately caused both parties to apply for fixing, would be simply punishing it for its underlying conduct and this goes against the very principle advanced.

[16] However, I am persuaded that the claim that costs should lie where they fall has merit. The relevant principle is that the nature of a case can influence costs and result in an order that costs lie where they fall in certain circumstances. Those circumstances include where the claims concern matters of public interest, parties have acted reasonably in making their claims (i.e., in this case seeking assistance from the Authority to fix the terms of the new collective agreement) and, overall, the interests of justice support no order for costs being made.[5]

[17] Applying these principles, I am satisfied that costs should lie where they fall:

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[5] *Four Midwives v Minister for COVID-19 Response (No 2)* [2021] NZHC 3420; and *GF v OO* [2022] NZEmpC 1.

(a) There is a public interest in, and the interests of justice support, parties accessing the Authority for assistance with bargaining when they are unable to reach agreement – to enable this parties should not be hampered by concerns over cost implications.[6]

(b) There is a public interest in having the Authority resolve collective bargaining impasses by fixing the terms of collective agreements.

(c) REA did not act unreasonably in bringing its claims against Nelmac, particularly as that relates to seeking assistance in fixing the terms of the new collective agreement.

Order

[18] Costs will lie where they fall.

Peter van Keulen
Member of the Employment Relations Authority

[6] I drew a similar conclusion in relation to the imposition of penalties in *Reunited Employees Association Incorporated v Nelmac Limited* [2021] NZERA 530 at [93] – [97].