

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 151
3098852

BETWEEN	NEW ZEALAND NURSES ORGANISATION Applicant
AND	AROHANUI HOSPICE SERVICE TRUST Respondent

Member of Authority: Michael Loftus

Representatives: Jock Lawrie, counsel for the Applicant
Alastair Hall and Joelle Avery, counsel for the
Respondent

Submissions Received: 5 April 2022 from the Applicant
14 April and 19 April 2022 from the Respondent

Date of Determination: 21 April 2022

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 23 March 2022 I issued a determination in which I found in NZNO's favour in a dispute concerning holiday pay.¹

[2] Costs were reserved but the parties have been unable to resolve the issue. As a result, and as the successful party, NZNO now seeks a contribution toward those it incurred in successfully bringing its claim.

¹ *New Zealand Nurses Organisation v Arohanui Hospice Service Trust* [2022] NZERA 107

[3] Before continuing it should be noted that on 19 April 2022 Arohanui advised the substantive determination had been challenged and queried whether this might mean the determination of costs be held in abeyance. The answer is no given case law strongly suggests the opposite and normal practice in the employment jurisdiction is to conclude all outstanding matters, including costs, pending an appeal or challenge. That is what the ... *Court expects will happen on appeals from the Employment Tribunal to the Employment Court*² and while *Swales* refers to the Employment Tribunal that has remained the practice of its replacement which is the Authority.³

[4] Returning to the costs application. Normally the Authority will apply a daily tariff when addressing costs with the current starting point being \$4,500 for the first day and \$3,500 for each day thereafter.⁴ From there adjustment may occur depending on the circumstances. That said, a strict application of the tariff is difficult in this instance as, by agreement, the matter was determined on the papers.

[5] NZNO seeks \$4,000 plus reimbursement of the Authority's filing fee. It does so on the basis costs follow the event and while determined on the papers the input required (namely the preparation of two evidential briefs along with a further supplementary brief, a bundle of documents and submissions) was not dissimilar to that necessary for a day long investigation.

[6] Arohanui acknowledges the principles governing costs but notes an additional factor applicable where the matter at issue is a genuine interpretational dispute. That that was the case was confirmed by the parties having sought the assistance of a labour inspector prior to the Authority's input.

[7] In such circumstances the Court has, in the past, concluded costs should lie where they fall and while there are a number of examples, that chosen for illustrative purposes by Arohanui was *Quality Service Enterprises Ltd v Huriwai*.⁵ There the Court said:

No doubt the rationale for costs being allowed to lie where they fall in disputes is that both parties need the services of the employment institutions to assist in resolving genuine disputes over agreements in which they are parties.

² *Swales v AFFCO New Zealand Limited* EmpC Auckland AC19/01, 23 March 2001 at [3]

³ For example *Sandilands v Chief Executive of the Department of Corrections* ERA Wellington WA67A/09, 10 September 2009

⁴ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

⁵ *Quality Service Enterprises Ltd v Huriwai* [2005] NZEmpC 134 at [5]

[8] In the alternate it is submitted I apply the principle costs be modest and recognise the fact costs were reduced by virtue of the fact the matter was dealt with on the papers which avoided considerable preparation, travel and attendance costs. Similarly it should be recognised the original application was more complex but the issues were simplified after intervention by the Authority.

[9] Finally, comment is made about the notional daily tariff and the fact there are numerous examples of the Authority considering a matter dealt with on the papers equates to a half day investigation at the most and should I reject the submission costs should lie where they fall an award in the order of \$1,500 would be appropriate.

[10] Arohanui's approach ignores one crucial point and that is notwithstanding the Court's frequent adoption of "costs lie where they fall" in genuine interpretational disputes the current Chief Judge has recently questioned its application and commented it may have a chilling effect on a parties ability to obtain a proper outcome.⁶ That said it is difficult to conclude the scenario outlined by the Chief Judge in *Gate Gourmet* applies here – this is not a small union with only twelve members and the costs incurred are not significant as they were in *Gate Gourmet*.

[11] That said the comments in *Gate Gourmet* raise a further issue which is the costs lie where they fall approach is often applied where the matter is in the nature of a test case with wide applicability. That is not the situation here but then again nor was it in *Huriwai*. Notwithstanding that the Court, in *Huriwai*, applied the approach on the basis it was a genuine dispute the resolution of which had benefits for both parties.⁷

[12] It is here Arohanui's final issue arises. The challenge means resolution has not been achieved and that appears to nullify an order that costs lie where they fall given the matter is not in the nature of a test case with wider application. That said I see merit in Arohanui's submission about its importance to the parties and the fact considerable prior effort was put into trying to resolve it without the Authority's input.

[13] A consideration of the submissions and the above factors leads me to conclude it appropriate I apply the alternate position put by Arohanui. In other words cost follow the event which was a successful application by NZNO, but the award should be modest given the nature

⁶ *Gate Gourmet New Zealand Limited v Sandhu* [2022] NZEmpC 50 at [8]

⁷ Above n 5 at [10]

of the claim – a genuine dispute and its importance to the parties. Finally I also note a conclusion that had an in person investigation been required it would likely have been completed in a half day.

[14] Putting these factors together and having rejected the costs lie where they fall approach, I conclude Arohanui's suggestion of \$1,500 is appropriate. Reimbursement of the filing fee is, in my view, a given.

Conclusion and orders

[15] For the above reasons I order Arohanui Hospice Service Trust pay the New Zealand Nurses Organisation the sum of \$1,571.56 (one thousand, five hundred and seventy one dollars and fifty six cents) as a contribution toward the costs NZNO incurred in pursuing its claim.

Michael Loftus
Member of the Employment Relations Authority