

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 370
3134016

BETWEEN RUI DE SOUSA, CHANTAL
DE SOUSA, SARA
CAVANAGH, CAMERON
KEATS, NICHOLAS KEAN,
GUILHERME ARAUJO,
SONTHI BANPHET AND
CHARLOTTE MORISON
Applicants

AND BAYSIDE FINE FOOD
LIMITED (IN LIQ)
First Respondent

DEANNA DEHLSSEN
Second Respondent

JAMES DEHLSSEN
Third Respondent

Member of Authority: Marija Urlich

Representatives: Simon Mitchell and Jeremy Lynch, counsel for the Applicants
Samuel Houliston, counsel for second and third Respondents

Investigation Meeting: On the papers

Submissions received: 13 July 2022 from the Second and Third Respondents
2 August from the Applicants

Determination: 9 August 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 17 June 2022 which declined the compliance order sought by the applicants.¹ This determination followed an earlier, related determination where the second and third respondents' challenge to jurisdiction

¹ *De Sousa and 7 Ors v Bayside Fine Food Limited (In liq) & 2 Ors* [2022] NZERA 253.

was unsuccessful.² Costs were reserved in both matters. The parties have filed submissions within the timetable set in the most recent determination.

Mr and Mrs Dehlsen's claim for costs

[2] Mr and Mrs Dehlsen seek a costs award of \$8,800 having incurred actual costs in excess of this amount. They submit such an award is warranted given:

- they successfully defended the compliance order sought by the applicants;
- total hearing time was approximately two days; and
- an uplift is warranted because the claim was misconceived from the outset.

The applicants' response

[3] The applicants submit costs should lie where they fall:

- the total hearing time was no more than a day and a half;
- the applicants are entitled to a credit for costs they incurred in respect of the challenge to jurisdiction; and
- given all the circumstances of this matter including, the negative impact on the applicants of the respondents' failure to apply for the COVID-19 wage subsidy, the exercise of the Authority's discretion weighs against an award of costs.

Costs principles

[4] 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. Principles guiding the Authority's approach to costs 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

² *De Sousa and 7 Ors v Bayside Fine Food Limited (In liq) & 2 Ors* [2021] NZERA 471.

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.

Costs analysis

[5] The applicants' claim for a compliance order was unsuccessful. 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 Mr and Mrs Dehlsen have incurred actual costs in respect of this matter in excess of the contribution they seek. It is also accepted the applicants have incurred costs in respect of the successfully defended jurisdiction challenge for which they might reasonably expect a credit.

[6] In assessing an appropriate award of costs the notional daily tariff is a starting point. The applicable daily tariff is \$4,500 for the first day and \$3,500 for every day thereafter. This matter required total investigation meeting time of a day and a half.³ The total notional costs, applying the Authority tariff, is \$6,250.

[7] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the tariff. I do not accept there is a basis for an increase in the tariff – there is no evidence before the Authority to suggest the applicants' claim was anything but sincere. There are factors which weigh in favour of a decrease including the successful defence of the jurisdiction challenge and the broader circumstances of this case which are set out in the substantive determination.

Outcome

[8] Weighing all the relevant factors I find this is a matter where the most just outcome is to let costs lie where they fall.

Marija Urlich
Member of the Employment Relations Authority

³ The first day run from 10am to 3pm and the second day 10am to 12pm.