

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 492
3133444

BETWEEN

SHER SINGH
Applicant

AND

E TŪ INCORPORATED
Respondent

Member of Authority: Peter van Keulen

Representatives: David Fleming, counsel for the Applicant
Simon Mitchell KC, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 31 July 2023 and 16 August 2023, from the Applicant
15 August 2023, from the Respondent

Date of Determination: 31 August 2023

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 28 April 2021, Member Campbell declined Sher Singh's application for interim reinstatement with E Tū Incorporated.¹ Member Campbell reserved costs in her determination.

¹ *DPR v WVK* [2021] NZERA 170.

[2] In a determination dated 19 July 2023 I found that E Tū had acted unjustifiably in suspending and then dismissing Mr Singh.² In my determination I reserved costs so that the parties could try to agree costs. The parties were unable to agree and now Mr Singh seeks costs.

Application for costs

[3] Mr Singh seeks an award of costs of \$11,500.00. This is based on applying the daily tariff for three days for the substantive matter.³ Mr Singh says this represents the amount of work undertaken in the substantive matter notwithstanding that the investigation meeting was two days. The additional work arose because of various delays in scheduling, delays issuing the determination and a change in Member allocated to the substantive matter requiring a further investigation, which was done on the papers. Mr Singh says the application for interim reinstatement should be treated neutrally for the purposes of costs as Mr Singh was successful with his application for non-publication but lost his application for interim reinstatement.

[4] E Tū says costs should lie where they fall. First, it was successful in defending the interim reinstatement application and should receive some credit for that. Second, the substantive matter required a two-day investigation meeting so the starting point for any costs award in favour of Mr Singh is \$8,000.00. Third, any additional work as a result of actual or perceived delays in issuing the determination by the Authority does not justify an uplift to the daily tariff amount; each party should bear its own additional costs arising out of these factors. Fourth, the daily tariff should, in fact, be reduced to reflect the fact that Mr Singh was unsuccessful with his interim reinstatement application and permanent reinstatement as part of the substantive claim. The end result is that no costs should be awarded to either party.

² *Sher Singh v E Tū Incorporated* [2023] NZERA 384.

³ The normal practice of the Authority when setting costs is to apply a set amount for each day of the investigation meeting calculating quantum based on the time spent in the investigation meeting; this is applying the daily tariff. The current daily tariff is \$4,500.00 for the first day of an investigation meeting and \$3,500.00 for every subsequent day of an investigation meeting.

Analysis

Costs in the Authority

[5] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Employment Relations Act 2000. The principles and approach adopted by the Authority in respect of this power are outlined in the Authority's practice note on costs.⁴

Costs for Mr Singh

[6] Costs normally follow the event. Mr Singh was successful with his substantive claim so the starting point is that he should be awarded costs. There is no reason to depart from this principle.

Applying the daily tariff

[7] The next question is whether I should follow the normal practice of the Authority and calculate the quantum of any costs award on the basis of the daily tariff.

[8] There is no reason why I should depart from using the daily tariff in this case.

Increasing or decreasing the daily tariff

[9] The main question then is whether the daily tariff should be adjusted.

[10] I accept that Mr Singh may have incurred extra costs due to additional work because of delays in scheduling and rescheduling the investigation meeting (due to COVID-19 implications) and because of the subsequent change in Member. However, I agree with counsel for E Tū that any extra cost arising out of these particular factors should be borne by each party. I will not impose an additional cost burden on an unsuccessful party if that party was not responsible for the extra cost, and for this reason I will not increase the daily tariff.

⁴ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.

[11] I accept that E Tū was successful in defending the interim reinstatement application; that Mr Singh was granted non-publication on the interim reinstatement application is not a basis to conclude he was successful with his interim application. And E Tū was successful in defending the permanent reinstatement sought by Mr Singh in the substantive matter. On the basis of these two points, a reduction in the daily tariff is appropriate. I set this reduction at \$3,000.00.

Conclusion

[12] Applying the daily tariff to a two-day investigation meeting and allowing for a reduction of \$3,000.00 I conclude that Mr Singh is entitled to a costs award of \$5,000.00.

Order

[13] E Tū Incorporated is to pay Sher Singh \$5,000.00 as a contribution to his costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority