

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 563
3203559

BETWEEN PENNY JACKSON & OTHERS
Applicants

AND FLETCHER DISTRIBUTION
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Victor Corbett, counsel for the Applicant
Rebecca Rendle and Matthew Austin, counsel for the
Respondent

Investigation: On the papers

Submissions or 21 September 2023 from the Respondent
information received: 27 September 2023 from the Applicants

Date of Determination: 28 September 2023

COSTS DETERMINATION OF THE AUTHORITY

Identification of the Applicants

[1] The nine Applicants in this matter are Penny Jackson, Nicholas Rumore, Lucy Smith, Aaron Burns, Louis Godinet, Linda Burroughs, Romel de Guzman, Travis Wernimont and Muslim Badami.

Employment Relationship Problem

[2] The Applicants unsuccessfully applied to join Fletcher Building Limited (“FBL”) as a controlling third party to this matter. FBL is not a party to this matter.

[3] The joinder application was made against FBL because (as a parent company) it formulated the vaccination policy that was adopted by the Fletcher Building Limited Group of companies (“the Group’s vaccination policy”).

[4] The Respondent, Fletcher Distribution Limited (“FDL”) implemented the Group’s vaccination policy for its employees. The Applicants were dismissed as they were unable to comply with the vaccination requirements FDL had implemented in its business.

[5] The Authority issued its determination on the joinder application on 7 September 2023.¹ This stated that FDL as the successful party is entitled to a contribution towards its actual legal costs on the joinder application.

The Authority’s investigation

[6] Costs have been determined ‘on the papers’.

[7] FDL lodged costs submissions on 21 September 2023.

[8] The Applicants advised the Authority on 27 September 2023 that they did not want to be heard on costs.

Issues

[9] The following issues are to be determined:

- (a) What is the notional starting point for assessing costs in this matter?
- (b) Should the notional starting tariff be adjusted?
- (c) What costs should be awarded?

Relevant law

[10] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000 (“the Act”).

[11] The Authority usually adopts a notional daily tariff-based approach to assessing costs. The notional daily tariff is currently \$4,500 for the first day of an investigation meeting and then \$3,500 for each subsequent day.

¹ *Penny Jackson and Ors v Fletcher Distribution Ltd* [2023] NZERA 507.

[12] Although costs are discretionary, an unsuccessful party will normally be required to contribute to the successful party's actually incurred legal costs. The Authority's costs discretion must be exercised on a principled basis.

[13] The Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz and Fagotti v Acme & Co Limited* set out the costs principles that the Authority must have regard to when assessing costs.²

[14] These are so well known there is no need to set them out again here. These principles have guided the Authority's assessment of costs in this matter.

What is the notional starting point for assessing costs?

[15] This matter involved an 'on the papers' investigation meeting.

[16] In the joinder determination the Authority indicated that this matter should be treated as if it had involved a half day investigation meeting, so the notional starting tariff for assessing costs is \$2,250 (being half of the \$4,500 notional daily tariff for the first day of an investigation meeting).³

Should the notional starting tariff be adjusted?

[17] Having fixed a notional starting tariff, consideration needed to be given to whether or not it should be adjusted to reflect the particular circumstances of this case.

[18] The Authority is not aware of any factors that should result in the notional starting tariff being reduced. Accordingly, a reduction is not appropriate.

[19] The Authority considered it appropriate to increase the notional daily tariff in this matter by \$750, to reflect that the time involved in this matter was more than would normally be expected for a half day 'on the papers' investigation and that the Applicants' conduct regarding the way in which they pursued the joinder application unreasonably increased FDL's actual costs.

[20] The real motivation behind the joinder application was that it was made solely because FBL had implemented a Group vaccination policy, which FDL had then implemented.

² *PBO Ltd v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

³ Above n1, at [114].

However, instead of being upfront about so the joinder application could be confined to that limited point, the Applicants all elected to lodge affidavit evidence that attempted to claim that FBL exercised the same or similar control over them that their employer FDL did. Such evidence was manifestly insufficient to have established that, so that should have been obvious to the Applicants at the outset.

[21] The Applicants together lodged nine affidavits and FDL lodged three affidavits in response to that. Both parties lodged written submissions.

[22] The Authority finds that FDL was put to unnecessary time and cost because the joinder application was misconceived and should not have been pursued.

[23] The Applicants' employer FDL admitted it had full responsibility for the Applicants' employment and dismissals. FDL ran the individual consultation processes with each Applicant, and it made the decision to dismiss each Applicant, after considering the feedback they had provided during the consultation process.

[24] FDL was in a financial position to be to fully meet any potential liability that could arise from the Applicants' various employment related claims, which had arisen as a result of them being unvaccinated employees. There was no obvious benefit to the Applicants by attempting to join FBL as a party, when FDL as the employer took full responsibility for the matters the Applicants had lodged claims with the Authority about.

[25] The Authority therefore finds that the Applicants' conduct unnecessarily and unreasonably increased the Respondent's costs in this matter. Such conduct included making claims that were objectively unsupported by their evidence and by lodging affidavits that fell far short of providing the necessary evidence required to support their joinder application, which FDL were required to respond to.

[26] While the Applicants are entitled to have their claims heard, and the Authority recognised that it was important to acknowledge that costs must not be used to punish an unsuccessful party, conduct that has unreasonably increased the successful party's costs should be reflected by an uplift being made to the notional starting tariff. That is what has occurred in this case.

What costs should be awarded?

[27] Within 28 days of the date of this determination, the Applicants are ordered to pay Fletcher Distribution Limited \$3,000 towards its costs (consisting of \$2,250 as the notional starting tariff plus \$750 as an uplift to tariff to reflect the Applicants' conduct unreasonably increased FDL's legal costs).

[28] The Authority finds that Penny Jackson, Nicholas Rumore, Lucy Smith, Aaron Burns, Louis Godinet, Linda Burroughs, Romel de Guzman, Travis Wernimont and Muslim Badami are all jointly and severally liable to pay the \$3,000 costs that have been awarded to FDL.

Rachel Larmer
Member of the Employment Relations Authority