

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 615  
3203559

BETWEEN PENNY JACKSON & 8 OTHERS  
Applicants

AND FLETCHER DISTRIBUTION  
LIMITED  
Respondent

Member of Authority: Rachel Larmer

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

Investigation: On the papers

Submissions: 17 October 2023 from the Respondent  
No submissions from the Applicants

Date of Determination: 20 October 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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**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.

[2] These nine Applicants were employed by Fletcher Distribution Limited (“FDL”) until they were dismissed in early 2022 for being unable to comply with the Covid-19 Procedure that required all employees in the Fletcher Building group of companies (referred to as “the Group”), of which FDL is one, to be fully vaccinated against Covid-19 by 15 February 2022.

[3] The Applicants claimed FDL unjustifiably dismissed them and breached its good faith obligations. Five of the nine Applicants (Ms Jackson, Mr de Guzman, Mr Wernimont, Mr Godinet and Ms Smith, together referred to as “the five Applicants”) also claimed they had been discriminated against in their employment.

[4] FDL disputed that the Authority had jurisdiction to investigate the discrimination grievances. It said none of the five Applicants raised discrimination personal grievances within the 90-day statutory time limit required by s 114(1) of the Employment Relations Act 2000 (“the Act”). FDL did not consent to any personal grievances being raised out of time.

[5] The five Applicants claimed they had raised their discrimination personal grievances within time.

[6] The Authority determined the jurisdiction issues on 4 October 2023.<sup>1</sup> The five Applicants were unsuccessful in establishing that they had raised discrimination grievances within the 90-day time limit required by s 114(1) of the Employment relations Act 2000 (“*the Act*”).

[7] As the successful party FDL has sought an award of costs of not less than \$2,250.

### **The Authority’s investigation**

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

[9] FDL lodged costs submissions on 17 October 2023.

[10] The Applicants advised the Authority on 20 October 2023 that they did not want to be heard on costs.

### **Issues**

[11] 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?

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<sup>1</sup> *Penny Jackson & Ors v Fletcher Distribution Ltd* [2023] NZERA 578.

**Relevant law**

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

[13] 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.

[14] 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.

[15] 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.<sup>2</sup>

[16] 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?**

[17] This matter involved an ‘on the papers’ investigation meeting.

[18] The Authority in its preliminary jurisdiction determination indicated that (subject to the parties’ submissions) this matter should be treated as if it had involved a half day investigation meeting. On that basis, 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).<sup>3</sup>

**Should the notional starting tariff be adjusted?**

[19] 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.

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

<sup>3</sup> Above n1, at [123].

[20] The Authority is not aware of any factors that should result in the notional starting tariff being reduced or increased, and the parties did not identify any. Accordingly, the notional daily tariff applies.

**What costs should be awarded?**

[21] Within 28 days of the date of this determination, the five Applicants (Ms Jackson, Mr de Guzman, Mr Wernimont, Mr Godinet and Ms Smith) are ordered to contribute \$2,250 in total towards Fletcher Distribution Limited's actual legal costs.

[22] Ms Jackson, Mr de Guzman, Mr Wernimont, Mr Godinet and Ms Smith are all jointly and severally liable to pay FDL the total costs of \$2,250 that the Authority has awarded it.

Rachel Larmer  
Member of the Employment Relations Authority