

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 652
3186621

BETWEEN	JANE HART Applicant
AND	NUPACIFIC RV LIMITED (FORMERLY SIGNATURE PROMOTIONS LIMITED) First Respondent
AND	BOOST PROMOTIONS LIMITED Second Respondent
AND	BRUCE CRAWFORD JUDGE Third Respondent
AND	RICHARD KULUZ Fourth Respondent

Member of Authority: Sarah Kennedy

Representatives: Johanna Drayton and Annah Casey-Solly, counsel for
the Applicant
Phil Mitchell, counsel for the First and Third
Respondents
Bridget Smith, counsel for the Second and Fourth
Respondents

Submissions: 9 August 2023 from the Applicant
26 July 2023 from the First and Third Respondents
7 August 2023 from the Second and Fourth Respondents

Date: 6 November 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] Ms Hart lodged a statement of problem with the Authority claiming she was an employee and not a contractor. Ms Hart withdrew her application eight weeks prior to the

scheduled investigation meeting. On withdrawing her application Ms Hart sought agreement to have costs lie where they fall.

[3] The parties have been unable to agree costs and all four Respondents now seek orders of costs in their favour. The Applicant submits costs should lie where they fall.

Costs

[4] Costs are a matter of discretion. The Authority may order any party to a matter to pay to any other party such costs and expenses as the Authority thinks reasonable.¹ The discretion is to be exercised in accordance with principle and not arbitrarily. The main principle in the exercise of the discretion is that costs follow the event. If a party is successful, they will be entitled to an award of costs. The starting point for costs based on the Authority's daily tariff is \$4,500.00 for the first day and \$3500.00 for each additional day of investigation meeting.

[5] When matters are withdrawn the Authority may still exercise its discretion to make an award for costs which the other party will have reasonably incurred in preparation for an investigation meeting.

Respondents' submissions

[6] The First and Third Respondents submit the case was flawed from the start and as a result they have had to incur significant costs. They submit the existence of a limited liability company meant it was extremely unlikely the Applicant could succeed in the Authority. In the event the Applicant was successful in the Authority, this would have been "pyrrhic victory" given the Applicant's potential financial liability in other jurisdictions. They seek a costs award in excess of the notional daily tariff rate with a starting point of \$15,000, equivalent to the notional daily tariff for four days.

[7] The Second and Fourth Respondents submit they have been put to considerable time and expense of filing and serving a statement in reply and briefs of evidence. They also submit the bulk of Ms Hart's claim was against the First and Third Respondents dating back 20 years. By comparison the Second and Fourth Respondents, as the new owners of the company, were only involved for three months.

¹ Employment Relations Act 2000, sch 2, cl 15.

[8] The Second and Fourth Respondent's propose a starting point of \$15,000 which is equivalent to tariff costs for four days, deducting 50 percent, noting the matter did not progress to an investigation meeting brings the total down to \$7,500.00. Dividing that equally with the First and Third Respondents would amount to a costs award of \$3,750.00. They have incurred significantly higher costs but do not specify the amount and submit it is important that a message is sent to applicant parties that if cases are pursued, they will be liable for costs unless withdrawal is agreed on a costs lie where they fall basis.

Applicant's submissions

[7] With reference to *Eden v Rutherford & Bond Toyota Ltd*,² and several recent Authority cases it was submitted that cost awards in withdrawal cases are modest and significantly below the daily tariff.

[8] The submissions on her behalf make it clear Ms Hart withdrew her application in the Authority after the letter of 8 June 2023 from Mr Mitchell, counsel for the First and Third Respondents. Ms Hart does not agree with the potential tax implications advanced by the Respondents but her concern arose from the Third Respondent making it clear she faced significantly larger, complex and ongoing tax litigation and liability should she proceed.

Analysis

[9] The Authority's daily tariff is based on the length of the investigation so does not assist when matters are withdrawn before a meeting, other than estimating how much preparation may have been required. The merits of the Applicant's case are not factors for consideration when calculating costs although whether the conduct of a party unnecessarily increased the costs of another party is a reason to increase costs. Given withdrawal of the matter was eight weeks before the investigation meeting and costs in the Authority are modest, this is a case where it would not be unreasonable for costs to lie where they fall.

[10] Mr Mitchell on behalf of the First and Third Respondent relies on the merits of the Applicant's case as a basis for the application for costs and the fact the tax and other liabilities were pointed out earlier in November 2022. The submission flowing from that is had the Applicant withdrawn at a much earlier stage, less cost would have been incurred by the

² *Eden v Rutherford & Bond Toyota Ltd* [2010] NZEmpC 43 at [8].

Respondents in preparation for the investigation meeting. The First and Third Respondents have incurred costs in the amount of \$70,386.00 and say the case necessitated briefing a tax lawyer and an accountant.

[11] The expert witness briefs were in fact not lodged in the Authority because the Respondents' were waiting for further information from the Applicant. Both parties sought orders from the Authority due to difficulties with each other not providing information that was requested. I note the First and Third Respondents resisted mediation and as a consequence the parties did not attend mediation.

[12] The letter of 8 June 2023 from Mr Mitchell had the desired effect because the Applicant withdrew her proceedings within the timeframe stipulated in the 8 June letter. It is reasonable for costs to lie where they fall at that point to recognise that litigation and further cost was avoided. The Authority encourages resolution and where a claim is withdrawn eight weeks prior to an investigation meeting it would be unusual for there to be a cost award. In addition, it would be open to Ms Hart to infer there would be no cost implication should Ms Hart withdraw as requested in the letter.

Conclusion

[13] This matter was withdrawn some eight weeks prior to the investigation meeting and within the 14-day period stipulated in Mr Mitchell's letter of 8 June 2023. I consider this to be matter where costs should lie where they fall and decline to make an award for costs.

Sarah Kennedy-Martin
Member of the Employment Relations Authority