

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

[2024] NZERA 12
3107039

BETWEEN DR WEI YUEN LOO
Applicant

AND THE NEW ZEALAND TERTIARY
EDUCATION UNION (TE HAUTŪ
KAHURANGI O AOTEAROA)
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Paul Blair, advocate for the Applicant
Peter Cranney, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: up to and including 15 December 2023

Date of Determination: 12 January 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 25 October 2023 I issued a determination concluding that the NZ Tertiary Education Union - Te Hautū Kahurangi o Aotearoa (TEU) had breached its duty of good faith to Dr Loo in withdrawing his representation as it did, without warning and without input from Dr Loo. Dr Loo had asked for a penalty to be imposed, and for remedies to be awarded including compensation. The Authority declined to impose a penalty and considered the Employment Relations Act 2000 (the Act) did not provide for a remedy of damages for hurt, humiliation and loss of dignity to be available under such circumstances. Costs were reserved and the parties were encouraged to resolve any issue of costs between themselves. Unfortunately, they have not been able to do so and both parties have filed submissions in respect of costs. The matter involved a one-day investigation meeting. Generally, the Authority adopts a tariff-based approach.

For a full day investigation meeting the tariff would normally equate to \$4,500.00. The Authority has discretion to raise or lower the tariff depending upon the circumstances.¹

Principles

[2] The power of the Authority to award costs arises from s 15 of Schedule 2 of the Act which provides:

15. Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit and may at any time vary or alter any such order in such manner as it thinks reasonable.

[3] The principles and approach adopted by the Authority in which an award of costs is made are well settled and outlined in *PBO Limited (formally Rush Security Limited) v D'Cruz*² as confirmed in *Fagotti v Acme and Co Limited*³.

Doctor Loo's Submissions

[4] Dr Loo submits that as the Authority found, there was a breach of good faith on the part of TEU, as the successful party he seeks a costs determination from the Authority for \$4,500.00 being the tariff for a one-day investigation meeting. Dr Loo rejects any suggestion that he was unsuccessful and or that any costs should be awarded against him. He strenuously denies that because he did not succeed in respect of all remedies claimed (he succeeded in his claim of a breach of good faith) that this means costs should be reduced or indeed awarded to TEU.

TEU's Position

[5] TEU for its part seeks costs of \$3,000.00 against Dr Loo. It submits that Dr Loo was substantially unsuccessful. TEU says it faced very substantial and onerous financial claims not only for penalties but also for compensation of humiliation, loss of dignity and injury to feeling along with a claim for \$30,000.00 related to alleged alternative representation costs.

[6] TEU submits that the appropriate result will be a starting point of the daily tariff of \$4,500.00 payable by Dr Loo to TEU. TEU also references an original claim by Dr Loo that the Authority direct the Union to restore its representation. It submits it is

¹ <https://www.era.govt.nz/determinations/awarding-costs-remedies/>

² [2005] 1 ERNZ808

³ [2015] NZEmpC 135 at [114]

entitled to costs in relation all of these claims. However, TEU submits that the \$4,500.00 costs it is entitled to should be reduced by \$1,500.00 to recognise the contribution to Dr Loo's costs in a single matter in which he (partially) succeeded. TEU is referring here to the finding of a breach of good faith.

Stay application

[7] Although TEU has filed costs submissions claiming costs, it has also applied for a stay. The basis for this seems to be because Dr Loo has challenged the determination of 25 October 2023 by way of a de novo challenge in the Employment Court. TEU says the effect of this will be to nullify and replace the Authority's determination including the "successful" part. It submits that under these circumstances the better course is to stay the issue of costs to be dealt with in the challenge proceedings.

[8] However, the possibility of a challenge is irrelevant to the question of costs in the Authority other than to suggest the matter should actually be determined. It is preferable that the Authority's process is complete and if the matter proceeds to a hearing in the Court, then the Court has a completed picture of the issues before it.⁴

Analysis

[9] Dr Loo's claim against TEU was essentially for a breach of good faith. He succeeded in establishing that TEU had breached its duty of good faith to him. I accept that the remedies Dr Loo requested as a result of that breach including penalties and compensation were either not warranted or outside the jurisdiction of the Authority to give. None the less Dr Loo was the successful party and accordingly is entitled to costs.

Orders

[10] The NZ Tertiary Education Union - Te Hautū Kahurangi O Aotearoa, is ordered to pay Dr Wei Yuen Loo the sum of \$4,500.00 as a contribution towards the costs he incurred in bringing his claim.

Geoff O'Sullivan
Member of the Employment Relations Authority

⁴ *Swales v AFFCO NZ Limited* [2001] NZEmpC 38 at [3]