

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 249  
3216639

BETWEEN	DEBORAH HANCOCK First Applicant
AND	CHRISTINE GIBSON Second Applicant
AND	HENRICA RYAN Third Applicant
AND	JONES & SANDFORD TIMBER & HARDWARE (1999) LIMITED First Respondent
AND	MITRE 10 (NEW ZEALAND) LIMITED Second Respondent

Member of Authority:	Natasha Szeto
Representatives:	Erika Whittome and Liz Lambert, representatives for the Applicants Penny Swarbrick and Karishma Zafar, counsel for the Respondents
Submissions received:	12 February and 27 February 2024 from the Second Respondent 19 February 2024 from the Applicants
Date:	1 May 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] On 23 January 2024, I issued a determination in this matter,<sup>1</sup> resolving two preliminary issues. Deborah Hancock, Christine Gibson and Henrica Ryan (the applicants) were successful in their claim against their former employer Jones & Sandford Timber & Hardware (1999) Limited (Jones & Sandford) trading as Mitre 10

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<sup>1</sup> *Hancock & Ors v Jones & Sandford Timber & Hardware (1999) Limited and Anor* [2024] NZERA 35.

New Plymouth, in that I found they had raised personal grievances for unjustifiable dismissal in accordance with section 114 of the Employment Relations Act 2000 (the Act). However, the applicants were unsuccessful in their application to join Mitre 10 (New Zealand) Limited (Mitre 10) as a controlling third party to the proceedings to resolve their personal grievances under section 103B(3) of the Act.

[2] I reserved the issue of costs until the substantive hearing or on earlier application by either party.<sup>2</sup> Mitre 10 now asks me to determine its costs, because it says it was entirely successful in defending the applicants' claims and its involvement in the proceedings is now at an end. The applicants submit that all costs matters should be reserved for the hearing of the substantive matter.

[3] The issues for determination are:

- (a) Whether I should now determine Mitre 10's costs application.
- (b) If so, whether I should award Mitre 10 costs as the successful party.

**Analysis – should I determine Mitre 10's costs application?**

[4] In the Notices of Direction and Minutes issued by the Authority, I reminded the parties of the Authority's power to award costs, their potential liability for costs and the Authority's use of the "tariff" based approach. In my determination, I allowed for the possibility that parties may apply for costs before the substantive matter is heard.<sup>3</sup>

[5] Mitre 10 asks for its costs to be determined because its involvement in these proceedings is now at an end. That is a reasonable basis on which to ask the Authority to determine costs and I accept it is appropriate for costs to be resolved for Mitre 10.

[6] The applicants indicate they will be seeking costs in the amount of the one-day tariff for the 90-day matter but say these costs would be better addressed at the time of the substantive hearing. Jones & Sandford reserves its position pending hearing of the substantive matter. I agree with these parties that costs should continue to be reserved for them.

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<sup>2</sup> Above, n1 at [147].

<sup>3</sup> Above, n1 at [147].

### **Analysis – should I award Mitre 10 costs?**

[7] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Act. Costs are at the discretion of the Authority.<sup>4</sup>

[8] The Authority has adopted a daily tariff approach as the starting point for considering costs which is now well known. The current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.<sup>5</sup>

[9] The parties can expect the Authority to adhere to the approach of applying the daily tariff, unless there is good reason to depart from it.

[10] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*<sup>6</sup> as confirmed in *Fagotti v Acme and Co Limited*<sup>7</sup>. It is a principle set out in *Da Cruz* that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. The financial situation of the party paying costs can be a relevant factor to take into account. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

[11] Mitre 10 was the successful party in relation to the issue of whether it should be joined to the proceedings as a controlling third party and is therefore entitled to a contribution to its costs actually and reasonably incurred.

[12] The submissions hearing on the preliminary issues ran for just over half a day. Mitre 10 says that with affidavits and legal submissions provided in advance and further submissions required following the hearing given the late introduction of new information by the applicants, the starting point for assessing costs should be one full day's tariff.

[13] Mitre 10 says the applicants' approach has resulted in it being put to unnecessary expense and inconvenience in defending the claim. Further, Mitre 10 says there should be an uplift in the normal daily tariff because the applicants' conduct has unnecessarily inflated its costs. The conduct Mitre 10 complains of includes the

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<sup>4</sup> *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

<sup>5</sup> Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi (February 2024) at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>

<sup>6</sup> [2005] 1 ERNZ 808.

<sup>7</sup> [2015] NZEmpC 135 at 114.

applicants unnecessarily complicating the way in which the claim proceeded, failing to comply with agreed timetabling directions, filing audio evidence without transcription, filing an amended statement of problem which was later withdrawn, rescheduling conference calls and the submissions hearing, and the late filing of financial statements.

[14] The applicants do not dispute that deadlines were not adhered to and dates had to be rescheduled, but say this was due to unforeseen circumstances beyond their control.

[15] Mitre 10 properly acknowledges that its costs were shared with Jones & Sandford and therefore apportionment is appropriate. It seeks a total amount of \$3,741.25 as a contribution to its costs, comprising the following:

- (a) A half share of a full day's tariff of \$2,250.
- (b) An uplift of \$450 being half the full costs of listening to the audio files.
- (c) An uplift of \$624.75 being half the full costs of dealing with the amended statement of problem.
- (d) An uplift of \$416.50 being full costs excluding GST of extra submissions dealing with the financial records produced at the submissions hearing.

[16] Mitre 10 says its actual and reasonable costs incurred have exceeded \$4,000 plus GST and the costs it actually seeks amount to \$1,247 per applicant.

[17] In assessing costs, I agree with Mitre 10's submission that an appropriate starting point is the daily tariff of \$4,500 for a full day of investigation meeting time. Although the submissions hearing ran for a little over half a day, there was significant preparation required by all parties. If the financial information had been provided in sufficient time to be addressed at the submissions hearing, it is likely that the investigation meeting would have occupied a full day.

[18] Based on apportioning the daily tariff cost between the two respondents, Mitre 10 has incurred half that cost, or \$2,250.

[19] I also consider there should be an uplift. While I accept there were genuine reasons for some of the applicants' delays and missed deadlines, reasons of illness do

not account for all of the delays. Ultimately, the way in which the applicants conducted their matters before the Authority has undeniably resulted in Mitre 10 being put to additional unnecessary time and cost in responding to the application against it.

[20] Mitre 10 asks for an uplift of \$1,491.25 consisting of actual costs incurred. Indemnity costs in the Authority are rare, and I have already accounted for the submissions on financial statements in setting the starting point of one day's tariff. I consider that an uplift of \$1,000 is a more modest and appropriate award, representing approximately two thirds of the actual additional cost incurred.

[21] This amounts to a total cost award to Mitre 10 of \$3,250. Stepping back to consider the reasonableness of the award, modest costs awards in the Authority, and parity with other cases, I conclude this is a fair amount for costs and I order the applicants (on a joint and several basis) to make this payment to Mitre 10.

### **Orders**

[22] For the reasons set out above, I order Deborah Hancock, Christine Gibson and Henrica Ryan to pay Mitre 10 (New Zealand) Limited the sum of \$3,250 as a contribution to its legal costs within 28 days of the date of this determination.

Natasha Szeto  
Member of the Employment Relations Authority