IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA524
3217339

BETWEEN	TERTIARY EDUCATION UNION First Applicant
AND	HUHANA WATENE Second Applicant
AND	PRABHAT CHAND Third Applicant
AND	WEI LOO Fourth Applicant
AND	TE PŪKENGA, NEW ZEALAND INSTITUTE OF SKILLS & TECHNOLOGY T/A UNITEC Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Peter Cranney, counsel for the Applicant Sherridan Cook and Sarah Lim, counsel for the Respondent
Costs Submissions:	7 August 2024 from the Applicant 10 and 13 August 2024 from the Respondent
Determination:	2 September 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 12 June 2024 ([2024] NZERA 347) it was determined that the Respondent, the New Zealand Institute of Skills and Technology t/a Unitec. (Te Pūkenga) could lawfully remove staff access to free car parking and Life Insurance and Income Protection policies.

[2] In that determination I stated that there is a presumption that in disputes over the application, interpretation or operation of terms of a collective agreement, the Authority

generally applies a presumption that parties will bear their own costs.[1] However if either party considered the presumption should not apply in this case, they should submit a memorandum on costs.'

[3] Mr Cook, for Te Pūkenga, submits that the presumption does not apply in this case. He notes that Te Pūkenga's actual costs significantly exceeded the notional tariff amount applied for costs at the daily tariff rate in the Authority for a two day investigation, however notes that it is seeking an award of costs only at the daily tariff amount.

[4] Mr Cranney, for the Applicants, submits that the presumption does not apply and is seeking that costs lie where they fall

[5] The investigation meeting involved a two day investigation meeting.

Submissions on behalf of Te Pūkenga

[6] It is submitted by Mr Cook that the Authority's Practice Direction lists nine categories of cases in which there is a presumption that parties will bear their own costs. This includes disputes about the application, interpretation or operation of a collective agreement.

[7] It is submitted that in this instance costs should not lie where they fall because the proceedings between the parties were not about the application, interpretation or operation of a collective agreement, but on the contrary the collective agreement between the parties featured only briefly.

[8] It is submitted that the case was not concerned with a joint dispute about the "application, interpretation or operation of a collective agreement" because:

(a) The crux of the issues before the Authority was whether the discretionary employment perks (such as free carparking and income protection and life insurance policies), were terms and conditions of employment at all, whether expressly or impliedly. This goes beyond how the terms of the collective agreement should be applied or interpreted in practice;

(b) The Authority also had to examine the issue in the context of individual employment agreements between Unitec and its non-union employees. Therefore the dispute had wider implications; and

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[1] Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi at: https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employmentrelations-authority.pdf.govt

(c) The Applicants were not merely seeking to clarify the scope of the terms and conditions of their employment, but sought to enforce the continuation of the employment perks, as well as damages in the form of recovered parking charges for the second to fourth applicants.

[9] Mr Cook submits for Te Pūkenga that there are sufficient grounds to rebut the presumption that costs should lie where they fall. As the successful party Te Pūkenga is entitled to costs which it seeks on the daily tariff basis in the sum of $8,000.00.

Submissions on behalf of the Applicants

[10] It is submitted by Mr Cranney for the Applicants that no costs are appropriate on the basis that the dispute was a collective dispute about whether certain long-standing terms remain enforceable.

[11] It is submitted that on its proper construction, the Authority's Practice Note applies. In any event the principle behind the Practice Note is that *bona fide* disagreements about such terms are responsibly resolved collectively in the Authority without the issue of costs arising.

[12] In respect of the related matters touched on by both parties, these were largely peripheral and did not impact on costs.

[13] It is submitted that costs should lie where they fall, or if they are awarded, they should be reduced to reflect the collective nature of the dispute.

Does the Authority's Practice Note Apply?[2]

[14] The Practice Note of the Authority states:

> 6. The Authority's discretion regarding costs is generally to be exercised on a presumption that the following categories of matter are not subject to a daily tariff and that parties bear their own costs:
>
> i. Referrals for bargaining facilitation;
> ii. Disputes about the application, interpretation or operation of a collective agreement;
> iii. Pay equity processes;
> iv. Screen industry processes;
> v. Collective bargaining disputes; disputes bout access to workplaces; fixing of the terms of a collective agreement;
> vi. Applications under the Parental Leave and Employment Protection Act 1987; and
> vii. Applications to which s 172A of the Act applies.

[2] Above n 1.

[15] A dispute falling under section 6ii of the Practice Note is intended to cover situations in which there is a dispute involving the terms set out in a collective agreement between the parties.

[16] In this case the dispute revolved around whether or not staff access to long-standing policies, namely free car parking and Life Insurance and Income Protection, could lawfully be removed by Te Pūkenga.

[17] Evidence was provided in support of the free car parking policy by reference to some historic individual employee agreements, and to the Staff A-Z. The free car parking was available to all Unitec employees, union and non-union. There was no clause referring to the policy in the collective agreement between the TEU and Unitec.

[18] Similarly there were no clauses covering the Life Insurance and Income Protection policies included in the collective agreement between the TEU and Unitec. The policies were instead referred to in employees' letters of offer. Employees choosing to be covered under the policies received a flyer from the insurance broker.

[19] All Unitec employees received emails from Te Pūkenga on 19 July 2022 proposing to change the carparking rights. Similarly on all Unitec employees were emailed on 19 January 2023 about the proposed withdrawal of the income protection and life insurance schemes.

[20] I accept that this was a collective dispute about long-standing terms, however these were not terms in a collective agreement and concerned both union and non-union employees.

[21] The Practice Note is specific in the wording of clause 6ii, which sets out that disputes about the application, interpretation or operation of a collective agreement are excluded from a costs consideration.

[22] This dispute was about policies which applied to all Unitec employees, and the terms relating to the policies were in documents other to the collective agreement which were available to all Unitec employees, union and non-union members.

[23] I find that the dispute affected all employees and notifications were to all Unitec employees so it was a collective dispute, However it did not involve a dispute "about the application, interpretation or operation of a collective agreement". As such I find it is not excluded from a costs consideration.

Costs Award

[24] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[3] that costs are modest. Principles also include that costs are reasonable and that they normally follow the event.

[25] This was a two day investigation so the starting point for costs assessed at the notional daily tariff in the Authority is $8,000.00. Te Pūkenga was the successful party in this matter and costs follow the event.

[26] **Accordingly iI order that Te Pūkenga is to be paid the sum of $8,000.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.**

[27] **At this stage I leave it to the Applicants to apportion the costs payment as they consider appropriate.**

Eleanor Robinson
Member of the Employment Relations Authority

[3] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.