IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 579
3275779

	BETWEEN	ELLIN PAKALANI, SIOSIUA MAHINA and MATELITA ELONE Applicants
	AND	VAHEFONUA TONGA METHODIST MISSION CHARITABLE TRUST Respondent

Member of Authority:	Rachel Larmer
Representatives:	Leilua Lou Alofa, advocate for the Applicants Matthew Hutcheson, counsel for the Respondent
Investigation Meeting:	On the papers
Information received:	19 August 2024 from the Respondent 13 September 20224 from the Applicants
Date of Determination:	2 October 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority in a preliminary determination dated 26 July 2024 determined that it did not have jurisdiction over any of the claims the applicants made in their Statement of Problem (SoP).[1]

[2] The disputed jurisdiction issue was determined 'on the papers', after the parties had attended an unsuccessful mediation.

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[1] *Pakalani & Ors v Vahefonua Tonga Methodist Mission Charitable Trust* [2024] NZERA 456.

[3] Because the disputed jurisdiction issues were resolved in the respondent's favour, it can be said to be the successful party for the purposes of assessing costs. The parties were encouraged to resolve costs by agreement, but that did not occur.

[4] Accordingly, the respondent applied to the Authority to determine costs. The applicants opposed any costs award being made against them.

The Authority's investigation

[5] Costs were dealt with on the papers, with the parties lodging written costs submissions.

Legal position

[6] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Although costs are discretionary, the discretion must be exercised on a principled basis.

[7] Costs may not be used to punish a party but conduct that has unreasonably increased the other party's costs may be reflected in the amount of costs awarded.

[8] The Authority usually adopts a 'notional daily tariff' based approach to costs. The current tariff is $4,500 for the first day of an investigation meeting and the $3,500 for each subsequent day. The notional starting tariff is then adjusted to reflect the particular circumstances of each case.

[9] When assessing costs in this matter the Authority has had regard to the 'costs assessment' principles identified by the full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v De Cruz*, which were affirmed by the full Employment Court and *Fagotti v Acme & Co Ltd*.[2]

Issues

[10] The following issues are to be determined:

(a) Should the respondent be awarded costs?

(b) What is the notional starting tariff for assessing costs?

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[2] *PBO Ltd v Da Cruz* [2005] ERNZ 808; and *Fagotti v Acme Co Ltd* [2015] NZEmpC 135.

(c) Should the notional starting tariff be adjusted?

(d) What costs should be awarded?

Should the respondent be awarded costs?

[11] Costs usually follow the event. The respondent succeeded with its challenge to the Authority's jurisdiction regarding all of the applicants' claims. There is no reason to depart from the usual principle that a successful party is entitled to a contribution towards their actual legal costs.

What is the notional starting tariff for assessing costs?

[12] The notional starting tariff for a one-day investigation meeting is $4,500. The Authority usually treats simple 'on the papers' investigations as involving a half-day of investigation meeting time for the purposes of assessing costs.

[13] The notional starting tariff for assessing costs in this matter is therefore $2,250.

Should the notional starting tariff be adjusted?

Should the notional starting tariff be increased?

[14] The respondent incurred actual legal costs of $33,166 excluding GST, with $7,815 of that amount relating to its leave to lodge a statement in reply out of time application, mediation and its costs submissions. It therefore did not seek to recover costs for those matters.

[15] The respondent sought to recover indemnity costs of $23,351, or in the alternative it sought an award of "substantially increased costs" in its favour.

[16] The indemnity costs the respondent claimed related to its actual legal costs involved in the lodging of a ten page statement in reply which attached relevant documentation, attending one case management conference and receiving email communications from the Authority, most of which consisted of the Authority following up the applicants' timetable breaches and failures of the applicants' representative to respond to attempts to contact him about these timetable breaches.

[17] The respondent also lodged an application for the applicants' claims to be dismissed on the grounds they were frivolous and vexatious. However, that application

was unnecessary, as this matter involved a straightforward disputed jurisdiction situation, based on the applicants' failure to raise personal grievance claims within the statutory 90-day time-limit required by s 114(1) of the Act.

[18] The respondent's legal costs appear manifestly excessive for Authority proceedings, given the minimal work that was likely required for this matter before the preliminary jurisdiction issues were determined.

[19] It is well known that costs in the Authority are modest, so the applicants cannot reasonably be expected to fund the respondent's decision to opt for what appeared to have been a "Rolls Royce" level of legal services.

[20] The respondent's request for indemnity costs did not succeed, as the Authority preferred to adopt its well understood notional daily tariff based approach to assessing costs. That approach enabled appropriate adjustments to be made to the notional daily tariff, should the Authority consider that was appropriate.

[21] Given the minimal amount of work that was likely involved in this matter prior to the preliminary determination being issued, it was not appropriate to increase the notional starting tariff. The failure of the applicants to appropriately engage in the Authority's investigation has been adequately covered, in this particular matter, by a normal application of the notional starting tariff. An uplift was therefore not required on that ground.

Should the notional starting tariff be decreased?

[22] It is appropriate to decrease the notional starting tariff to reflect that the respondent lodged an application to have the applicants' claims dismissed, but did not otherwise incur time or costs in submitting affidavit evidence and/or submissions. This meant the actual time the respondent was required to commit to the disputed jurisdiction issues was minimal.

[23] The respondent caused the applicants to incur costs by failing to lodge its statement in reply within the statutory 14 days, thereby requiring it to seek leave from the Authority to do so out of time.

[24] The respondent's application to have the applicants' claims dismissed on the grounds they were frivolous and vexatious did not succeed. The disputed jurisdiction

issues were resolved in the respondent's favour, but the 'dismissal application' on the grounds the claims were frivolous and vexatious was unnecessary and misconceived.

[25] The applicants are also individuals with family commitments who were all made redundant in August 2023. The Authority was informed that the applicants and their families are still suffering continued hardship, because none of them have obtained new employment.

[26] The strain the obligation to pay costs will impose on each of the applicants, given their current modest personal circumstances, is a factor that needs to be reflected in the level of costs imposed on them.

[27] Accordingly, the notional starting tariff should be reduced by half to reflect these factors. It therefore has been reduced by the Authority to $1,125, which should be imposed on a joint and several liability basis on all three applicants.

Outcome

[28] Within 28 days of the date of this determination, and on a joint and several liability basis, the applicants are ordered to contriubute $1,125 towards the respondent's actual legal costs.

[29] If the total amount of costs awarded to the repsondent is shared equally, then each of the three applicants would pay a contribution of $375 towards the respondent's actual legal costs. If any applicant was unable to pay their equal share, then the imposition of joint and sevearl liability on them meant the other applicants would need to do so.

Rachel Larmer
Member of the Employment Relations Authority