

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 605
3274279

BETWEEN	MICHAEL FERRIS Senior First Applicant
AND	MICHAEL FERRIS Junior Second Applicant
AND	THE PROPRIETORS OF NUHITI Q Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Ali Bendall, counsel for the Applicants
Richard Harrison, counsel for the Respondent

Submissions Received: 16 September 2024 from the Applicants
30 September 2024 from the Respondent

Date of Determination: 10 October 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 16 August 2024 The Proprietors of Nuhiti Q (Nuhiti Q) were ordered to comply with Authority determinations dated 26 July 2023 and 6 October 2023 and pay the outstanding amounts owing to Michael Ferris Senior and Michael Ferris Junior by instalments.¹

[2] The Authority reserved the issue of costs. The parties were encouraged to resolve costs between them. The Authority has now received submissions from both parties seeking a determination on costs.

¹ *Michael Ferris Senior and Micheal Ferris Junior v The Proprietors of Nuhiti Q* [2024] NZERA 490.

Costs

[3] Costs are a matter of discretion. 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.

[4] The starting point for costs based on the Authority's daily tariff is \$4,500.00 for the first full day. From that starting point the Authority can consider whether there are factors justifying an increase or decrease in costs. Costs follow the event and an award of costs is a contribution towards the legal costs of the successful party. Costs have been awarded in the past when the Authority has determined matters on the papers.

Submissions

[5] The applicants seek an award of costs on the basis costs should follow the event and say they ought to be awarded full costs. They seek an uplift to the daily tariff because they say Nuhiti Q's conduct increased costs when it:

- failed to make payments until January 2024 in relation to the Authority orders made in July 2023 and October 2023;
- made an unrealistic offer to pay by instalments where payment would not be completed until 30 June 2026; and
- sought to offset rent that was alleged to be owed by the applicants to Nuhiti Q.

[6] Nuhiti Q adopts a starting point of \$4,500.00 and says this should be reduced down because the compliance order was heard on the papers so did not require a full hearing day or in-person attendance. Reduction by 25-50 percent reduces the daily tariff to a range of \$1,125 to \$2,250. Nuhiti Q says this amount should be further reduced because the outcome of the compliance order was in line with earlier proposals made by Nuhiti Q to the applicants for instalment payments.

[7] Nuhiti Q also says the situation is further exacerbated by the applicants' failure to address the unpaid rent situation which has contributed to the Nuhiti Q's financial position. Nuhiti Q had submitted the rent arrears could be offset but this argument was unsuccessful.

Discussion

[8] The Authority's investigation was determined on the papers. The applicants were the successful party in that Nuhiti Q was ordered to comply with the Authority determinations and pay the outstanding amounts owing by instalments.

[9] At the time of the compliance order application Nuhiti Q had made partial payment of \$17,691.56 leaving \$68,456.00 outstanding and an offer to pay by instalments that would see the full amount paid by June 2026 had been declined by the applicants. After the compliance order application was lodged a further lump sum was paid leaving the outstanding amount of \$29,820.00 owing.

[10] On that basis I accept it was necessary for the applicants to lodge the compliance application. The matter was heard on the papers which means a lower starting point is generally adopted. An uplift is required for the cost involved given affidavits and submissions in reply were required to address the offsetting submission and the late payment of a further lump sum.

[11] Nuhiti Q was entitled to raise the offsetting issue, but it must have done so knowing there could be costs implications if it was unsuccessful.

Conclusion

[12] Given the matter was heard on the papers and the applicants were the successful party, I adopt a starting point at 25 per-cent of the notional daily tariff being \$1,125.00. I consider a small uplift is justified given additional affidavits and submissions were lodged.

Orders

[13] I order The Proprietors of Nuhiti Q to pay Michael Ferris Senior and Michael Ferris Junior \$2,000.00 as a contribution towards costs.

Sarah Kennedy-Martin
Member of the Employment Relations Authority