

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 715
3172146

BETWEEN	ARUSHI ARUSHI Applicant
AND	ISHER ENTERPRISES LIMITED First Respondent
AND	KULVINDER SINGH (AKA KELVIN SINGH) Second Respondent
AND	LIONMEAD CAPITAL GROUP LIMITED Third Respondent

Member of Authority:	Sarah Blick
Representatives:	Michelle Urquhart and Drisana Sheely, counsel for the applicant Arunjeev Singh, counsel for the respondents
Investigation Meeting:	On the papers
Information and submissions received:	13 September, 31 October and 21 November 2024 from the applicant 5 November 2024 from the respondents
Determination:	29 November 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] On 3 October 2024 the Authority issued a determination in this matter in which Isher Enterprises Limited (Isher) and Lionmead Capital Group Limited (Lionmead) were ordered to pay premium payments as debts, wages, holiday pay, interest, and penalty amounts.¹ In addition, Isher was ordered to pay compensation as remedies for personal grievances. The combined remedies totalled over \$123,000. Leave was also

¹ *Arushi v Isher Enterprises Limited and Ors* [2024] NZERA 615.

granted to recover monies from one of the companies' directors, Kulvinder Singh, to the extent either company could not pay defaults due to breaches of employment standards. The parties were given an opportunity resolve costs between them.

[2] On 8 October 2024 counsel for Ms Arushi sent a letter to the respondents requesting payment of the substantive amounts awarded by the Authority, and to reach agreement on costs at the daily tariff amount plus expenses.

[3] The respondents wrote back stating the companies had recently commenced operations in "diverse industries" and given their current stage of business development, they were unable to fulfil the entire payment amount at this time. The response stated the companies could:

...collectively afford to allocate \$600 towards the outstanding payment. We hope for your understanding regarding companies current financial constraints and assure you that as companies financial situation improves, we will endeavour to increase the payment amount accordingly.

[4] Ms Arushi found this proposal unacceptable and has lodged a costs memorandum, to which the respondents have responded.

[5] The respondents have filed a challenge in the Employment Court in relation to the Authority's substantive determination. There is no reason before me why the issue of costs in the Authority cannot be dealt with now.

Submissions

Ms Arushi's submissions

[6] Ms Arushi submits as the successful party she is entitled to \$27,250, being the daily tariff amount for 7.5 investigation meeting days. She also seeks to recover the Authority application fee of \$71.55 and hearing fees totalling \$996.65. Ms Arushi originally flagged that an uplift to the daily tariff was sought, but says she has reconsidered her position and has decided not to seek an uplift in costs.

Respondents' submissions

[7] The respondents' position on costs was somewhat unclear from counsel's submissions, which initially stated costs should lie where they fall, but then stated the Authority should not deviate from the traditional approach of applying the daily tariff and that no uplift was warranted in the circumstances.

[8] The submissions stated the investigation meeting took 6.5 days (not 7.5 days).
It was further submitted:

- (a) Ms Arushi did not make reasonable efforts to resolve the substantive proceedings and “did not act fairly in rushing to the Authority”.
- (b) The respondents did not act unreasonably in defending the claims nor delay the matter.
- (c) The Authority made certain observations relevant to Ms Arushi’s credibility relating to her spreadsheet of her hours of work and contribution to the grievance.
- (d) The respondents do not have the financial capacity to pay an award of costs.

[9] The respondents submitted that the Authority should take these circumstances into account, as well as the fact they have themselves incurred significant legal costs of around \$20,000.

Costs principles

[10] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority’s approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority’s equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party’s conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

Discussion

[11] Ms Arushi is the successful party and is clearly entitled to an award of costs.

[12] In assessing an appropriate award of costs, the notional daily tariff is \$4,500 for the first day of an investigation meeting, with \$3,500 for each day thereafter. The investigation meeting was held in three parts over 7.5 days (not 6.5 as suggested by the respondents). Written submissions were received at a later date. I agree with Ms Arushi that the starting point is the daily tariff amount for 7.5 days which totals \$27,250. Invoices provided by counsel show Ms Arushi's legal costs have far exceeded that amount.

[13] Ms Arushi is not seeking an uplift to the tariff amount. In light of the respondents' submissions, I now consider whether there are factors which warrant a decrease in the tariff.

[14] The respondents' suggestion that Ms Arushi did not make reasonable efforts to resolve the proceedings is not supported by any factual basis. Further, even if it was, as the other parties to the employment relationship problem, the respondents had ample time and opportunity to attempt to resolve the matter after the Authority application was lodged. Apart from attending mediation, there are no examples of it having done so, which may have supported an adjustment to the daily tariff amount.

[15] The respondents' submission that it did not act unreasonably in defending the claims nor delay the matter would appear to have had relevance had Ms Arushi been seeking an uplift to the daily tariff. She is not, so I do not factor this into my assessment.

[16] It is unclear what relevance the claimed issues of "credibility" and contribution has to costs. The first example given relating to Ms Arushi's spreadsheet of her hours of work did not amount to a credibility finding by the Authority, nor was it in any way a criticism of her record-keeping. The obligation of complete and accurate record-keeping lay with Isher and Lionmead in any event. This is not a basis for downward adjustment of the tariff. The second example given, referencing the Authority's consideration of contribution by Ms Arushi's under s 124 of the Act, is not a basis for downward adjustment of the tariff. While no reduction for contribution was made, the Authority would not have considered the issue of contribution to be a matter relevant to the issue of costs.

[17] It has not been made clear why the legal costs incurred by the respondents are relevant to the Authority's assessment of costs this matter. The respondents were entitled to defend the application, but in doing so took on those costs along with the

litigation risk of an unsuccessful defence. For completeness, there is no suggestion the manner in which Ms Arushi's case was conducted increased the respondents' costs unnecessarily, such that a downward adjustment might be warranted.

[18] A party's ability to pay is relevant to an assessment of costs, but any claim of financial hardship must be supported by sufficient evidence. A one-page "cash-flow forecast" for 2024-2025 has been provided listing forecast income and expenses of Isher and Lionmead. I have not been provided with the full picture of their circumstances including information about their assets. No information relating to Mr Singh has been provided at all. In light of this, I am not persuaded I should exercise my discretion to reduce the tariff, with so little financial information having been disclosed.

[19] Additionally, although the respondents proposed to Ms Arushi paying the awards of the Authority by instalment, it has not applied for orders by instalment in the Authority. Such orders could only be made on grounds the respondents' financial position required this. Given the information before the Authority, I am not satisfied they do require this in any event.

[20] Finally, it is appropriate to require the respondents to pay the Authority application fee and hearing fees.

[21] In the circumstances, I find the respondents should be held jointly and severally liable for any costs and expenses ordered.

Outcome

[22] Isher Enterprises Limited, Lionmead Capital Group Limited and Kulvinder Singh (aka Kelvin Singh) are jointly and severally liable to pay Arushi Arushi the following within 14 days of the date of this determination:

- (a) \$27,250 (costs); and
- (b) \$71.55 (application fee); and
- (c) \$996.65 (hearing fees).

Sarah Blick
Member of the Employment Relations Authority