

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 96
3034336

BETWEEN WARREN DERBIE
 Applicant

AND TRANZURBAN HUTT VALLEY
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Simon Meikle, Counsel for Applicant
 Daniel Vincent, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 3 September and 21 September 2018 from Respondent
 19 September 2018 from Applicant

Determination: 29 October 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] On 30 August 2018 I issued a determination in which I answered two questions posed by Mr Derby in Tranzurban’s favour. In doing so I concluded Tranzurban had not breached a contractual term by requiring Mr Derby exceed 13 hours work time in any cumulative 24 period contrary to the limitations of s 30ZC of the Land Transport Act 1998 and nor had it breached s 69ZD of the Employment Relations Act 2000 by failing to provide paid rest breaks.¹

[2] Costs were reserved and Tranzurban, as the successful party, now seeks a contribution toward those it incurred defending the claims.

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim.² From there adjustments may be made depending on the circumstances.

¹ [2018] NZERA Wellington 75

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[4] The investigation took approximately half a day which would, applying the tariff, see a contribution in the order of \$2,250.

[5] Tranzurban seeks considerably more and asks I award indemnity costs of \$9,694.50 (inclusive of GST).

[6] In support of that request Tranzurban says the claims were serious in that they included allegations of criminal conduct which were entirely without merit. Issue is also taken with the fact urgency was originally sought when it was not justified.

[7] It is also argued there were improper ulterior motives in that Mr Derby's claims were being supported by his union to advance its interests and in an attempt to bring pressure on Tranzurban with respect to collective bargaining. As such the claim is characterised as an abuse of process which should be penalised by an award of indemnity costs.

[8] Mr Derby's reply advises an intention to file an appeal (which has now occurred) and it is submitted a determination on costs be delayed as a result.

[9] In the alternate, and assuming I reject that, it is submitted the matter was progressed *...by both parties, with haste and co-operation*. It is also submitted the claim was really in the nature of a dispute concerning the meaning of the employment agreement and its compliance with various legislative provisions and in any event Tranzurban had, between lodgement and hearing, altered its rosters in an attempt to address one of the issues.

[10] The allegation the claim was an attempt to put pressure on Tranzurban in respect to bargaining is denied. It is suggested that if I am minded to determine costs the above considerations, and the half day hearing, should lead to an award of no more than half the daily tariff.

[11] Tranzurban replied regarding the question of whether or not I should determine costs citing various cases in support of its contention I should. I agree.

[12] Normal practice in the employment jurisdiction is to conclude all outstanding questions, including costs, pending an appeal or challenge and this normally occurs in

the Authority.³ This recognises it is desirable the Court be in a position to dispose of all matters once a challenge has been made and addresses a successful party's expectation the Authority's process is at an end.

[13] Turning next to Mr Meikle's reference to this matter being in the nature of a dispute. While not said I suspect this implied I might consider what used to be a widely accepted belief costs should lie where they fall in such matters. I take this no further as the argument was not actually enunciated and I am cognizant of relatively recent comments from the Court that there does not, in fact, appear to be such a rule.⁴

[14] Costs follow the event which in this instance was Tranzurban's success in defending the claims against it. Applying the tariff would see Tranzurban receive a contribution toward its costs in the order of \$2,250.

[15] As already said it asks that be increased and in doing so cites the levelling of what it says were unmeritorious allegations of criminal conduct and an attempt to improperly influence bargaining.

[16] These arguments fail to convince. While the claims failed I consider it a step too far to suggest they had no merit whatsoever with that view being supported to some extent by the fact Tranzurban responded to one by changing some rosters. That would suggest the claims raised something that was of concern to Tranzurban. The Union and/or its members must, in my view, be entitled to raise concerns and have them considered which turns me to the allegation this was an attempt to improperly influence bargaining. Until bargaining is complete nothing is actually agreed and nothing therefore addressed. I have already been involved in enough arguments ancillary to the bargaining presently being undertaken by Tranurban and Mr Derby's union to know it is both protracted and far from resolution. Mr Derby and the union should not be required to await that processes completion if they have what are considered legitimate concerns requiring attention. To ask they be considered is not, in my view, a case of trying to improperly influence bargaining.

[17] Finally I note an increase in the tariff is usually the result of actions which caused an undue increase in the costs incurred by the successful party. Beyond the two points already addressed and rejected, there is no evidence there was such

³ see *Swales v AFFCO New Zealand Ltd* EmpC Auckland AC19/01, 23 March 2001) and *Sandilands v Chief Executive of the Department of Corrections* ERA Wellington WA67A/09, 10 September 2009

conduct by Mr Derby and his representatives. Indeed, and while the original request for urgency was not granted, I agree with Mr Meikle these claims were addressed with alacrity.

[18] For the above reasons I conclude this is an instance in which the tariff should be applied and order Mr Derby pay Tranzurban Hutt Valley Limited the sum of \$2,250 (two thousand, two hundred and fifty dollars) as a contribution toward the costs incurred defending the claims.

M B Loftus
Member of the Employment Relations Authority

⁴ *Tertiary Education Union v Vice-Chancellor, University of Auckland* [2016] NZEmpC 6 at [6] to [14]