

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 389
5380398

BETWEEN BEN FATUPAITO
Applicant

A N D HHGC LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Anamika Singh, Counsel for Applicant
Graham Rodgers, Advocate for Respondent

Submissions Received 17 October 2012 from Applicant
30 October 2012 from Respondent

Date of Determination: 31 October 2012

COSTS DETERMINATION OF THE AUTHORITY

A. Within 28 days of the date of this determination HHGC Limited is ordered to pay Mr Ben Fatupaito:

(a) \$4,000 towards his legal costs; and

(b) \$71.56 to reimburse his filing fee.

Employment relationship problem

[1] In a substantive determination dated 01 October 2012¹ the Authority held that HHGC Limited (HHGC) had dismissed Mr Fatupaito and that its dismissal was unjustified. The parties were encouraged to resolve costs by agreement but if that was not possible then a timetable was set for costs to be dealt with by an exchange of memoranda.

[2] Agreement was not reached and Mr Fatupaito has applied for a costs order in his favour.

¹ [2012] NZERA Auckland 340.

Parties' submissions

[3] Mr Fatupaito says he has incurred costs of \$10,905.95 inclusive of GST and disbursements. This amount includes unspecified mediation costs, which cannot be recovered from HHGC.

[4] Mr Fatupaito seeks costs of \$5,000. he says the daily tariff should be increased because HHGC refused attempts to settle the matter; it filed its own bundle of documents instead of co-operating with the applicant to file one joint bundle for use at the investigation meeting; no witness statement was filed for Mr Dean Williams in advance of the investigation meeting, so he was summonsed to give evidence; HHGC failed to serve Mr Williams' witness statement which was produced at the investigation meeting.

[5] HHGC submits costs of \$1,500 should be awarded, but it did not explain why it considered less than half the notional daily tariff was appropriate.

Costs principles

[6] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs, on a principled basis.

[7] The principles guiding the Authority's approach to costs are set out by the Full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*². Those principles are so well recognised that I do not need to restate them.

[8] The general principle is that costs follow the event, and there is no reason to depart from that in this case. Accordingly, Mr Fatupaito as the successful party is entitled to a contribution towards his actual legal costs.

Outcome

[9] I adopt the Authority's usual daily tariff based approach to costs. This matter involved a one day investigation meeting so the starting point for assessing costs is the current notional daily tariff of \$3,500.

² [2005] 1 ERNZ 808

[10] I must now consider on a principled basis whether any factors warrant an adjustment to that notional daily tariff. I consider there are no factors which would warrant a decrease to the notional tariff.

[11] In terms of factors warranting an increase to the notional tariff, Mr Fatupaito has not produced any without prejudice except as to costs communications in support of the submission that HHCG *spurned all attempts to resolve matters* so I do not accept the notional tariff should be increased on that ground.

[12] I do however consider that HHCG increased Mr Fatupaito's costs because it failed to provide a witness statement for Mr Williams as directed which resulted in Mr Fatupaito being put to the time and expense of obtaining a summons for him, which HHCG then queried.

[13] Mr Williams did end up providing a witness statement but Mr Fatupaito was not given a copy until the day of the Authority's investigation meeting. Further time was wasted because Mr Williams' statement contained inadmissible without prejudice material so the Authority had to adjourn to enable the parties to address and resolve that error.

[14] HHCG failed to comply with the Authority's direction that the parties use one joint bundle, which meant that two bundles containing similar or the same documents were used which was inefficient and unnecessary. For these reasons I consider that a \$500 increase is appropriate.

[15] HHGC is ordered to reimburse Mr Fatupaito his filing fee of \$71.56 and to pay him \$4,000 towards his legal costs within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority