

[2] Costs were reserved with a timetable for memoranda to be lodged if the parties were not able to resolve that issue between themselves. Shortly before Mr Halwala's costs memorandum was due to be lodged his counsel advised the Authority that Mr Halwala was in hospital in Melbourne undergoing treatment for cancer and, later, that Mr Halwala had died on 17 November 2015. The parties had already lodged their respective costs memoranda by then and the issue of costs still needed to be determined. If any payment of costs was due from or to Mr Halwala, it had become a matter to be dealt with by the administrator of his estate.

[3] The costs memorandum lodged by Mr Halwala's counsel advised he had incurred \$15,753 in legal costs in preparing for and attending an Authority investigation meeting held over two days. Copies of three invoices lodged to verify the costs he incurred showed they included disbursements totalling \$188.

[4] Mr Halwala sought an uplift of the Authority's usual daily tariff for costs, currently \$3500 per day, on the basis his costs were increased by \$1322.50 due to requests from MRP to provide documents about his travel arrangements in December 2014 and January 2015, family communications about those travel plans, and bank account details. He also sought an increase in costs to compensate for what was described as unreasonable non-compliance by MRP with the Authority's timetable direction for lodging witness statements.

[5] MRP replied that its costs of representation in the Authority investigation had exceeded those incurred by Mr Halwala and submitted that an analysis of the overall outcome should result in an award requiring him to pay MRP between \$1000 and \$1750 as a contribution to its costs. It submitted Mr Halwala failed to establish his primary claim of unjustified dismissal and had limited success so could not claim costs for the two day investigation meeting. It also submitted that further documents MRP got Mr Halwala to provide for the investigation were central to its defence and aspects of the Authority's eventual findings.

[6] Both parties accepted costs should be determined from a starting point of the Authority's notional daily tariff then adjusted upwards or downwards to account for relevant factors in the particular case and the application of appropriate principles.²

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

[7] In this case the necessary adjustments in exercising the discretion to order either party to pay the other party's costs and expenses involved considering two principles – firstly, that costs follow the event and secondly, that party conduct that unnecessarily increased costs of the other party could be taken into account to reduce or increase a costs award.

The 'event'

[8] The parties had differing views on their relative success in the 'event' or outcome as determined by the Authority. Mr Halwala submitted he was "largely successful" due to the finding that he was unjustifiably disadvantaged and MRP failed in its two counterclaims. MRP's submissions in response were to the effect that the unjustified disadvantage finding was a minor success for Mr Halwala while the finding that his dismissal was not unjustified was a major failure for him. MRP accepted its failure on its counterclaim had cost consequences but suggested the preparation done by Mr Halwala on that aspect of the case warranted only a modest allowance of \$750. It submitted MRP should be awarded \$3500 for successfully defending the unjustified dismissal claim with that sum then adjusted downwards by \$1750 to take account of Mr Halwala's success in his unjustified disadvantage claim. It submitted a further reduction, for his costs in responding to MRP's unsuccessful counterclaims, should be as low as zero but no higher than \$750.

[9] While such a detailed assessment of relative success on elements of the parties' respective claims or counterclaims might be warranted in some cases, this was not such an instance. For example time spent in the investigation meeting on the evidence about data use on Mr Halwala's mobile phone was relevant to the reasons MRP gave for his dismissal (and its justification), his disadvantage (over the opportunity to comment on the data use information during the disciplinary process) as well as MRP's counterclaim about who should pay the charges for the data use. What Mr Halwala said about the data use (both during the investigation meeting and earlier during MRP's disciplinary process) was also relevant to assessing the credibility of his explanations about other events under scrutiny in the employer's inquiry and the Authority's investigation. In that way the bundle of issues and evidence overlapped and were not as amenable to the detailed assignment that MRP sought for the purposes of the costs assessment. Rather, on a broader view, Mr

Halwala was successful in establishing MRP had acted unjustifiably towards him and in resisting its counterclaim. In that respect he was more successful than MRP and in that 'event' was entitled to an assessment of costs from the starting point of \$3500 for each of the two days over which the investigation meeting ran.

Adjustment for unnecessary conduct?

[10] I have not accepted Mr Halwala's submission that his costs were unnecessarily increased by MRP pressing him to provide further documentary evidence about his travel arrangements. The information was central to the issues of whether and when he had known that his return travel bookings from Brisbane to Auckland would not get him back to New Zealand before the expiry of his approved leave. It led to findings in the Authority determination that he had acted deliberately in returning one day late from leave and that MRP could justifiably have dismissed him for serious misconduct.

[11] Neither have I accepted that there were unacceptable deviations by MRP from timetable directions. Some delays occurred and adjustments to due dates were made in response to requests from both parties but, as expected where professional legal representatives are involved, there was prompt advice to the Authority about the circumstances, with authorisation sought for necessary changes.

Other factors

[12] Two other factors required particular reference.

[13] Firstly, Mr Halwala submitted that, in order to achieve the success he did, it was necessary for him to spend significantly more on legal costs than he would be able to recoup.

[14] Overall an award of \$7000 for costs (being two days at tariff) and \$6000 in distress compensation tallied up to less than his total legal bill for the Authority investigation. He had however also succeeded in defending a counterclaim that might otherwise have required him to pay MRP more than \$30,000. Parties have the right to instruct counsel and incur legal costs but cannot expect to recoup sums greater than the notional daily tariff, unless specific factors (already addressed) require an upward

adjustment.³ Neither should a costs award attempt to address any perceived deficiencies in the relief awarded to a successful party, just as it should not seek to punish an unsuccessful party.⁴

[15] Secondly, the sad recent event of Mr Halwala's death (that occurred after the parties' memoranda were lodged and so was not referred to in them) is not a factor in setting the appropriate level of cost award, which had to be reached solely by considering the usual principles and adjustments allowed for relevant factors. I also took no account of submissions made by each party about the ability of the other party to pay costs (as those arguments were irrelevant to the particular circumstances and the modest outcome).

Expenses

[16] MRP submitted Mr Halwala should not be reimbursed for disbursements included in his legal fees because the details provided about them were not sufficient. The invoices provided showed disbursements of \$50, as a bureau fee, and \$138 for the copying, compiling and paginating of a bundle of documents for the Authority investigation meeting. Those two amounts were expenses for which reimbursement was warranted in addition to the award of \$7000 as costs on the daily tariff basis for the two day investigation meeting.

Robin Arthur
Member of the Employment Relations Authority

³ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94]-[95] and *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [17], by the full court in *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [107]-[108].

⁴ *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [13].