

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2016] NZERA Auckland 325
5593998**

BETWEEN

TE ARAIWINI HOLO'IA
Applicant

AND

BUPA CARE SERVICES NZ
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Submissions received: 8 September 2016 from Applicant
from Respondent

Determination: 23 September 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2016] NZERA Auckland 272 it was determined that the Applicant, Ms Te Araiwini Holo'ia, had not been unjustifiably suspended or unjustifiably dismissed by the Respondent, BUPA Care Services NZ Limited (BUPA).

[2] In that determination costs had been reserved in the hope that the parties would be able to resolve this issue between themselves. Unfortunately, they have been unable to do so, and the parties have filed submissions in respect of costs.

[3] The matter involved one day and a quarter day of meeting time.

[4] Ms Eden, on behalf of BUPA, is seeking a contributory award of \$4,666.67 towards the actual costs of \$25,503.76 (including GST).

[5] Ms Eden in support of the claim submits that Ms Holo'ia was wholly unsuccessful in her claims before the Authority, and further that I noted in the determination that even if the decisions to suspend and subsequently dismiss Ms Holo'ia had not been found to be justified, the level of contribution was such that no remedies would have been awarded to Ms Holo'ia.

[6] Mr Austin, on behalf of Ms Holo'ia, opposes an award of costs to the Respondent on the basis that firstly the Respondent's application for costs was submitted one day outside the

time period indicated in determination [2016] NZERA Auckland 272, and secondly, that SHL submissions fall short of the requirement contained in determination [2016] NZERA Auckland 272.

[7] In respect of the first ground of opposition, Mr Austin points out that in determination [2016] NZERA Auckland 272 which was issued on 11 August 2016 I stated: “... *the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. No application for costs will be considered outside this time frame without prior leave.*”

[8] Mr Austin submits that the period allowed for the lodging and serving of a memorandum on costs by the Respondent can be determined by reference to the Interpretation Act 1999 s. 35 which states that: “(1) *A period of time described as beginning at, on, or with a specified day, act, or event includes that day, or the day of the act and or event.*”

[9] On that basis he submits that the time period for the Respondent’s submissions began on 11 August and concluded on 7 September 2016. The Respondent’s submissions having been filed on 8 September 2016, it was therefore out of time. As no application for leave to file out of time has been received, the application for costs should be rejected.

[10] Mr Austin further points out that it was also stated in determination [2016] NZERA Auckland 272 that: “*All submissions must include a breakdown of how and when costs were incurred and be accompanied by supporting evidence*”.

[11] Mr Austin submits that the Respondent’s memorandum and associated invoices provide no details of the length of time in attendance at the listed activities cited in the invoices, or any basis for associating the substantial costs claimed with the listed activities. As such the Respondent’s memorandum of costs lacks the specificity required such that the Authority’s clear and reasonable standards have not been met.

Principles

[12] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) *The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[13] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[14] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*².

[15] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[16] It is also a principle that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party’s conduct.

Determination

[17] I have carefully considered the submissions of the parties. It is incumbent upon me that I approach the question of costs in a principled manner and not arbitrarily, and I therefore consider each ground for opposition separately as appropriate.

Outside the time limit

[18] Determination [2016] NZERA Auckland 272 was issued on 11 August 2016. Although the Respondent’s submissions have been received on the 29th day after that determination was issued, I consider that this may have resulted from a miscalculation rather than from a deliberate disregard for the timetable set down by the Authority.

[19] The Respondent’s submissions on costs were received on 8 September 2016, the day immediately following 7 September 2016, and on that basis I do not consider it would be appropriate to exercise my discretion by declining the application for costs.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

A lack of specificity

[20] In determination [2016] NZERA Auckland 272 I stated that all submissions must include a breakdown of how and when costs were incurred. The supporting documentation to the Respondent's memorandum includes copies of invoices submitted to BUPA, and a breakdown of how and when the costs were incurred.

[21] I accept that those costs are not further broken down into time segments; however they do provide the required information as to the dates upon which the costs were incurred, and the activity to which the incurred costs relate. I consider that this fulfils the requirements as to specificity set out in determination [2016] NZERA Auckland 272.

[22] I note the comments made by Mr Austin with reference to unexplained charges such as "*Air NZ excess baggage*". I note that a claim for costs frequently includes such items as disbursements. Provided these are deemed reasonable and supported by invoices, they may be the subject of an award as a separate element. However in this case the Respondent is not seeking actual costs plus disbursements, but rather an award of costs at the 'daily tariff' rate.

[23] Having examined that Respondent's memorandum and supporting documentation, I am satisfied that the Respondent has complied with the requirements as to specificity and accept the incurred costs as reasonable.

[24] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending upon the circumstances. I see no reason for departing from the usual tariff approach in this matter.

[25] Costs normally follow the event and BUPA is entitled to a contribution towards its costs. I award this at the notional daily tariff rate sought of \$3,500.00 per day in respect of 1 day and 2 hours, rather than at the actual costs incurred level.

[26] Ms Holo'ia 1 is ordered to pay BUPA the sum of \$4,666.67 costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority