

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 247
5462995**

BETWEEN

PAULINE LOLOHEA
Applicant

AND

TONGAN HEALTH SOCIETY
INC
Respondent

Member of Authority: Eleanor Robinson

Representatives: Keshila Fayen, Advocate for Applicant
Amelia Schaaf, Counsel for Respondent

Submissions received: 13 August 2015 from Applicant
30 July 2015 from Respondent

Determination: 17 August 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2015] NZERA Auckland 199 it was determined that the Applicant, Ms Pauline Lolohea, had not been unjustifiably dismissed by the Respondent, The Tongan Health Society Incorporated (the Society).

[2] Costs were reserved in both matters in the hope that the parties would be able to resolve this issue between themselves. Unfortunately, they have been unable to do so, and Ms Burt, on behalf of NZTA, has filed a submission in respect of costs.

[3] The two matters involved 2 days of meeting time. Ms Schaaf on behalf of the Society, submits that a contribution to costs incurred by the Society should be awarded in line with the normal daily tariff of \$3,500.00 per day of hearing time.

[4] In support of her submission, Ms Schaaf highlights the cost of two doctors being necessarily present during the course of the investigation meeting, one for a few hours, and the other for the whole two days. This represents a significant cost to the Society.

[5] Further Ms Schaaf submits that it was necessary for the Society to incur more preparation than would otherwise be incurred due to the lack of focus in Ms Lolohea's claims and the witness statements filed by the Applicant's witnesses.

[6] Ms Fayen, on behalf of Ms Lolohea, submits that if costs were awarded at the level sought by the Society, this would result in financial hardship to her.

[7] Ms Fayen further submits that it was appropriate that witness statements were completed by all the Applicant witnesses, and that time was not wasted during the investigation meeting by the Applicant witness creating unnecessary delays in the presenting of their evidence.

Principles

[8] 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.

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

[10] 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.

[11] 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."

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

[12] 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

[13] 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. For a 2 day investigation meeting this would normally equate to \$7,000.00.

[14] Costs normally follow the event and the Society is entitled to a contribution towards its costs.

[15] Ms Fayen submits that Ms Lolohea will have difficulty in meeting the Society's claim for costs at the level of \$7,000.00, and had provided information in support of that submission relating to Ms Lolohea's financial position, specifically her earnings and regular out-goings.

[16] As stated in the Employment Court case *Bishop v Benner*⁵ at [30]: "*Assessment of the ability to pay requires consideration of the total financial position of the party concerned including both assets and liabilities and income and necessary expenditure.*"

[17] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings and having considered the information provided concerning Ms Lolohea's financial situation, I find that this is a case in which it is appropriate for the Authority to use its discretion by lowering the tariff.

[18] Ms Lolohea is ordered to pay the Society the sum of \$5,000.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[19] The Society has indicated that is willing for Ms Lolohea to make payment by instalments between the date of this determination and early in 2016. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Eleanor Robinson
Member of the Employment Relations Authority

⁵ [2012] NZEmpC 5

