

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 542  
3173582  
3183960

BETWEEN                      SIMON MUTONHORI  
   Applicant in 3173582  
   Respondent in 3183960

AND                              WAIROA DISTRICT COUNCIL  
   Respondent in 3173582  
   Applicant in 3183960

Member of Authority:      Michael Loftus

Representatives:            Mr Mutohori in person  
   Charles McGuinness, counsel for Wairoa District  
   Council

Submissions Received:    30 August 2023 from Wairoa District Council  
   Nil from Mr Mutohori

Date of Determination:    20 September 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]      On 22 August 2023 I issued a determination in which I concluded Wairoa District Council had successfully defended a multiplicity of disadvantage claims Mr Mutohori pursued.<sup>1</sup>

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

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<sup>1</sup> *Mutohori v Wairoa District Council* [2023] NZERA 468

[3] Also included was a request for a contribution toward the costs the Council incurred with respect to an application for interim relief it had earlier brought against Mr Mutonhori and with which it was also successful.<sup>2</sup>

[4] The Authority's jurisdiction to order a contribution toward a party's costs is exercised by applying well-established principles.<sup>3</sup> Those principles recognise that:

- (a) a successful party should receive a contribution toward reasonably incurred costs and expenses;
- (b) costs should generally be modest and may not be used to punish the substantive conduct of the unsuccessful party;
- (c) the nature of a case may allow for an order that costs lie where they fall; and
- (d) the Authority may use a notional daily tariff as its starting point. From there adjustment may occur either up or down depending on the circumstances of the case. Such adjustment may be to take account of settlement offers, particularly "calderbanks," the financial means of the liable party and whether or not a party unnecessarily increased the costs incurred by the other.

[5] The current tariff is \$4,500 for the first day of an investigation and \$3,500 for each day thereafter.

[6] The Council seeks to apply the tariff to three days, being one for the interim application and two for the investigation of Mr Mutonhori's disadvantage claims. In doing so the Council notes a belief there were grounds to seek an uplift but that it chose not to do so.

[7] Mr Mutonhori failed to reply notwithstanding a reminder, though it is possible he is under the belief a challenge he has lodged in the Employment Court sets aside a consideration of costs with that view being alluded to in a reply he sent Council when it raised the issue of costs. It is equally possible Mr Mutonhori is simply ignoring the claim as his initial reply to various applications by the Council has, more than once, been along the lines of it's a frivolous waste of time and should be dismissed.

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<sup>2</sup> *Wairoa District Council v Mutonhori* [2022] NZERA 434

<sup>3</sup> *Employment Relations Act 2000, Schedule 2, clause 15, Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 and [www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf](http://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf)

[8] While the lack of response leaves me unsure as to why Mr Mutohori has not replied, the fact of the challenge means it is desirable the issue of costs be determined. It is preferable the Authority's process is complete and the Court has a complete picture of the issues before it.<sup>4</sup>

[9] In the circumstances I know of no reason not to adopt the normal approach of applying the tariff though one issue remains. That is quantum as my notes suggest three days were not used. The interim application took under half a day while the investigation into Mr Mutohori's substantive claims took a bit over a day and a half. Two days in total, though as they were separate investigations I believe both should be calculated on the basis of the first days' tariff.

### **Conclusion and Orders**

[10] For the above reasons I order Simon Mutohori pay the Wairoa District Council the sum of \$9,000.00 (nine thousand dollars) as a contribution toward the costs the Council incurred with respect to the two investigations in which it was successful.

**Michael Loftus**  
**Member of the Employment Relations Authority**

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<sup>4</sup> *Swales v AFFCO New Zealand Ltd* NZEmpC Auckland AC19/01, 23 March 2001 at [3] adopted by the Authority as applicable to it – for example *Sandilands v Chief Executive of the Department of Corrections* ERA Wellington WA67A/09, 10 September 2009