

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 139  
5584631

BETWEEN PHIL & DARIA PREECE  
Applicants

A N D HE-DO-KI TRUST  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicants in person  
Ian McGovern, Representative for the Respondent

Date of Determination: 08 May 2017

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**COSTS DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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- A. Mr and Mrs Preece are ordered to contribute \$2,200 towards the costs of He-Do-Ki Trust (the Trust).**

**The substantive determination**

[1] In a determination of the Authority issued on 06 April 2017<sup>1</sup>, the Authority determined that:

- (a) The underlying and true nature of the relationship between the parties was that of an independent contract, not an employment agreement.
- (b) Accordingly, the Authority had no jurisdiction to investigate the employment related claims by Mr and Mrs Preece against the Trust.
- (c) Costs were reserved. The parties were encouraged to resolve costs. If this was not possible, the Trust was given 14 days from the date of the

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<sup>1</sup> [2017] NZERA Auckland 100

Authority's determination to file a submission as to costs and the Preeces were given 14 days from receipt to respond.

### **The Authority's power to award costs**

[2] 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.

[3] The Full Employment Court decision in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>2</sup> sets out the principles that apply to awards of costs in the Authority. Principles include:

- There is a discretion as to whether costs should be awarded and as to the amount.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account when inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- Costs generally follow the event.
- "Without prejudice except as to costs" offers can be taken into account.

### **Costs determination**

[4] The Employment Court in *Carter Holt Harvey v. Eastern Bays Independent Industrial Workers Union & Ors*<sup>3</sup> observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique

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<sup>2</sup> [2005] ERNZ 808, para.44  
<sup>3</sup> [2011] NZEmpC 13

jurisdiction. This approach has been affirmed by the Employment Court more recently in *Fagotti v. Acme & Co Ltd*<sup>4</sup>. I adopt that approach.

[5] The Trust's representative filed a memorandum as to costs on 20 April 2017 after being unable to resolve costs with the Preeces. The Preeces sent an email to the Authority stating that the Willms' costs were "extreme" and they were going to appeal the Authority's determination. No other information was provided. Costs of \$2,200 to \$2,500 are sought on behalf of the Trust.

[6] The Trust's representative provided details of costs incurred to defend the claims by the Preeces. Costs incurred totalled \$1,590 (excluding GST). These costs appear to relate to preparation for the investigation meeting and representation of the Trust at the meeting. Earlier costs incurred by the Trust were not included in the costs being sought.

[7] It appears that an uplift is sought by the Trust's representative on the grounds that the termination of the contract occurred more than 2 years ago and attempts had been made by the Trust to settle matters. It is unclear whether the offers to settle referred to were *Calderbank* offers<sup>5</sup>.

[8] This matter involved an investigation meeting of one full day. At the time the Preeces filed proceedings, the Authority's daily rate was \$3,500. The rate has subsequently increased to \$4,500 for the first day of an investigation meeting and \$3,500 for each day thereafter. The Trust seeks costs of \$2,200 to \$2,500. I consider this to be reasonable.

[9] Mr and Mrs Preece are ordered to pay the Trust the sum of \$2,200 in costs pursuant to clause 15 of Schedule 2 of the Act. This sum is less than the Authority's normal daily tariff of costs for one full day of an investigation meeting. The sum represents the costs incurred by the Trust together with a small uplift to take into account conduct which caused additional costs to the Trust.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**

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<sup>4</sup> [2015] NZEmpC 135

<sup>5</sup> *Calderbank v Calderbank* [1975] 2 All ER 333