

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2017] NZERA Auckland 65  
5638161  
5638180**

BETWEEN TRES MARIAS TRADING  
LIMITED  
Applicant

AND ASHLEY MAXIMO  
First Respondent

CARL MENDOZA  
Second Respondent

Member of Authority: Eleanor Robinson  
Submissions received: 2 March 2017 from Applicant  
15 February 2017 from Respondent  
Determination: 13 March 2017

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] By determination [2017] NZERA Auckland 16 it was determined that the Respondents, Mr Ashley Maximo and Mr Carl Mendoza, did not breach clauses 6, 7 and 8 of their employment agreements, nor did they breach the duty of good faith owed to the Applicant, Tres Marias Trading Limited (Tres Marias).

[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 3 and a half days of meeting time.

*Submissions for the Respondent*

[4] Mr Mitchell, on behalf of the Respondents, submits that an uplift to the normal daily rate tariff in the Authority is justified on the basis that:

- the matter was initially filed on an urgent basis which required the Respondents to lodge responses to the claims which were of an injunctive nature;
- the Tres Marias claims against each Respondent were not identical which meant that they had to incur their own legal fees and necessitated the actual attendances of each Respondent in responding to the claims;
- if the Respondents had engaged separate legal counsel, this would have exposed Tres Marias to a separate costs award of potentially \$12,375.00 each Respondent;
- the combined legal costs of the Respondents was \$37,208.08; and
- engaging one counsel to represent each of the Respondents minimised costs.

[5] Mr Mitchell is seeking a contribution to costs in the sum of \$18,375.00, in addition to disbursements payable to each Respondent.

*Submissions of the Applicant*

[6] Mr Mc Lean, on behalf of the Applicant, submits that:

- The meeting took less than 3.5 days on the basis that the final half day, which was used for closing submissions, was not required.
- The Respondent claims may not have been identical, but they were similar;
- The wording of the employment agreements was not identical, but it was very similar and both were in the nature of a claim for breach of the employment agreements;
- There were similarities between the some of the sections of the employment agreements alleged to have been beached; and
- Mr Mitchell, although representing both Respondents, appeared only once.

## *Principles*

[7] 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.*

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

[9] 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*<sup>2</sup> as confirmed in *Fagotti v Acme & Co Ltd*.<sup>3</sup>

[10] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>4</sup> that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*<sup>5</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[11] 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**

[12] 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 3.5 day investigation meeting the tariff would normally equate to \$13,250.00.

[13] Costs normally follow the event and the Respondents are entitled to a contribution towards their costs.

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<sup>1</sup> [1996] 2 ERNZ 622

<sup>2</sup> [2005] 1 ERNZ 808

<sup>3</sup> [2015] NZEmpC 135 at [114]

<sup>4</sup> [2005] 1 ERNZ 808

<sup>5</sup> [2001] ERNZ 305

[14] I accept that representing two clients on matters arising from similar claims with a similar factual matrix, and being represented by the same counsel, does not necessarily equate to a doubling of costs; equally I also accept that utilisation of the same counsel does not necessarily result in each Respondent incurring costs which are solely shared costs.

[15] Whilst appearance by counsel may not involve more than one appearance in the Authority proceedings, this does not equate to a halving of the time necessarily spent with each Respondent when there are dissimilarities in the exact nature of the claims against each.

[16] The costs and claim for disbursements presented by the Respondents include a breakdown and are accompanied by supporting evidence preparation time in respect of each Respondent. I accept them as reasonable.

[17] Tres Marias is ordered to pay the Respondents the sum of \$18,000.00 costs, to be shared equally between them.

[18] Tres Marias is also order to pay disbursements in the sum of \$362.56 to Mr Maximo and \$351.06 to Mr Mendoza, pursuant to clause 15 of Schedule 2 of the Act.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**