

Mr Tane's claim for costs

[3] Mr Tane has incurred total costs in relation to this employment relationship problem of \$10,207.90. A breakdown of the costs has not been provided. The costs incurred appear to be total costs including initial advice, preparation for lodging, preparation and attendance at mediation and may include disbursements. Mr Tane seeks a contribution to costs of \$8,500 (plus GST). He requests the Authority consider issues of delay and cancellation as referred to at [45] of the substantive determination.

FOL's response

[4] FOL submits a costs award of no more than half the notional daily tariff (\$2,250 plus GST) is reasonable given the investigation meeting was held by audio visual link and took no more than half a day. It submits it made an offer to settle costs of \$4,500 plus GST on 15 November which was not accepted, this matter was not particularly complex and apart from the COVID delays for which FOL is not responsible Mr Tane has not suffered unnecessary costs.

Costs principles

[5] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.³

³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.

Costs analysis

[6] Mr Tane was the successful party. It is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs. It is accepted Mr Tane has incurred actual costs in respect of this matter. He should receive a contribution to costs incurred. In assessing an appropriate costs award the notional daily tariff is a starting point. The applicable daily tariff is \$4,500 for the first day and \$3,500 for every day thereafter. This matter required one hearing day.⁴ The total notional costs, applying the Authority tariff, is \$4,500.

[7] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the tariff.

[8] Given the hearing lasted most of a normal hearing day a reduction on the daily tariff is not warranted. The issues around delays in the parties attending mediation, cancellation of mediation and the requirement for the Authority to become involved to direct mediation has, it is accepted, increased costs. Can mediation-related costs be recovered? A review of the relevant cases indicates this is unlikely.⁵ There will be no uplift for the mediation-related costs in this matter. Weighing all the relevant factors a reasonable contribution to Mr Tane's costs is a total of \$4,500. The filing fee of \$71.56 is also reasonably recovered.

Outcome

[9] Farrand Orchards Limited is ordered to pay Michael Tane a contribution to costs of \$4,500 and reimburse him the cost of the filing fee of \$71.56 within 21 days of the date of this determination.

Marija Urlich
Member of the Employment Relations Authority

⁴ Investigation meeting ran from 10am to 3pm with appropriate breaks.

⁵ *Naturex Ltd v Rogers* [2011] NZEmpC 9, (2011) 8 NZELR 251; *RHB Chartered Accountants Ltd v Rawcliffe* [2012] NZEmpC 31, (2012) 10 NZELC 79-002; *Quan Enterprises Ltd v Fair* [2012] NZEmpC 62 at [9].