

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 112  
5580463

BETWEEN                      AROHA KAPA, TUPOU  
   UELE, ELIZABETH ASHBY,  
   MAKELETA MAAKE,  
   JENNIFER KAA AND  
   CHRISTOPHER SEXTON  
   Applicants

AND                                A M HOSPITALITY LIMITED  
   Respondent

Member of Authority:        Robin Arthur

Representatives:             Simon Mitchell, Counsel for the Applicants  
   Russell Drake, Advocate for the Respondent

Determination:                11 April 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A. A M Hospitality Limited must pay \$3500 to the applicants as a contribution to their costs of representation in successfully bringing their claim to the Authority for determination.**

[1] By determination on 18 March 2016 the Authority made findings about the terms and conditions of employment on which the applicants should have transferred their employment to A M Hospitality Limited (AMHL) in September 2014.<sup>1</sup> AMHL was directed to calculate and pay shortfalls for various entitlements due to the applicants.

[2] The parties were encouraged to resolve any issue of costs themselves, with a timetable set for memoranda to be lodged if they were unable to do so. An oral indication was given at the close of the investigation meeting that, if required the Authority was required to determine costs, the assessment of an appropriate award

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<sup>1</sup> [2016] NZERA Auckland 88.

would likely start from the usual daily tariff for a single day (conflating two part days taken for the investigation).

[3] The costs issue was not resolved because, as evident from the memoranda since lodged by the parties, they disagreed on whether an adjustment to the daily tariff should be made due to deficiencies in information provided by the parties in the two sessions of the investigation meeting – one on 18 December 2015 and one on 17 March 2016. They each blamed the other party, at least in part, for failure to provide relevant and available material.

[4] The applicants' costs memorandum acknowledged some shortcomings in providing information sought by the Authority at the adjournment of the investigation in December 2015. However they noted they had, in the outcome, been wholly successful in their claim and their employer had incorrectly pursued arguments excusing its failure to have properly meet obligations under Part 6A of the Employment Relations Act 2000 (the Act) at the time of their transfer of employment.

[5] AMHL's memorandum sought an order that costs lie where they fell or for a "significant reduction" of the daily tariff if it were required to contribute to the representation costs of the applicants.

[6] In AMHL's submission the applicants and their union should have done more sooner to resolve problems over the terms and conditions imposed at the time of their transfer of employment to the first contractor, ISS Facilities Services Limited (ISS) in July 2013, rather than after the second transfer to AMHL in September 2014.

[7] That argument, and some related submissions, sought to re-agitate aspects of the Authority's determination that found AMHL bore the onus under Part 6A of the Act for getting the transfer terms correct and that AMHL could itself have done more sooner. Faced with considerable difficulties getting sufficient information from the displaced first contractor ISS at the time of the second transfer, AMHL had not in 2014 taken the relatively simple and sensible step of asking its customer (and the applicants' original employer) Silver Fern Farms Limited (SFF) for help ascertaining what the applicants should properly be paid. The evidence also established AMHL subsequently made some changes that further reduced the applicants' terms in a way contrary to the requirements of Part 6A. The Authority's determination has remedied

not only the residual effect of earlier unlawful reductions made by ISS but also the consequences of AMHL's later actions.

[8] AMHL's suggestion that the applicants and their union should also have pursued ISS for back pay was not relevant to its own obligations or what costs award should be made for the applicants' success in their claim against their current employer.

[9] Following the adjournment of the Authority investigation in December 2015 AMHL made diligent efforts to get relevant information from ISS, with some success. The additional information helped resolve some factual issues in the investigation. More could have been done, including by the applicants and their representative, in getting and providing various records for the SFF period of employment. What was produced however was sufficient to clearly establish that the applicants' terms and conditions were reduced following the transfers of employment in a way that was inconsistent with the requirements of Part 6A. It provided a sufficient evidential basis for the orders made by the Authority for the shortfalls to be remedied.

[10] The relatively modest amount of the current daily tariff of \$3500 as an award of costs against AMHL in part reflects its co-operation with the Authority's investigation in seeking further information when asked to do so. The result however also recognises the principle that costs must follow the event of the applicants' success.

Robin Arthur  
Member of the Employment Relations Authority