IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 211
3240999

	BETWEEN	ANDREW LEOTA Applicant
	AND	FULTON HOGAN LIMITED Respondent
Member of Authority:	Jeremy Lynch	
Representatives:	Grant MacDonald, counsel for the Applicant Kirsty McDonald and Joseph Williams, counsel for the Respondent	
Investigation Meeting:	On the papers	
Submissions and other Material Received:	28 November 2023, and 30 January 2024 from the Applicant 2 December 2023, and 26 January 2024 from the Respondent	
Determination:	12 April 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Andrew Leota was employed by Fulton Hogan Limited (Fulton Hogan) in November 2020 as an electrician. He resigned in October 2023. In relation to a workplace accident, he says he raised a personal grievance within the statutory 90-day timeframe. In the alternative, he seeks leave of the Authority to raise his grievance out of time, because exceptional circumstances prevented him from raising it within the statutory 90-day time period.

[2] Fulton Hogan rejects the claim that Mr Leota raised a personal grievance within the statutory 90-day timeframe, and does not consent to the grievance being raised out of time. Fulton Hogan opposes leave for Mr Leota to raise a personal grievance out of time.

[3] This determination deals only with the preliminary jurisdictional issues of whether Mr Leota has raised his personal grievance within the statutory 90-day timeframe, and whether Mr Leota should be granted leave to bring his grievance out of time.

Background

[4] On 29 July 2022, Mr Leota suffered an electric shock at a worksite. He says he attended Greenlane Hospital and that after undergoing testing to determine cardiac function, and a period of observation, he was discharged.

[5] Mr Leota was able to return to work shortly after the incident.

[6] As this was a notifiable event, Fulton Hogan informed WorkSafe of this incident on 29 July 2022.[1] On 4 August 2022 Fulton Hogan commenced an internal investigation into the incident.

[7] By letter dated 18 August 2022, Fulton Hogan advised Mr Leota of the outcome of its investigation. Mr Leota says he was not given this letter until some days later, on 23 August 2022. Fulton Hogan did not dispute this.

[8] The investigation found that Mr Leota had not taken reasonable steps to protect himself, including by entering the worksite without notification, failing to lockout and test before commencing work on equipment, and not wearing required PPE (electrical gloves). The letter thanked Mr Leota for his honesty both in coming forward to report the incident, and during the investigation process. The letter advised that a review of Fulton Hogan's processes had occurred and several improvements to its operating procedure had been identified.

[9] Mr Leota says that on 23 August 2022, he met with Fulton Hogan's Transport, Technology and Tunnels Manager, Patrick Burns to discuss the letter. Mr Leota says he made it clear that he disagreed with the findings of the investigation.

[10] On 6 September 2022 Mr Burns wrote to Mr Leota explaining that he was not subject to any disciplinary process. He reiterated this in a text message to Mr Leota on 7 September 2022.

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[1] Health and Safety at Work Act 2015, s 24(1)(e).

[11] On 8 September 2022, Mr Leota emailed Mr Burns to advise that:

> I will be engaging with the Work Safe investigation fully.
> I will be replying to their enquiry email sometime this week or next.
>
> Further, I have legal representation in the matter above.
>
> Lawyer details – Grant MacDonald.
>
> …
>
> Grant is attached in this email. Any further queries in response into the investigation. Please go through him.

[12] Fulton Hogan says that upon notifying WorkSafe of the incident, it was asked to provide evidence of corrective actions undertaken in response. This information was provided, and on 10 October 2022 WorkSafe advised it would not be taking any further steps in relation to the incident.

[13] Between 21 – 31 October 2022, Mr Leota requested that Fulton Hogan provide him with access to the final investigation report, which he understood had been sent to WorkSafe.

[14] In an email to Fulton Hogan sent on 31 October 2022, Mr Leota advised:

> It has been disappointing to see the lack of responses to my request for the Investigation Report specific to the incident I was involved in.
>
> …I have a right to this report…
>
> My legal counsel is attached in this email. And would appreciate your reasonable response.

[15] Auckland System Management (an alliance of three entities of which Fulton Hogan is a member) replied to Mr Leota's email on 31 October 2022. This email sets out:

> -No report was sent to WorkSafe, they did not request one. They were initially notified of the event as we were legally required to do, they then requested evidence of corrective actions undertaken and I sent them the LOTO SOP developed by the Tech team, along with the updated prestart document, that is all.
>
> -You have also requested a copy of the investigation report. I asked Pat to take you through the report filed in Vault but it is not ASM policy, nor FH policy for that matter, to allow anyone to take copies of investigation reports.

[16] On 1 December 2022 Fulton Hogan received an email from Mr Leota's counsel, advising:

> I have instructions from Mr Leota to pursue a claim into the District Court with regard to a breach of the Health & Safety at Work Act 2015 and a further claim into a breach of his human rights, that would be pursued in the first instance with the NZ Human Rights Tribunal.
>
> This matter was initially (I am instructed) referred to Worksafe NZ to potentially prosecute. Worksafe has declined to do so, which allows Mr Leota to pursue his claim into the District Court.
>
> I have instructions to seek mediation in the first instance, if you feel that could be beneficial.
>
> If you were open to mediation, possibly MBIE could provide a mediator and location to facilitate this.
>
> Of course, if you are not, that is your option …

[17] On 18 July 2023, Mr Leota lodged his statement of problem in the Authority. In this, Mr Leota sought leave to raise his personal grievance out of time.

[18] Fulton Hogan in its statement in reply, said there was no jurisdiction for Mr Leota to bring his personal grievance as it had been raised outside of the statutory 90-day time limit, and did not consent to it being raised out of time.

[19] Fulton Hogan also noted that Mr Leota's statement of problem had been lodged in the Authority 354 days after the incident in which Mr Leota received an electric shock; 260 days after Fulton Hogan had clarified that it had not been asked to provide its investigation report to WorkSafe; and 229 days after Mr Leota's lawyer contacted Fulton Hogan to advise that Mr Leota would be pursuing remedies against Fulton Hogan through means other than via the personal grievance process.

The Authority's investigation

[20] On 13 September 2023 the Authority held a case management conference by telephone (CMC) with the parties' representatives.

[21] As Mr Leota's statement of problem sought leave of the Authority to raise a personal grievance out of time, it was agreed that this matter was suitable for an investigation meeting 'on the papers'.

[22] For the Authority's investigation, an affidavit sworn on 20 October 2023 was lodged by Mr Leota. For Fulton Hogan, an affidavit sworn on 7 November 2023 was lodged by David Casey, it's North Island HR Manager.

[23] Written submissions were then lodged by the parties' counsel. Provision had been made for Mr Leota to file submissions in reply. No submissions in reply were

received from Mr Leota, and in January 2024, his counsel confirmed no reply submissions would be filed on behalf of Mr Leota.

[24] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all the evidence and submissions received.

The issues

[25] At the 13 September 2023 CMC, it was agreed that the issues requiring investigation and determination were:

(a) whether Mr Leota should be granted leave by the Authority to raise his personal grievance out of time, pursuant to the provisions of s 114(3) of the Act; and

(b) whether either party should be required to contribute to the other's costs?

[26] The above issues for investigation and determination were recorded in written directions of the Authority following the CMC, issued to the parties on 13 September 2023.

Relevant law

[27] In determining this employment relationship problem, the following law is relevant.

Raising a personal grievance

[28] Section 114 of the Act provides:

> (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days, beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
>
> (2) For the purposes of subs (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.
>
> (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply

to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subs (3) the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as the Authority thinks fit, if the Authority –

(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in s 115); and

(b) considers it just to do so.

[29] Section 115 of the Act provides:

For the purposes of s 114(4)(a) exceptional circumstances include –

(a) Where the employee has been so affected or traumatised by the matter giving rise to the grievance, that he or she was unable to properly consider raising the grievance within the period specified in s 114(1) …

[30] As provided under s 114(1), a fundamental requirement is that the grievance is raised with the employer within the statutory 90-day time period.

[31] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, Her Honor Judge Holden summarised the applicable principles for raising a personal grievance:[2]

> [36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there have been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.
>
> [37] It does not matter what an employee intended his or her complaint to be, or preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act, and if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.
>
> [38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[2] *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36]–[38].

[32] However, in *Shaw v Bay of Plenty District Health Board*, the Court of Appeal noted that: "… Not every criticism of an employer or the culture within a workplace, will obviously constitute a personal grievance".[3]

Additional matters raised in Mr Leota's submissions

[33] Mr Leota's statement of problem does not allege a personal grievance had already been raised. Rather, it is expressly stated to be an application for leave to bring a grievance out of time, under s 114(3) of the Act. From this, the Authority inferred that there was an acceptance that a grievance had not been raised within the statutory 90-day period.

[34] Notwithstanding, the written submissions lodged on behalf of Mr Leota appear to raise an entirely new claim. Mr Leota submits that he had raised a personal grievance within the statutory 90-day period and is therefore not out of time. Mr Leota did not seek leave of the Authority to expand upon or modify the issues for investigation and determination agreed at the September CMC.

[35] Although not expressly stated, Mr Leota is now seeking a finding that his grievance has been raised within the statutory 90-day period. The application for leave to bring his grievance out of time (as made in his statement of problem), effectively becomes a claim in the alternative.

[36] Fulton Hogan did not object to Mr Leota's change of approach. Instead, in its submissions, it responded to Mr Leota's new claim. From this the Authority infers that the parties are comfortable that the issues (albeit significantly revised) can still be determined on the papers and has proceeded with its investigation.

[37] Mr Leota now submits that he raised his personal grievance with Fulton Hogan within the statutory 90-day period in two discrete ways. In the alternative, he submits that if his grievance was raised out of time, Fulton Hogan consented to this. He further submits that should the Authority determine that his grievance was not raised within the statutory 90-day period, the delay was due to exceptional circumstances, and he should be granted leave to bring his grievance out of time. The Authority has considered all these submissions below.

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[3] *Shaw v Bay of Plenty District Health Board* [2022] NZCA 241 at [19].

Has Mr Leota raised his personal grievance within the statutory 90-day period?

(i) Mr Leota's response to Fulton Hogan's 18 August 2022 letter

[38] Fulton Hogan's letter of 18 August 2022 makes findings that Mr Leota had not taken reasonable steps to protect himself from electric shock. It is clear that Mr Leota was disappointed by these findings. His evidence is that he told Mr Burns that he:

> … totally disagreed to the final outcome. As what was not a finger-pointing exercise (as previously stated) has now become my fault.
>
> I was devastated and I did inform Patrick Burns that I did not agree with the result or contents of the letter.

[39] Mr Leota also says of Fulton Hogan's 18 August 2022 letter, "I raised this issue with Patrick Burns. I told him that I categorically did not agree with the 'findings' of the investigation".

[40] As set out above in *Zivaljevic*, the grievance process is designed to be informal and accessible, and that a personal grievance may be raised orally. However, the issue becomes whether the nature of Mr Leota's complaint was a personal grievance within the meaning of s 103 of the Act, and if so, whether Mr Leota's communications comply with s 114(2) of the Act by conveying the substance of the complaint to Fulton Hogan.

[41] Upon learning of Mr Leota's dissatisfaction at the 18 August 2022 letter, Fulton Hogan would not have known that Mr Leota was alleging a personal grievance which he required the company to address. Mr Leota was required to give Fulton Hogan sufficient information to respond to his grievance on its merits, with a view to resolving it.[4] There is no evidence that Mr Leota complied with this requirement.

[42] There was no disciplinary process underway, and nor was Mr Leota's employment in any way at risk. In such circumstances, simply informing Mr Burns that he did not agree with Fulton Hogan's outcome letter does not meet the requirements for raising a personal grievance under s 114(2). As in *Shaw* above, this is more akin to a mere 'criticism' and does not reach the standard required to raise a grievance.

[43] Mr Leota's expression of dissatisfaction does not comply with the provisions of s 114(2) of the Act. As such, Mr Leota's claim that his response to Fulton Hogan's 18 August 2022 letter constituted the raising of a personal grievance, does not succeed.

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[4] Above n 2, at [38].

(ii) The 1 December 2022 email from Mr Leota's counsel

[44] As set out above, on 1 December 2022 Mr Leota's counsel emailed Fulton Hogan advising that he had been instructed to pursue a claim in the District Court under the Health and Safety at Work Act 2015, and a further claim relating to a breach of Mr Leota's human rights, in the Human Rights Tribunal.

[45] Mr Leota submits that this constitutes the raising of a grievance, and that upon receipt of this email, Fulton Hogan "was under no illusion that Mr Leota was pursuing a grievance…". This submission does not succeed.

[46] Although there is no particular formula of words that must be used in the raising of a personal grievance,[5] it is surprising that Mr Leota's counsel chose not to expressly specify that a personal grievance was being raised (or even use the words 'personal grievance') in the email which he says raises a grievance. Instead, counsel sets out that he has instructions to seek remedies by way of processes commenced in the District Court and Human Rights Tribunal.

[47] Under s 161(1)(e) of the Act, the Authority has exclusive jurisdiction to make determinations about personal grievances. By specifying the District Court and/or Human Rights Tribunal as the fora for his claims, Mr Leota's counsel was by implication, ruling out a personal grievance, as there is no jurisdiction for a personal grievance to be pursued in either the District Court or Human Rights Tribunal.

[48] On receipt of the 1 December 2022 email from Mr Leota's counsel referring to the District Court and Human Rights Tribunal processes, Fulton Hogan would not have been aware that Mr Leota was alleging a personal grievance that he wanted it to address, as required under s 114(2) of the Act. This claim does not succeed.

(iii) Mr Leota's request for mediation

[49] Mr Leota submits that his employment agreement provides that a personal grievance may be raised by making a request for mediation assistance with the mediation service of the Ministry of Business, Innovation, and Employment (MBIE). He further submits that by inviting Fulton Hogan to attend mediation in the 1 December

[5] Above n 2, at [36].

2022 email from his counsel, he raised a personal grievance. He does not specify which statutory type of grievance he says was raised.

[50] Appendix D to the employment agreement provides:

> **Raising an employment relationship problem**.
>
> Where you consider you have an employment relationship problem, you should endeavour to resolve the matter by discussing it with the Employer at the earliest opportunity.
>
> If the matter is not resolved, you should make a written complaint to the Employer. The Employer too, will endeavour to resolve the matter.
>
> In the event the problem remains unresolved… you should contact the mediation service of the Ministry of Business, Innovation, and Employment… The Ministry of Business, Innovation, and Employment will provide a mediator to give you confidential advice and assistance.
>
> If you wish to raise a personal grievance, you must do so within 90 days of the date that the alleged grievance occurred or came to your attention, whichever is the later. The grievance is considered raised once you have informed the employer that you have a personal grievance you want addressed.

[51] Having carefully considered Appendix D to Mr Leota's employment agreement, the Authority finds that there is no contractual basis for Mr Leota's position that requesting mediation assistance constitutes the raising of a personal grievance.

[52] By way of an alternative argument, Mr Leota submits that if the Authority was to determine that he has not raised his grievance within the statutory 90-day period, then it should find that exceptional circumstances arise because Fulton Hogan agreed to attend mediation, and therefore consented to the personal grievance being raised out of time.

[53] Mediation is the primary problem-solving mechanism under the Act.[6] It is difficult to understand how attendance at mediation could possibly constitute an exceptional circumstance. Parties routinely attend mediation in relation to employment relationship problems other than personal grievances. Merely inviting Fulton Hogan to attend mediation does not comply with the requirements of s 114(2) of the Act, and does not in fact or at law, raise a personal grievance

[54] In any event, even if Mr Leota's invitation to attend mediation was sufficient to raise a personal grievance, Mr Leota would still be out of time to raise a grievance in relation to the electric shock incident and/or Fulton Hogan's investigation findings.

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[6] Employment Relations Act 2000 (the Act), s 3(a)(v).

[55] Section 114(1) of the Act provides that a personal grievance must be raised with the employer within the period of 90 days, beginning with the date on which the action alleged to amount to a personal grievance occurred.

[56] The electric shock incident occurred on 29 July 2022. To comply with the statutory 90-day time period, a personal grievance in relation to this event would need to have been raised by 27 October 2022.

[57] To comply with the 90-day statutory time period, a personal grievance in relation to the findings set out in Fulton Hogan's 18 August 2022 investigation outcome letter (which Mr Leota became aware of on 23 August 2022), would need to have been raised by 21 November 2022.

[58] By 1 December 2022, Mr Leota was out of time to raise a personal grievance in relation to the events of either 29 July 2022, or the events of 23 August 2022. Mr Leota's submission that his invitation to Fulton Hogan to attend mediation constitutes the raising of a personal grievance does not succeed.

(iv) Consent to a personal grievance being raised out of time

[59] Mr Leota submits that Fulton Hogan, in agreeing to attend mediation, consented to Mr Leota raising his grievance out of time.

[60] At the time of the mediation, Mr Leota was in an ongoing employment relationship with the Fulton Hogan. Because of this, Fulton Hogan owed obligations of good faith to Mr Leota. Attending mediation at Mr Leota's request was appropriate, and consistent with Fulton Hogan's obligations to be active and constructive in maintaining a productive employment relationship.[7]

[61] Engagement in the dispute resolution process does not signify consent to a personal grievance being pursued out of time.[8] Whether Fulton Hogan gave implied consent for Mr Leota to bring his grievance out of time is a matter of fact and degree.[9]

[62] The Court of Appeal in *Commissioner of Police v Hawkins* held that the issue is whether the employer "…so conducted himself that he can reasonably be taken to

[7] Section 4(1A)(b) of the Act.
[8] *Vulcan Steel v Wonnocott* [2013] NZEmpC 15 at [45].
[9] Above n 8, at [46].

have consented to an extension of time".[10] Mr Leota does not provide any evidence that Fulton Hogan conducted itself in such a way that it can be taken to have consented to an extension of time.

[63] The Authority finds that Fulton Hogan, in agreeing to attend mediation, did not consent to Mr Leota raising his personal grievance after the expiry of statutory 90-day time period under s 114(1) of the Act.

Are there exceptional circumstances?

[64] Section 115(a) of the Act provides that exceptional circumstances include circumstances in which the employee has been so affected or traumatised by the matter giving rise to the grievance, that they have been unable to properly consider raising their grievance.

[65] Despite Mr Leota's statement of problem specifically relying on the 'exceptional circumstances' provisions of s 115(a) of the Act, he does not identify any exceptional circumstance to account for the delay in raising his personal grievance.

[66] Mr Leota's affidavit is completely silent as to exceptional circumstances.

[67] In his submissions, Mr Leota poses the question "…were the circumstances exceptional?" However, rather addressing any exceptional circumstances, Mr Leota reiterates his previous position that Fulton Hogan's engagement in the dispute resolution process meant it had consented to the grievance being raised out of time.

[68] Mr Leota makes no reference to his being so affected or traumatised that he was unable to consider raising his grievance within the statutory 90-day timeframe. The closest Mr Leota comes to addressing the issue of exceptional circumstances is his submission that:

> The 'exceptional circumstances' is made out in that, while the time taken to reach the point of formally saying the words 'personal grievance' are unusual, but not a bar to bringing the grievance.

[69] Although this submission uses the words "exceptional circumstances," it does not address how Mr Leota was 'so affected or traumatised' that he was unable to properly consider raising his grievance within the statutory 90-day timeframe. In any

[10] *Commissioner of Police v Hawkins* [2009] NZCA 209 at [24].

event, Mr Leota's own delay in itself cannot amount to an exceptional circumstance, when it was not caused by an exceptional circumstance.

[70] In *Austin v Silver Fern Farms Limited*, the Employment Court held that the circumstances set out in s 115(a)–(d) "are only examples and not an exhaustive or closed list of "exceptional circumstances" that the Authority may consider …".[11] However, Mr Leota fails to identify any exceptional circumstance. The Authority is therefore unable to consider whether Mr Leota's delay in raising his personal grievance was occasioned by exceptional circumstances as required under s 114(4)(a) of the Act.

[71] In addition, Mr Leota's own evidence discloses that from at least 31 August 2022, he had instructed counsel to represent him in relation to the electric shock investigation. Inability to 'properly consider' raising a grievance means the employee must suffer the inability for the entire 90-day period. The fact that an employee is able to properly consider raising a grievance at some point during the 90-day period, means the test will not be satisfied.[12]

[72] Given Mr Leota's apparent eagerness to engage in the WorkSafe investigation process, and the fact that he had instructed a professional representative to act on his behalf (including to raise claims in other jurisdictions), it is more likely than not that Mr Leota had the capacity to properly consider raising a personal grievance within the statutory 90-day timeframe. The grounds under s 115(a) are not established.

[73] For completeness, there is no suggestion that Mr Leota made reasonable arrangements to have a grievance raised on his behalf, but his representative has failed to ensure that the grievance was raised within the statutory 90-day period.[13]

[74] Mr Leota has not established there are any exceptional circumstances sufficient to meet the statutory tests. As such, the Authority declines to exercise its discretion to grant Mr Leota leave to raise his personal grievance out of time.

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[11] *Austin v Silver Fern Farms Limited* [2014] NZEmpC 30 at [34].
[12] *Telecom NZ Limited v Morgan* [2004] 2 ERNZ 9 at [23]–[24].
[13] This is grounds for an exceptional circumstance under s 115(b) of the Act.

Conclusion

[75] Mr Leota did not raise a personal grievance under s 114(2) of the Act by expressing his dissatisfaction with Fulton Hogan's investigation report letter of 23 August 2022.

[76] In addition, a personal grievance was not raised on Mr Leota's behalf by the email to Fulton Hogan from his counsel on 1 December 2022.

[77] Fulton Hogan did not consent to a personal grievance being raised out of time by agreeing to attend mediation or engaging in the dispute resolution process.

[78] No exceptional circumstances are established, and therefore Mr Leota's application for leave to raise his personal grievance after the expiration of the statutory 90-day timeframe is declined.

Costs

[79] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[80] If this is not possible, Fulton Hogan is to lodge and serve a costs memorandum within 14 days of the date of this determination, and Mr Leota may lodge and serve any reply memorandum within a further 14 days. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[81] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily tariff unless particular circumstances or factors require an upward or downward adjustment of that tariff.[14]

Jeremy Lynch
Member of the Employment Relations Authority

[14] For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/.