

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 275  
3007191

BETWEEN                      VIANNEY TUALA TALIPOPE  
Applicant

AND                              TRUCK SYSTEMS LOGISTICS  
LIMITED  
Respondent

Member of Authority:              Jenni-Maree Trotman

Representatives:                      E Latimer-Bell, Counsel for Applicant  
E Kuo, Counsel for Respondent

Costs Submissions Received:      29 August 2017 from Applicant  
5 September 2017 filed from Respondent

Date of Determination:              12 September 2017

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**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS  
AUTHORITY**

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**A. The Respondent is ordered to pay to the Applicant a total of \$6,474.89  
made up of:**

- i) The sum of \$6,250.00 towards the Applicant's legal costs;**
- ii) The sum of \$153.33 for hearing fees; and**
- iii) The sum of \$71.56 for the filing fee the Applicant paid to lodge his  
Statement of Problem.**

**B. Payment of the sum of \$6,474.89 is to be paid within 14 days of the date of this determination.**

**Employment Relationship Problem**

[1] On 7 April 2017, I issued a determination in which I found the Applicant (Mr Tuala) had been unjustifiably dismissed by Truck Systems Logistics Limited (Truck Systems). Truck Systems was ordered to pay Mr Tuala various sums for lost wages, compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), wage arrears, holiday pay and unlawful deductions. Truck Systems was also ordered to pay a penalty.

[2] I reserved costs and set a timetable for submissions. The parties were encouraged to resolve costs by agreement. If that was not possible, then Mr Tuala had seven days to file a costs memorandum. Truck Systems then had a further seven days to file its costs memorandum.

[3] Mr Tuala filed cost submissions for on 29 August 2017. Truck Systems filed submissions on 5 September 2017.

**The Application for Costs**

[4] Mr Tuala claims \$10,000.00 as a contribution towards the costs he has had to pay to his Solicitors. He further claims the Authority's filing fee of \$71.56 and the hearing fee for the half day on 10 August 2017 of \$153.33.

**The Law**

[5] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act. This confers a wide discretion on the Authority to award costs on a principled basis.

[6] The principles to be applied by the Authority are well settled. They are outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.<sup>1</sup> These principles were affirmed by the Employment Court in *Fagotti v Acme & Co Limited*.<sup>2</sup>

[7] Costs principles include:

- a) A discretion on whether to award costs and if so what amount.
- b) The discretion must be exercised in accordance with principle and not arbitrarily.
- c) The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d) Equity and good conscience must be considered on a case-by-case basis.
- e) Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g) Without prejudice' offers can be taken into account.
- h) Awards of costs will be modest, and must be reasonable.
- i) Frequently costs are judged against a notional daily rate.
- j) Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- k) The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

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<sup>1</sup> [2005] ERNZ 808 at page 819

<sup>2</sup> [2015] NZEmpC 135

[8] Recently in *Booth v Big Kahuna Holdings Limited*<sup>3</sup> Judge Inglis wrote:

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particularly apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...

[9] For matters filed in the Authority from 1 August 2016, the Authority's normal daily tariff increased from \$3,500.00 to \$4,500.00 for the first day of an investigation meeting. For each subsequent day of an investigation meeting the Authority's normal daily tariff remains at \$3,500.00<sup>4</sup>.

[10] Mr Tuala lodged a Statement of Problem with the Authority on 7 April 2017. The new costs regime therefore applies.

### **Applicant's Submissions**

[11] Mr Tuala seeks an uplift to the daily tariff from \$4,500.00 for the first day to \$7,000.00. For the second day of the investigation meeting he seeks an uplift for the half day from \$1,750.00 to \$3,000.00. In total \$10,000.00.

[12] There are three grounds advanced by Mr Tuala in support of his application for increased costs. Firstly, Mr Tuala points to a Calderbank letter which he sent to Truck Systems on 26 June 2017. The letter was open for acceptance until 3 July 2017 but received no response. The offer was for Truck Systems to pay to Mr Tuala \$9,000.00 compensation under s 123(1)(c)(i) of the Act and \$4,500.00 plus GST legal costs.

[13] Mr Tuala submits the amount the Authority subsequently awarded exceeded the amount that he was prepared to settle for in the Calderbank letter. He submits that since the Calderbank letter was sent, his solicitors recorded \$10,722.50 of additional time on his file. A detailed summary of his solicitors' time was produced and

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<sup>3</sup> [2015] NZEmpC

<sup>4</sup> Practice Note 2, Costs in the Employment Relations Authority

considered. This record showed in total \$21,551.50 plus GST of time was recorded by his solicitors against Mr Tuala's file.

[14] Secondly, Mr Tuala submits that Truck Systems was unsuccessful in its counterclaim. He submits Truck Systems counterclaim resulted in additional costs being incurred.

[15] Thirdly, Mr Tuala submits an increase is warranted because his solicitors had to file written submissions to the Authority. He submits these may not have been necessary if Truck Systems had engaged in dialogue as to costs. He seeks a sum of \$750.00 plus GST towards these costs.

[16] Truck Systems filed a brief memorandum. It accepts legal costs are payable as per the daily tariff in the sum of \$6,250.00, representing 1.5 hearing days, plus disbursements of \$224.89. It denies there should be any uplift in these costs. It submits the amount awarded by the Authority for compensation under s123(1)(c)(i) of the Act (\$8,400.00) is less than the amount offered.

### **Findings on costs**

[17] I have taken into account the applicable law as well as the submissions filed by the parties and the Calderbank offer.

[18] I am satisfied the Calderbank offer was a reasonable and valid offer. The amount offered was close to the amount awarded to Mr Tuala. However, in failing to accept this offer Mr Tuala has not incurred additional legal fees. An uplift in costs is not warranted.

[19] Mr Tuala entered into a fixed fee arrangement with his solicitors. The arrangement was that his solicitors would issue invoices leading up to the Investigation Meeting at a nominal amount. The final fee would then be determined based on the level of Mr Tuala's recovery. For an outcome of over \$16,000.00, including any costs award in Mr Tuala's favour, the legal fee was set at \$10,000.00 plus GST and disbursements.

[20] I am not satisfied that an uplift in the daily tariff is reasonable for attendances in relation to Truck Systems counterclaim, or for the preparation of Mr Tuala's costs submissions. The costs in defending Truck Systems counterclaim, and the preparation of the costs memorandum, appear to be covered by the fixed fee arrangement Mr Tuala had with his solicitors. The record of time provided shows the total time recorded by Mr Tuala's solicitors was \$21,551.50 plus GST. This time includes attendances in relation to the counterclaim and Mr Tuala's costs application.

[21] Applying the daily tariff over a 1.5 day hearing I find a sum of \$6,250.00 is payable by Truck Systems to Mr Tuala. This is a reasonable contribution towards Mr Tuala's costs.

[22] The Authority has also charged Mr Tuala \$153.33 in hearing fees for the half day of hearing on 10 August 2017. That is also a cost that Truck Systems must pay to Mr Tuala together with the filing fee paid of \$71.56.

### **Determination**

[23] Truck Systems is ordered to pay to Mr Tuala a total of \$6,250.00 towards Mr Tuala's legal costs. In addition, it is ordered to pay Mr Tuala a sum of \$153.33 for hearing fees and the sum of \$71.56 being the Authority's filing fee. These sums must be paid within 14 days of the date of this determination.

Jenni-Maree Trotman  
Member of the Employment Relations Authority