

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 392
3168021

BETWEEN

MICHAEL TANE
Applicant

AND

FARRAND ORCHARDS
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Michelle Pollak, representative for the Applicant
Martin Nicholls, counsel for the Respondent

Investigation Meeting: On the papers

Submissions or
information received: 25 July 2022, from the Applicant

No submissions or information filed from the
Respondent

Determination: 16 August 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 11 July 2022 ordering Farrand Orchards Limited comply with earlier determinations made in Mr Tane's favour.¹

[2] The issue of costs was reserved and a timetable set for filing memoranda if the parties were unable to resolve costs themselves.² Mr Tane now applies for a costs award in his favour.

¹ *Michael Tane v Farrand Orchards Limited* [2022] NZERA 309.

² Above [17].

The parties' positions

[3] Information filed by Mr Tane show he has incurred total costs in relation to the compliance application of \$5,074.06 - \$4,300 in legal fees, disbursements of \$50, GST of \$652.50 and filing fee of \$71.56.

[4] Mr Tane seeks a costs award in his favour of the total amount of \$5,074.06. He submits because the compliance application was determined on the papers the starting point for a costs consideration is half the notional daily tariff being \$2,250 and an uplift to 100% of actual costs incurred is warranted because the costs were unnecessarily incurred.

[5] FOL did not file a costs memorandum within the timetable set or seek to vary the timetable or otherwise engage with the Authority on the matter of costs as they relate to the compliance application.³ The email exchange attached to Mr Tane's submissions show the parties' discussed resolution of costs themselves and indicate FOL's position, at least then, was a quarter of the notional daily tariff or no more than half a day of that tariff may be an appropriate costs award.

Costs principles

[6] 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.

³ For completeness the Authority emailed the respondent on 29 July 2022 and 9 August 2022 regarding filing of information relevant to the determination of costs.

- Frequently costs are judged against a notional daily tariff.⁴

Costs analysis

[7] 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 cost award the notional daily tariff is a starting point. As this matter was determined on the papers, I accept the starting point should be half the applicable first day notional tariff of \$4,500 being \$2,250.

[8] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the starting point. There are no matters which warrant a decrease in the starting point.

[9] There are though factors which indicate an increase in the starting point is warranted the most significant of which is Mr Tane has incurred costs in seeking to enforce orders made in his favour. The costs were incurred because of the effect of FOL's actions in not taking steps reasonably and lawfully open to it to delay the effect of the determination in the face of the challenge. The effect of this is to have shifted the burden of compliance onto Mr Tane who has incurred costs unnecessarily.

[10] Weighing all the relevant factors a reasonable contribution to Mr Tane's costs is a total of \$3,500.00 plus disbursements of \$50. The filing fee of \$71.56 is also reasonably recoverable.

Outcome

[11] Farrand Orchards Limited is ordered to pay Michael Tane a contribution to costs of \$3,621.56 within 21 days of the date of this determination.

Marija Urlich
Member of the Employment Relations Authority

⁴ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.