

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 684
3240159

BETWEEN OFA TONGA
Applicant
AND AWARD LIVING LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Simon Greening, counsel for the applicant
No appearance for the respondent
Submissions Received: 15 October 2024 from the applicant
Nothing received from the respondent
Determination: 20 November 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority issued a 4 October 2024 determination in this matter.¹

[2] Award Living Limited (Award Living or the company) was found to be Ofa Tonga's employer when he undertook work on a hospital project. I was not in a position to safely conclude Mr Tonga's disadvantage grievance could be pursued, as Mr Tonga had reached an agreement with another company who was also involved in this situation. Award Living was found to owe Mr Tonga \$8,134.25 gross wages, \$871.54 gross for holiday pay and interest on those sums.

¹ *Ofa Tonga v Award Living Limited* [2024] NZERA 591.

[3] Costs were reserved with the parties encouraged to resolve any issue of costs between themselves. They have not done so and Mr Tonga applies for costs. Nothing was received from Award Living on the costs question.

Submissions for Mr Tonga

[4] Mr Tonga has been legally aided for most of this proceeding. He seeks costs as a legal aid recipient, relying on the Court of Appeal's decision in *Curtis v Commonwealth of Australia*.²

[5] Mr Tonga has incurred legal aid costs of \$2,255.15.

Costs discussion

[6] The Authority has the power to award costs.³ This power is discretionary and is to be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the principles guiding the Authority's approach 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 based on a notional daily tariff.⁴

[7] Being in receipt of legal aid for his representation does not rule out Mr Tonga's costs claim. The Legal Services Act 2011 does not prevent a legal aid recipient from seeking costs.⁵ Recipients are required pay the Legal Services Commissioner a specified amount which may

² *Curtis v Commonwealth of Australia* [2019] NZCA 126.

³ Employment Relations Act 2000, Schedule 2, cl 15.

⁴ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

⁵ *Curtis*, above at n 2 at [15].

be recovered as a debt due.⁶ Recipients thus have incurred a liability for costs. As stated in Curtis:

“...the expenditure incurred by the taxpayer in legal aid should be recovered whenever it is lawful and practical to do so”.⁷

[8] Here Mr Tonga was successful in achieving an order requiring payment for a not insubstantial amount of wages. He has incurred costs in doing so and is entitled to a costs award.

[9] In deciding the appropriate award, the applicable daily tariff rate for this matter is firstly established. For assessment of costs purposes, the time taken here is rounded up to a half day investigation meeting. The tariff rate for the first day of an investigation meeting is \$4,500.00. A half day is thus \$2,250.00

[10] No grounds to increase the tariff rate were raised on Mr Tonga’s behalf.

[11] The amount of costs incurred is very slightly above the tariff rate. Mr Tonga is entitled to an award at the tariff rate.

[12] Mr Tonga is also entitled to be reimbursed for the Authority’s filing fee.

Orders

[13] In conclusion Award Living Limited is to pay Ofa Tonga the following amounts within 28 days of the date of this determination:

- \$2,250.00 as a contribution to his costs; and
- \$71.56 for the Authority’s filing fee.

Nicola Craig
Member of the Employment Relations Authority

⁶ Legal Services Act 2011, ss 18(2), 34(1), 36(1) and 41.

⁷ *Curtis*, above at n 2 at [19] referring to *P v Minister of Immigration* {1999} 13 PRNZ 370 at 371.