



### *Submissions of the Respondent*

[5] Ms Hodgson submits on behalf of Linfox that it is entitled to a costs award above the notional daily tariff rate in the Authority on the basis that a number of matters which were outside of its control caused the Authority investigation to be more costly for Linfox. Specifically:

- Mr Tuala first filed a statement of problem in the Authority in 2010 (approximately 12 months following his dismissal). The matter did not proceed to an Authority hearing and was not actively pursued by Mr Tuala.
- In late 2013, Mr Tuala filed new information in the Authority, and the parties attended a mediation which did not resolve the matter. However Mr Tuala did not actively pursue a claim in the Authority thereafter until mid-2014 when a telephone conference was held and new pleadings were filed.
- Throughout this series of events, Linfox responded to Mr Tuala and the Authority in a timely manner.
- The delays in the process attributed to the Applicant caused additional costs to Linfox because:
  - i. It was required to review and prepare new pleadings in 2014 despite a statement in reply already being prepared and filed in response to the claim filed in 2010;
  - ii. It was required to liaise with three witnesses who were no longer employed by Linfox and two of whom no longer live in Auckland;
  - iii. It was required to source documents from external storage (and the Land Transport Authority's archives) which were obsolete and had not been in circulation for several years (during which time Linfox had undertaken a full IT system upgrade);
  - iv. Additional witnesses were required to be called to ensure that events, and policies in place at the time Mr Tuala was employed could be properly recollected; and
  - v. It had to cover the costs of travel and accommodation of one of the witnesses who was based in Christchurch.

- Linfox submits that had Mr Tuala pursued his personal grievance shortly after his dismissal, the Authority's investigation would have progressed in a more efficient manner for both parties thereby ensuring that costs were minimised.
- In relation to the disadvantage grievance, Mr Tuala did not raise this in the original statement of problem filed in 2010; it was only raised in amended pleadings in 2014. Although Linfox immediately disputed that this had been raised within the statutory time limit, it was nonetheless required to include evidence of the alleged grievance in its witness statements and brief an otherwise unnecessary witness, Mr Stephen Wood, and to file written submissions prior to the substantive hearing.

[6] Ms Hodgson further claims that there were a number of delays caused by the Applicant during the Investigation Meeting which required the parties to appear for longer than necessary, namely:

- The morning of 3 December 2014 was primarily spent determining the witness order and the fact that the Applicant's witnesses were not available to attend that day. On the basis that Linfox had instigated emails on the subject; this matter could have been determined prior to the meeting and should not have required intervention from the Authority on the first day of the hearing.
- The Applicant's witnesses were not available to be heard immediately following Mr Tuala's evidence which caused delays; and
- There were a number of other disruptions during the meeting which were outside of Linfox's control.

[7] In light of the actual costs incurred by Linfox in defending the claims by Mr Tuala, and the additional costs incurred as a result of the Applicant's actions, Ms Hodgson submits that uplift in the notional daily tariff is justified.

*Submissions of the Applicant*

[8] Mr Fonua submits that to award costs at the level claimed by the Respondent would have the effect of penalising Mr Tuala who is entitled to bring his claim to the Authority.

[9] Mr Fonua also refers to the fact that Mr Tuala has appealed my determination on the substantive matter, although he has not made an application that the costs determination be stayed pending the appeal process.

[10] Mr Fonua submits that the delay on the first day of the Investigation Meeting could have been avoided by the Respondent having its witnesses available to proceed on the second day of the Investigation Meeting instead of the afternoon of the first day.

[11] In relation to the issue of delay during the investigation meeting, Mr Fonua submits that this was caused by my repeatedly asking the same questions to the Applicant's witness.

[12] Ms Fonua therefore submits that costs should be determined as \$1,000.00.

### *Principles*

[13] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

#### ***s. 15 Power to award costs***

*(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

*(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[14] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*<sup>1</sup>.

[15] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup>.

[16] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup> that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria*

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<sup>1</sup> [1996] 2 ERNZ 622

<sup>2</sup> [2005] 1 ERNZ 808

<sup>3</sup> [2005] 1 ERNZ 808

*University of Wellington v Alton-Lee*<sup>4</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[17] It is also a principle that: “Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful parties conduct, although conduct which has increased costs unnecessarily” can be taken into consideration and thereby increase the notional daily tariff.

### **Determination**

[18] The normal rule is that costs follow the event and Linfox is entitled to a contribution to its costs in respect of both the preliminary and the substantive matters.

[19] Having had regard to the principles set out in *Da Cruz*, the time taken for the Investigation Meeting, and the conduct of the parties, I consider that a contributory award towards Linfox’s actual costs is reasonable.

[20] There was considerable delay in Mr Tuala pursuing this matter in the Authority. Whilst within the statutory time limits, the effect of such delay is to make it much more difficult for the Respondent to defend the claims made against it: memories fade, relevant documents may be difficult to access after such a time delay, and relevant witnesses may no longer be with the company.

[21] I accept that such delay in an applicant proceeding with a personal grievance claim may result in costs in excess of what might have been incurred had the applicant proceeded in a timely manner. However the legislation permits such delay. I observe in this context however that the delay may in some cases affect an applicant achieving a favourable outcome and/or remedies if successful.

[22] Of more persuasion in this case is the delay occasioned during the Investigation Meeting by the Applicant not having its witnesses available for examination in a timely manner. It is the Applicant who brings the claim and the Respondent who has to defend the claims. Mr Tuala was represented by experienced counsel who would have been well acquainted with this mode of proceeding, and whilst a request to alter the established mode of proceeding may be considered by the Authority and other party if made in advance of the investigation meeting, no such request was made in this case.

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<sup>4</sup> [2001] ERNZ 305

[23] In respect of the criticism levelled against me by the Applicant in submissions, I note only that it is incumbent upon me that I understand fully the claims and the premises on which it is based in order to determine the matter.

[24] There has been no application for a stay on a costs determination made in this matter and an election to have a challenge heard by the Employment Court does not operate as a stay pursuant to s.180 of the Act.

[25] I find that there was significant delay in the proceedings at the commencement of the Investigation Meeting which was occasioned by the Applicant, and which had the effect of extending proceedings, which included some time being devoted to the unsuccessful unjustifiable disadvantage claim.

[26] I determine that an uplift in the notional daily tariff in respect of the delays caused by the Applicant on the first day is merited. Taking the notional daily rate of \$3,500.00 as a starting point for costs, I order that Mr Tuala contributes \$11,250.00 towards Linfox's actual costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**