

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 296  
5382324

BETWEEN

KOLINIASI TUPOU  
Applicant

A N D

WAIKATO MILKING  
SYSTEMS NZ LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Paula O'Sullivan, Counsel for Applicant  
Rob Towner and Suzanna Maxfield, Counsel for  
Respondent

Submissions: 19 December 2012 from Respondent  
None from Applicant

Date of Determination: 10 July 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. Mr Tupou is ordered to pay Waikato Milking Systems NZ Limited (Waikato Milking) \$7,000 towards its legal costs.**

**Employment relationship problem**

[1] In a substantive determination dated 13 December 2012<sup>1</sup> the Authority dismissed Mr Tupou's unjustified dismissal claim because it concluded he had freely and voluntarily resigned.

[2] Waikato Milking applied for costs on 19 December 2012. Its costs application was served on Mr Tupou who has not responded. The delay in determining costs is due to an administrative oversight which meant Waikato Milking's costs application was not brought to my attention until today.

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<sup>1</sup> [2012] NZERA Auckland 455.

[3] Waikato Milking incurred legal costs of \$58,000. It seeks a costs award of \$20,000 which it says amount to approximately one third of its actual costs. It submits the Authority's current notional daily tariff of \$3,500 should be increased because:

- a. It does not adequately compensate Waikato Milking for the costs it was required to expend defending Mr Tupou's claims;
- b. Mr Tupou unreasonably refused to engage in settlement negotiations;
- c. Mr Tupou unreasonably opposed Waikato Milking's successful application for a non-publication order relating to Witness A;
- d. Mr Tupou caused Waikato Milking to incur unnecessary costs because he failed to comply with Authority directions and unreasonably pursued issues which had no prospect of success and on which he ultimately failed;
- e. Mr Tupou's claim was misconceived because the evidence he filed was insufficient to enable it to succeed. Waikato Milking says it pointed the deficiencies in his claim and evidence out to him prior to the Authority's investigation meeting;
- f. The basis of Mr Tupou's claim was not articulated until his closing submissions at which point it became clear his claim never had any prospect of success.

[4] Mr Tupou was legally aided. Costs may be awarded against a legally aided person where there are "*exceptional circumstances*."<sup>2</sup> I am satisfied exceptional circumstances exist in accordance with s.45(2) of the Legal Services Act 2011 (LSA).

[5] I find the following matters identified in s.45(3) LSA occurred in respect of this case:

- a. Mr Tupou's conduct caused Waikato Milking unnecessary cost;

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<sup>2</sup> Sections 45(2), 45(3) Legal Services Act 2011.

- b. Mr Tupou failed to comply with the Authority's directions (which I consider in the nature of procedural rules and orders as per s.45(3)(b) LSA);
- c. Mr Tupou engaged in misleading conduct when presenting his case to the Authority because he misrepresented his position; he failed to disclose he had been caught twice accessing pornography on the work computer and had been spoken to and reprimanded about his actions; Mr Tupou accused another employee of accessing the pornography in circumstances where he must have known such claims were untrue because the named employee was obviously not at work when the pornography was accessed whilst Mr Tupou was obviously the only person at work at the relevant times; he misrepresented what had occurred at his meeting with Mr Jong on 20 February 2012; he omitted to mention lengthy meetings with Mr Bell and Mr Anderson on 21 and 22 February 2012 during which they both attempted to dissuade him from resigning;
- d. Mr Tupou unreasonably pursued claims in circumstances where it should have been obvious they had no prospect of success;
- e. Mr Tupou unreasonably failed to participate in settlement negotiations. He failed to respond to Waikato Milking's settlement offer of 16 August 2012 which put him on notice it would be seeking indemnity costs against him; he rejected a second settlement offer which put him on notice Waikato Milking would be claiming exceptional circumstances when applying for costs without proposing a counter offer.

[6] I am satisfied each of the matters Waikato Milking identifies in its submissions warrant increasing the notional daily tariff. I also find that five of the six factors identified in the LSA as giving rise to exceptional circumstances exist in respect of this case.

[7] This was a one day investigation meeting so the starting point for assessing costs is the Authority's current notional daily tariff of \$3,500. I consider it appropriate to double the notional daily tariff in this case.

[8] I question how Mr Tupou was granted legal aid for an obviously weak case particularly where the deficiencies in his claim and evidence had been pointed out to him at an early stage.

[9] I also find it was inappropriate for Mr Tupou to have opposed Waikato Milking's application for name suppression of Witness A when it must have been clear that person could not have accessed the pornography in issue because it was clearly established that individual was not at work at the relevant time.

[10] Mr Tupou is ordered to pay Waikato Milking \$7,000 towards its actual costs.

**Rachel Larmer**  
**Member of the Employment Relations Authority**