

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2025] NZERA 174  
3232819

BETWEEN	TONY AUSTWICK Applicant
AND	TAURANGA VETINARY SERVICES LIMITED First Respondent

Member of Authority:	Claire English
Representatives:	Mark Beech, counsel for the Applicant Jeremy Sparrow, counsel for the Respondent
Submissions received:	17 January and 8 February 2025 from Applicant 31 January 2025 from Respondent
Determination:	25 March 2025

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] On 6 November 2024, the Authority issued a determination in this matter in favour of the applicant, awarding him \$8,238.47 gross in lost remuneration, \$27,000 in compensation, and costs.

[2] In that determination, the parties were encouraged to resolve any issue of costs between them, and the Authority made reference to its usual practice of applying the daily tariff to determine costs. As the parties have been unable to reach agreement, the applicant has applied for an award of costs.

[3] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days<sup>1</sup>.

[4] The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it.

[5] The investigation meeting in this matter was held over three days, in person and by AVL. Both parties attended, with counsel and witnesses. Submissions were provided by both counsel following the investigation meeting.

[6] The applicant now seeks an award of costs, in the total sum of either indemnity costs or \$35,000, being an uplift from what is submitted to be tariff costs of \$12,375.00. It is submitted on the applicant's behalf that an uplift from the Authority's usual tariff is warranted, primarily on the grounds that the respondent declined two Calderbank offers, acceptance of which would have placed it in a better position than the awards made by the Authority in favour of the applicant.

[7] The respondent says in its view, tariff costs amount to \$9,750.00. The respondent rejects the submission that indemnity costs are appropriate. It further says that should the Authority grant any uplift from the tariff costs, this should be a modest uplift only.

## **Principles**

[8] The power of the Authority to award costs is contained in s 15 of schedule 2 of the Employment Relations Act 2000 (the Act). Costs are discretionary.

[9] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*<sup>2</sup> as confirmed in *Fagotti v Acme and Co Limited*<sup>3</sup>. The principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to

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<sup>1</sup> For further information about the factors considered in assessing costs, see: <https://www.era.govt.nz/determinations/awarding-costs-remedies/>

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

<sup>3</sup> [2015] NZEmpC 135 at 114.

be used as a punishment or expression of disapproval of the unsuccessful parties conduct.

*The applicant was the successful party*

[10] The starting point is that costs follow the event. The applicant was successful in his claims, and orders were made in his favour amounting to a total of \$35,238.47, plus costs in a sum to be determined.

[11] I accept the information provided to me that the applicant has incurred legal costs greater than the tariff sum. The applicant has been successful, and is entitled to a contribution to his costs, at the rate of the daily tariff.

*What is the appropriate daily tariff?*

[12] In the substantive determination, I indicated that my initial view was that costs should be calculated on the basis of a three-day investigation meeting. Applying the tariff, this amounts to \$11,500.

[13] However, there remains a dispute between the parties as to the calculation of the daily tariff. The applicant calculates it as \$12,375, which amounts to the tariff for a three-day hearing, plus an allowance of a further quarter of a day for the preparation of written legal submissions filed after the investigation meeting.

[14] The respondent calculates tariff as being \$9,750 on the basis of 2-and-a-half day of hearing, with no other allowances. I understand this is on the basis that the final day of hearing did not occupy a full day.

[15] The investigation was scheduled for three days, and my notes show it occupied more than two-and-a-half days. In “rounding up” to three days, this recognises the call on both counsels’ time and effectively provides an allowance for the preparation of subsequent written submissions, which were provided. Taking all this into account, I confirm my initial view that three days is the appropriate starting point, eg the sum of \$11,500.

*Indemnity costs*

[16] It is submitted that an uplift is warranted, either to provide the applicant with indemnity costs, or costs in the sum of \$35,000. This is said to be on the basis of the respondent’s rejection of two Calderbank offers, its calling of expert clinical evidence which was not relevant to the Authority’s determination but which the applicant had to

respond to and which increased hearing time, and the respondent's failure to follow fair process and act in good faith.

[17] I will first deal with the request for indemnity costs. Mr Austwick is entitled not to the reimbursement of his legal costs, but to a contribution to those costs. This is not a case where indemnity costs would be appropriate. The question was in essence one of unjustified dismissal, and although the respondent robustly defended its position, it was entitled to do so. The application for indemnity costs is declined.

*Uplifts for other reasons*

[18] The applicant advances two other reasons for an uplift in costs, to a total award of \$35,000. The first is the respondent's rejection of Calderbank offers. While it is relatively common for the refusal of a Calderbank offer to result in an uplift to a costs award, such uplifts are invariably modest. Here the applicant has sought a significant uplift, which if awarded would amount to same as the tariff for a further 9 days of hearing time. I am not persuaded this is proportionate in the circumstances, especially where the respondents are already facing costs for a relatively lengthy three-day hearing, and there could be the risk of double counting.

[19] Instead an uplift equivalent to half of a further day at the rate of the second day's tariff of \$3,500 (being \$1,750) is sufficient to recognise the rejection of the Calderbank offers.

[20] I have also considered the submission that the hearing was prolonged by the respondent's calling of expert evidence which was of limited assistance, and to which the applicant needed to respond. I consider that given the amount and detail of this evidence, some additional time would have been needed to respond. A further allowance of half a day at the rate of the second day's tariff of \$3,500 (being \$1,750) is sufficient to recognise this.

[21] In light of the various other issues canvassed by both parties on an interlocutory basis, I make no further allowances. I also note that no costs allowance is made in respect of what is submitted to be the respondent's failures to follow fair process and/or breaches of good faith, such as they may be, as this tends to go towards "punishment" of the unsuccessful party, which would be inappropriate.

[22] The starting point is an award of costs in favour of the applicant of \$11,500.00. A further allowance equivalent to a total of one day is made, being a further sum of \$3,500.00.

[23] Orders for the payment of costs to the applicant in the total sum of \$15,000.00 are made.

### **Orders**

[24] Tauranga Veterinary Services Limited is ordered to pay to Mr Tony Austwick within 28 days of the date of this determination the sum of \$15,000.00 (inclusive) as a contribution to costs.

Claire English  
Member of the Employment Relations Authority