

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 233
3171302

BETWEEN CARL BERRYMAN
 Applicant

AND FONTERRA CO-
 OPERATIVE GROUP
 LIMITED
 Respondent

Member of Authority: Rowan Anderson

Representatives: Liz Lambert, advocate for the Applicant
 Rebecca Rendle and Matthew Austin, counsel for the
 Respondent

Investigation Meeting: On the papers

Submissions received: 11 March and 4 April 2024 from Applicant
 26 February and 17 April 2024 from Respondent

Determination: 22 April 2024

COSTS DETERMINATION OF THE AUTHORITY

Background and submissions

[1] On 29 January 2024 the Authority issued a determination¹ in which I found that Carl Berryman’s claims of unjustified dismissal, unjustified disadvantage, discrimination, and breach of good faith were not made out.

[2] Costs were reserved. The parties have not been able to agree on costs, and Fonterra Co-operative Group Limited (Fonterra) now asks the Authority for orders as to the costs it incurred in defending the claims made by Mr Berryman.

¹ *Berryman v Fonterra Co-operative Group Limited* [2024] NZERA 44.

[3] Fonterra seeks a total contribution towards their costs of “at least \$15,000” based on the daily tariff approach adopted by the Authority for a two and one-half day investigation meeting, with an uplift of 50 percent on the basis that Mr Berryman’s discrimination claim was meritless and lacked evidential foundation and resulted in unnecessary costs.

[4] Mr Berryman submitted that costs should lie where they fall, that the parties incurred similar expenses in having experts attend the investigation meeting and that Mr Berryman was unable to have his previous representatives make costs submissions on account of impecuniosity. Reference was also made to Mr Berryman’s rights under the New Zealand Bill of Rights Act 1990 being infringed and there being a public interest in the case.

[5] In terms of public interest, Mr Berryman asserted that costs should lie where they fall as the “substantive effect of the COVID-19 Vaccinations Order” had not yet been heard in the Employment Court and referred to the approach to costs in *GF v OO* [2022] NZEmpC 1 EMPC 292/2021. Mr Berryman also submitted that costs in his favour should be factored in having regard to a successful preliminary determination in which I found that he had raised a personal grievance within the relevant statutory timeframes.²

[6] Mr Berryman raised impecuniosity, or an inability to pay, in submissions. Given that, I made timetable directions to ensure the parties were afforded to address that issue fully.

[7] Mr Berryman has, in the alternative, submitted that the issue of costs should be set aside pending a challenge to the substantive determination in the Employment Court.

Costs principles

[8] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.³

² *Berryman v Fonterra Co-operative Limited* [2023] NZERA 138.

³ *Employment Relations Act 2000*, Schedule 2, clause 15.

[9] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that Calderbank offers may be taken into account, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.⁴

[10] The daily tariff is usually taken as a starting point,⁵ although not used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.

Consideration

[11] Fonterra was successful in defending the claims and it is appropriate that costs follow the event.

[12] The investigation meeting comprised of a two-day investigation meeting on 11 and 12 October 2023 with an additional one and a half hours used for oral submissions on 26 October 2023. I consider the appropriate starting point for daily tariff approach would see a contribution of \$4,500 for the first, \$3,500 for the second day, and \$1,750 for a further half day including submissions.

[13] The appropriate starting point is \$9,750.

[14] Mr Berryman was entitled to pursue his claims. I do not consider an uplift to the daily tariff is warranted having regard to all of the circumstances. I am also not satisfied that Mr Berryman's claims, and in particular the discrimination claim, can properly be characterised as a test case that was in the public interest.

[15] Mr Berryman ultimately provided some limited unsworn evidence as to an inability to pay. No documentary evidence was provided as to, for example, the assertions made in that statement or otherwise as to an inability to pay. While the evidence was largely unsatisfactory, I consider it clear there is at least some significant difficulty faced by Mr Berryman that the Authority should take into account. A modest reduction is appropriate in the circumstances of \$1,000.

[16] Costs as to the preliminary matter were reserved. Mr Berryman was successful in the preliminary matter, and I consider it appropriate to take that into account in the

⁴ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

⁵ Employment Relations Authority Practice Direction, August 2023, <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>

overall assessment of costs. As the matter was determined on the papers, I allow a half day, \$2,250, in Mr Berryman's favour.

[17] Mr Berryman's challenge to the Employment Court is yet to be resolved. While that is the case, Mr Berryman's election challenge does not operate as a stay and it is appropriate that I deal with the issue of costs now.

Orders

[18] I order Carl Berryman to pay Fonterra, within 28 days, the sum of \$6,500.00 as a contribution towards the costs Fonterra incurred in defending the claims.

Rowan Anderson
Member of the Employment Relations Authority