

**NOTE: This determination contains an order prohibiting publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 425  
3229679

BETWEEN	MURRAY ALEXANDER BOYD Applicant
AND	OJI Respondent

Member of Authority:	Helen Doyle
Representatives:	Murray Boyd self-represented Ashleigh Fechny, advocate for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	No submissions from the Applicant 30 June 2023 from the Respondent
Date of Determination:	8 August 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1] A non-publication order was made in the substantive determination of the Authority dated 22 March 2023 and confirmed in the reopening determination dated 23 June 2023.<sup>1</sup>

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<sup>1</sup> *OJI v Murray Boyd* [2023] NZERA 144 and *Murray Alexander Boyd v OJI* [2023] NZERA 332.

[2] The non publication order continues for the purposes of this determination. The name, medical information and identifying details of OJI are subject to a permanent non-publication order.

### **Reopening determination**

[3] In a determination dated 22 March 2023 the Authority did not grant a reopening application lodged by Murray Boyd.<sup>2</sup>

[4] The issue of costs was reserved. A timetable was set for lodging and serving of cost submissions.

[5] The Authority has received cost submissions from OJI, but there has been no cost submissions received from Mr Boyd within the timeframe set out in the Authority determination.

### **OJI's submission**

[6] OJI is legally aided and seeks full recovery of her legal aid approved costs. That is the sum of \$1,613.45 which includes GST. Ms Fechny submits that these costs are less than what would have been ordered under the daily tariff of between \$2000 - \$2,750.

[7] Ms Fechny refers the Authority to cases in the Employment Court where there has been consideration of costs where a party is legally aided.<sup>3</sup> The Employment Court has relied on a statement by the Court of Appeal in considering whether a successful party funded by legal aid could recover scale costs or some lesser amount.<sup>4</sup> The Court of Appeal stated at [22]:

The quantum of costs should be according to the Court of Appeal scale. Costs should be scale costs or the amount paid by the [Legal Services] Commissioner for the appeal, whichever is the lesser figure. Thus costs should not exceed scale, or (if they are less), the amount paid for legal services.

[8] Ms Fechny recognises that the approach to costs in the Authority differs from the Employment Court approach, although submits that the same principles are transferable.

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<sup>2</sup> Above n 1 - [2023] NZERA 332.

<sup>3</sup> *McKinlay v Wellington Cosmetic Clinic Limited* [2021] NZEmpC 211 and *UXK v Talent Propeller Limited* [2021] NZEmpC 223 and *UXK v Talent Propeller Limited* [2022] NZEmpC 178.

<sup>4</sup> *Curtis v Commonwealth of Australia* [2019] NZCA 126.

[9] She submits that Authority cases show the starting point for a matter determined on the papers is between one third and one half of a day. Based on the daily tariff that is between \$1,500 and \$2,250.<sup>5</sup>

[10] Ms Fechney submits that there should be an uplift because the frivolous and vexatious nature of the application of at least \$500.

### **Analysis and discussion**

[11] The Authority has its own costs regime. Clause 15(1) of the second schedule to the Employment Relations Act 2000 (the Act) provides that the Authority may order any party to a matter to pay to the other party such costs and expenses as the Authority thinks reasonable.

[12] Legal principles appropriate for costs in the Authority and consistent with its functions and power are those set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.<sup>6</sup>

[13] These include that there is a discretion as to whether costs will be awarded and in what amount. The discretion should be exercised in accordance with principle and not arbitrarily. Further to this, the statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority to be considered on a case by case basis. Costs will be modest in the Authority and are frequently judged against a national daily tariff set for current matters at \$4,500 pre day for the first day and \$3,500 for each subsequent day.<sup>7</sup>

[14] The full Court of the Employment Court in *Fagotti v Acme & Co Limited* endorsed the broad principles in *Da Cruz* about costs and stated that they should not be departed from or even altered generally or in the particular case.<sup>8</sup>

[15] The difference between the Authority and the Employment Court was recognised in *Da Cruz* as being such to warrant the Authority taking a different approach to the question of costs.<sup>9</sup> The Employment Court has stated that it would be generally inconsistent with the

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<sup>5</sup> *Slabbert v Idea Services Limited* [2020] NZERA 256; *Levcenko-Scott v Presbyterian Support Central Charitable Trust* [2020] NZERA 452; *Price v Pathways Health Limited* [2022] NZERA 145; and *AG Technology NZ Holdings Limited v Wild* [2021] NZERA 494.

<sup>6</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [20056] ERNZ 808 at [44].

<sup>7</sup> Above n 6 at [44].

<sup>8</sup> *Fagotti v Acme & Co Limited* [20156] NZEmpC 135 at [114].

<sup>9</sup> Above n 65 at [39].

statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority.<sup>10</sup>

[16] The Authority adopts the principles in the exercise of its discretion from *Da Cruz* and *Fagotti* in an assessment of costs.<sup>11</sup> OJI was the successful party and is entitled to an assessment of a contribution towards her costs.

[17] OJI seeks reimbursement of the full amount approved for legal aid in this matter of \$1,6513.45. That amount includes GST where applicable.

[18] An appropriate starting point with this matter is one third of a day which based on the daily tariff is \$1,500. The matter was dealt with on the papers and did not require submissions to be lodged beyond the application to strike out and a case management conference with the Authority and Mr Boyd. The information provided by Mr Boyd before and following the case management conference would have required consideration.

[19] For completeness this would be an appropriate starting point whether the matter was one for which legal aid was granted or not.

[20] Ms Fechney submits that the daily tariff should be increased to reflect the nature of the application. Costs however are not to be used to punish and that is not an adjustment that is appropriate to make.

[21] The approach of the Authority currently in respect of GST is that the daily tariff is all inclusive and therefore GST neutral.

[22] The GST exclusive amounts approved by the Legal Services Commissioner excluding disbursements are \$1,303.

[23] I reduce the starting point of \$1500 therefore to \$1,303. This is an appropriate award of costs in this matter.

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<sup>10</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94] – [95].

<sup>11</sup> Above n 6 and 8.

**Order**

[24] I order Murray Alexander Boyd to pay to OJI the sum of \$1,303 for costs.

Helen Doyle  
Member of the Employment Relations Authority