

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 402
3113595

BETWEEN	JORDAN VASILIE PATRICK CHURCHILL Applicant
AND	CITY ELECTRICIANS WELLINGTON LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Phil Mitchell, counsel for the Applicant Paul McBride, counsel for the Respondent
Submissions received:	22 June 2022 from Applicant 21 June 2022 and 4 August 2022 from Respondent
Determination:	19 August 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] On 7 June 2022, the Authority issued a determination in this matter, dismissing the applicant's claim of unjustifiable dismissal, and awarding a small amount in favour of the respondent.

[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.

[3] The parties have not been able to resolve costs between themselves, and have filed memoranda accordingly.

[4] The applicant says that costs should lie where they fall.

[5] The respondent's position is that costs of "something in the order of \$15,000 is submitted appropriate". In addition, the respondent seeks disbursements in the sum of \$3,450.

[6] The substantive matter was a claim by the applicant for constructive dismissal. The applicant's claim did not succeed. The respondent raised various counterclaims for damages and penalties against the applicant, and was awarded a little under \$2,700 in the round.

[7] The starting point is that costs should follow the event. Looking at the matter in the round, the respondent was the successful party, and is therefore entitled to an award of costs.

Principles

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

[9] 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 days¹.

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

[11] 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*² as confirmed in *Fagotti v Acme and Co Limited*³. 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 be used as a punishment or expression of disapproval of the unsuccessful parties conduct, except to the extent that conduct affects the conduct of the Authority's investigation.

¹ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

² [2005] 1 ERNZ 808.

³ [2015] NZEmpC 135 at 114.

Hearing Time as a starting point

[12] The respondent has submitted that there was a hearing over 2.5 days, leading to a starting point for costs, with reference to the daily tariff, of \$10,000.

[13] The suggestion by the respondent that the starting point for calculating costs with reference to the daily tariff is 2 and a half days is incorrect, and I reject it.

[14] The Authority's records indicate that the investigation meeting lasted for, at most, 1 and three quarter days. The investigation meeting was spread over 3 days for reasons of witness availability, and I have (generously, given the total attendance of only 2.8 hours on days 2 and 3) calculated the time as follows:

- 5 July 2021: full day
- 6 July 2021: half day (9.30 am to 11.47 a.m.)
- 5 August 2021: quarter day (9.30 a.m. to 10.05 a.m.)

[15] Applying the usual tariff rates of \$4,500 for the first day, and \$3,500 thereafter, the starting point for an award of costs for a hearing of 1 and three quarter days is therefore \$7,125.00.

Uplift Requested and Disbursements

[16] The respondent has sought an uplift of costs, and is claiming total costs of \$15,000. Reasons given for the uplift are stated as being:

- a. That there was a claim for damages and this was well out of the ordinary run of cases;
- b. Written submissions were filed following the investigation meeting;
- c. Penalties were awarded against the applicant, and the employer party should be compensated for "bringing that to account". I note that the penalty awarded against the respondent was \$500, and I have included this sum in the total of just under \$2,700 already mentioned above.

- d. The respondent wrote to the applicant advising that the applicant's claim was unmeritorious and warning the applicant increased costs would be sought against him.

[17] The respondent is seeking a considerable uplift, of more than double the appropriate starting point. The suggestions that the existence of a claim for damages, and the filing of written submissions subsequent to the investigation meeting merit substantial uplift can be discounted as they are not relevant factors in an assessment of costs, and are usually considered to be covered by the application of the daily tariff, unless particular circumstances warrant otherwise⁴. These are factors that appear in any number of matters before the Authority, and there is nothing about the nature of the issues in this matter that suggests the need for an uplift of more than 100%.

[18] Likewise, I take with caution the suggestion that an award of a penalty against a party should also "trigger" an increased award of costs. A penalty claim is at the discretion of the party making that claim, and the issuing of a penalty is its own reward. To award an uplift in costs on the grounds that a penalty has also been awarded would be a type of "doubling up" that the court has cautioned against, due to the time taken to consider it already being accounted for⁵. Remedies and costs are to be assessed separately⁶.

[19] The respondent did write to the applicant, advising the respondent's view that the applicant's claim was an "unmeritorious try-on" and if the applicant decided to progress his application, the respondent would seek full solicitor/client costs⁷. I have viewed this letter, and note it is not a "Calderbank offer", as it contains no offer to settle all or part of matter, and is not expressed to be on the basis that it is "without prejudice save as to costs"⁸.

[20] While the applicant was not successful in his claim of constructive dismissal, I am not persuaded that the applicant should not have brought his claim at all. An

⁴ *Mattingly v Strata Title Management Ltd*, [2014] ERNZ 1, at [21].

⁵ See *Salt v Fell*, [2006] NZEmpC 49.

⁶ *White v Auckland District Health Board*, [2008] ERNZ 635 CA.

⁷ Letter from respond to applicant dated 20 July 2020.

⁸ Noting the need for an express statement in a written offer that the offer is "without prejudice except as to costs", codified in the High Court Rules 2016, at 14.11.

employee is entitled to challenge decisions made by their employer, and to have those decisions tested.

[21] I also note the court's analysis that an uplift of \$1,000 against a party who unreasonably rejected a Calderbank offer was appropriate⁹.

[22] Taking all these matters into consideration, I find that a small uplift is the most that is appropriate in the circumstances, and I have taken into consideration the potential for disruption and lost time from having the hearing take place over multiple part days. I find that an award of costs in favour of the respondent in the sum of \$8,000 is appropriate.

[23] Finally, I note the request by the respondent for disbursements of \$3,450 in respect of costs incurred in relation to forensic computing services by the firm InPhysec.

[24] Although the respondent has provided invoices in support of such a claim, I note that the Authority has already considered this matter in its substantive determination.

[25] At paragraph [47] of the Authority's determination dated 7 June 2022, the Member (not myself) states:

I find an award of special damages to be appropriate in this instance to recompense CEWL, in part, for the expense it incurred in engaging the services of InPhySec. The award will be a contribution rather than cover the full expense of the forensic computer company's engagement..... I find an award of special damages, amounting to 30 percent of the expense incurred by CEWL in engaging InPhySec, to be appropriate.

[26] And again para [58]:

I am satisfied it is reasonable to award CEWL a contribution of 30 percent of the expense it incurred in obtaining forensic computer services from InPhySec. While no copy of the InPhySec invoice was produced to the Authority, I accept Mr Donovan's evidence that it was \$6,500.

[27] The respondent has already placed its claim for these disbursements before the Authority, and has been awarded a contribution towards those costs in the sum of \$6,500. The claim for additional payment in relation to InPhySec costs on top of what

⁹ *Davide Fagotti v Acme & Co Ltd*, [2015] NZEmpC 135.

has already been awarded appears therefore to be a double claim, and no further award will be made under this head.

Orders

[28] Mr Jordan Vasilie Patrick Churchill is ordered to pay to City Electricians Wellington Limited, within 28 days of the date of this determination, the sum of \$8,000.00 without deduction towards costs.

Claire English
Member of the Employment Relations Authority