

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2025] NZERA 118
3238759

BETWEEN	SHALINEE DOWLUT Applicant
AND	AURECON NEW ZEALAND LIMITED Respondent

Member of Authority:	Natasha Szeto
Representatives:	Applicant in person Mark Lawlor and John Gray-Smith, counsel for the Respondent
Submissions / information received:	22 November 2024 from the Respondent 2 December 2024 from the Applicant
Date:	27 February 2025

COSTS DETERMINATION OF THE AUTHORITY

[1] Shalinee Dowlut lodged a statement of problem in the Authority making multiple claims against her then employer, Aurecon New Zealand Limited (Aurecon). In a determination dated 1 July 2024¹ I found none of Ms Dowlut's claims succeeded. In the determination, a timetable was set for the lodging of a memorandum on costs if the parties were unable to resolve that issue between them.

[2] Ms Dowlut challenged the determination to the Employment Court. The matter of costs in the Authority was adjourned pending an update on the progress of Ms Dowlut's challenge.

¹ *Shalinee Dowlut v Aurecon New Zealand Limited* [2024] NZERA 385.

[3] On 8 October 2024 Aurecon wrote to the Authority requesting a direction for the parties to file submissions on costs. Ms Dowlut objected to the costs matter being progressed on the basis that because the matter was before the Employment Court, the Authority's determination had been "cancelled".

[4] I advised the parties that under s 180 of the Employment Relations Act 2000 (the Act) making an election under s 179 of the Act does not operate as a stay of proceedings on the determination of the Authority unless the Court or the Authority so orders. I told the parties I was not aware of any barrier to progressing the issue of costs, but if there was such a barrier, I expected the parties to notify the Authority of the specific issue and attach supporting evidence. I then timetabled the exchange of submissions on costs.

[5] Aurecon filed its submissions on 22 November 2024. On 2 December 2024, Ms Dowlut responded to the Authority to reject the proposal (to determine costs) until the court hearing and high court interlocutory. Ms Dowlut referred to the Employment Court practice guide about costs. In a Minute dated 10 December 2024 I advised the parties I would proceed to determine the issue of costs based on information currently before the Authority. This determination now resolves the issue of costs.

[6] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

Submissions

[7] The investigation meeting was held in person in Tauranga on 21 November 2023 and from 20 to 22 February 2024. A final witness called by Ms Dowlut gave evidence by audio-visual link (AVL) on 11 March 2024. Aurecon says the investigation meeting lasted 4.25 days and the starting point for assessing costs at tariff rates is therefore \$15,875.00.²

[8] Aurecon also says the tariff should be uplifted by 25 percent to \$19,843.75 on the basis that Ms Dowlut's actions leading up to and during the investigation meeting

² Based on \$4,500 for the first day, and \$3,500 for each additional day of investigation time.

have caused unnecessary costs to Aurecon. In making this submission, Aurecon relies on the following conduct/actions:

- (a) Ms Dowlut refused to provide a witness statement, then provided new or additional evidence which resulted in Aurecon needing to re-brief existing witnesses and call two additional witnesses.
- (b) Ms Dowlut advanced several claims that were entirely without merit but which Aurecon was required to respond to.
- (c) Ms Dowlut sought to call an additional witness after the investigation meeting had begun, resulting in further time being needed to complete the investigation meeting by AVL.
- (d) Aurecon was put to the cost of disputing the authenticity of a document Ms Dowlut produced late in the investigation, which was necessary because it was alleged to be a contemporaneous file note of a key meeting.

[9] Aurecon says Ms Dowlut declined to engage with it regarding costs. Ms Dowlut allegedly told Aurecon she does not have to pay costs because her claims are “undetermined” as a result of challenging the Authority’s determination to the Employment Court. Aurecon has confirmed that its actual and reasonable legal costs incurred in this matter materially exceeded the amount it asks the Authority to order.

[10] Ms Dowlut has not provided any submissions in response, despite being given multiple opportunities to do so. Assessing Ms Dowlut’s communications since the determination was issued in July 2024 as best I can, I understand her position to be:

- (a) While the matter is before the Employment Court, the Authority cannot determine costs.
- (b) The Employment Court practice guide should be referred to on the issue of costs.

[11] At various stages of the Authority’s investigation, Ms Dowlut has indicated she has experienced financial difficulty since being dismissed from her employment. However she has not provided specific details or any information in support.

Approach to costs

[12] The Authority has clear statutory power to order such costs and expenses to be paid as the Authority thinks reasonable.³ Costs are awarded at the Authority's discretion.⁴ The principle that costs follow the event is well-recognised by the Authority and courts.⁵ There is no basis for the Authority to depart from this approach.

[13] Ms Dowlut has not provided any legal or factual basis for her submission that the Authority cannot determine costs and I am not aware of any barrier to proceeding to determine the costs application.

[14] I am satisfied that both parties were aware of their potential liability for costs. Following the first Case Management Conference (CMC) with the parties in August 2023, I referred to the Authority's power to award costs to a successful party under clause 15 of schedule 2 of the Act.⁶ The parties were advised of the Authority's tariff based approach in awarding such costs which has been approved by the Employment Court. They were advised they could expect the Authority to apply this approach and were advised of the current tariffs, which for a one-day investigation meeting is \$4,500.00.⁷

[15] 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*⁸ as confirmed in *Fagotti v Acme and Co Limited*⁹. It is a principle set out in *Da Cruz* that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. The financial situation of the party paying costs can be a relevant factor to take into account. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

Analysis

[16] As the successful party, Aurecon is entitled to a contribution to its costs actually and reasonably incurred. My notes record the total investigation meeting time was four

³ Schedule 2, clause 15 of the Act.

⁴ *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

⁵ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

⁶ Directions dated 18 August 2023.

⁷ For further information about the factors considered in assessing costs see:

www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

⁸ [2005] 1 ERNZ 808.

⁹ [2015] NZEmpC 135 at 114.

full days because the meeting on 22 February 2024 concluded early and the AVL meeting on 11 March 2024 was only for approximately one hour. The starting point for assessing costs at tariff is therefore \$15,000.00.

[17] I must consider whether the factors submitted by Aurecon justify an increase in costs, and if so, whether 25 percent represents a fair and reasonable uplift. While it is a well-settled principle that costs are not intended to punish, where an unsuccessful party has acted unreasonably, thereby also unnecessarily increasing costs, an uplift can be considered. Aurecon says Ms Dowlut's conduct required it to incur unnecessary costs and I accept Aurecon's submission. I also accept the conduct Aurecon has pointed to was not reasonable. While the circumstances of each case must be determined on its own merits, I have considered parity with other recent cases in the Authority¹⁰ and the uplift of 25 percent sought by Aurecon is both modest and warranted.

[18] I also need to consider whether there are any factors justifying a reduction to the overall amount of costs. Ms Dowlut has not provided any information in relation to factors justifying a decrease. Although Ms Dowlut was self-represented in the Authority, I have no evidence before me to assess her ability to pay costs. There is accordingly no basis for me to reduce an otherwise appropriate costs award.

[19] Taking into account all of the factors above, I conclude \$18,750.00 represents a modest and appropriate costs award in the exercise of my discretion as to costs.

Orders

[20] For the reasons set out above, I order Shalinee Dowlut to pay Aurecon New Zealand Limited within 28 days of the date of this determination the sum of \$18,750.00 as a contribution to its costs.

Natasha Szeto
Member of the Employment Relations Authority

¹⁰ See for example, *WFW v ZUW* [2024] NZERA 451; *Dhala v Futurereed Australia New Zealand Pty Limited & Anor* [2024] NZERA 38.