

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 265
3079292

BETWEEN	LEIGH DUNN Applicant
AND	AIR NEW ZEALAND LIMITED First Respondent

Member of Authority:	Vicki Campbell
Representatives:	Victor Corbett, advocate for Applicant Kevin Thompson, counsel for Respondent
Submissions received:	29 June 2020 from Applicant 25 June 2020 from Respondent
Determination:	30 June 2020

COSTS DETERMINATION OF THE AUTHORITY

- A. Ms Dunn is ordered to pay to Air New Zealand Limited the sum of \$4,500 as a contribution toward costs under clause 15 of Schedule 2 of the Act within 28 days of the date of this determination.**

[1] In a determination dated 18 June 2020 I declined Ms Dunn's application for remedies in relation to two personal grievances and an application for penalties.¹

¹ *Dunn v Air New Zealand Limited* [2020] NZERA 234.

[2] I reserved costs and invited the parties to resolve the issue between them. The parties have been unable to resolve the matter and they have lodged submissions seeking a determination on the issue of costs. Air New Zealand Limited seeks a contribution to its costs in the sum of \$7,500.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks' reasonable.² The principles applying to costs are well settled and do not require repeating.³

[4] An assessment of costs in the Authority will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.⁴ All together the investigation meeting took less than one day and just over half a day, including the issue of an oral determination. Accordingly, I have set the starting point at \$3,000.

[5] The Authority will take into account any offers made by the parties to settle matters.⁵ If the Applicant does not beat the offer, there should be a steely response by the Courts, as that would be in the broader public interest.⁶

[6] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:⁷

It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. ... The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[7] Air New Zealand seeks an uplift in the daily tariff to reflect offers of settlement made to Ms Dunn prior to the investigation meeting. In total there were three offers and counter-offers made by the parties to resolve Ms Dunn's application.

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

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

⁴ Practice Note 2, Costs in the Employment Relations Authority.

⁵ *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

⁶ *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172, (2004) 17 PRNZ 16 (CA) at [53]

⁷ Above n 5 at [18]-[20].

[8] On Friday, 29 November 2019 at 12.10 pm Air New Zealand made a written offer via email to resolve Ms Dunn's applications to the Authority with the payment of \$2,000. In its email Air New Zealand advised Ms Dunn that if she wished to attribute the \$2,000 toward her costs GST would be additional and would require a compliant GST invoice. The offer was available for acceptance until 4 pm on 5 December 2019.

[9] On 18 December 2019 at 11.10 am Ms Dunn made a counter-offer to resolve matters on the basis that she receive \$6,000 with costs to lie where they fall. The offer was open for acceptance for two days, until 5 pm on 20 December 2019.

[10] On 4 February 2020 Ms Dunn advised Air New Zealand she would not have any supporting witnesses at the investigation meeting due to her one witness being uncontactable and her whereabouts in Australia unknown.

[11] In response Air New Zealand made a further offer to resolve matters on the basis that Ms Dunn withdraw her applications from the Authority and the parties let costs lie where they fall. This offer was rejected by Ms Dunn by return email the same day.

[12] In light of Ms Dunn's lack of success the rejection of the offers made by Air New Zealand on 29 November 2019 and 5 February was unreasonable. If Ms Dunn had accepted the 29 November settlement offer at that early stage then both parties would have avoided incurring the legal costs they did.

[13] During the period that the 29 November offer was open for acceptance the parties had attended a case management call with the Authority on 2 December 2019 where a timetable was set for 7 and 21 February for the lodgement of Ms Dunn's and Air New Zealand's witness statements respectively. The second offer from Air New Zealand was made before Ms Dunn's witness statements were due to be lodged and served on 7 February.

[14] Given my finding regarding the rejection of the calderbank offers there will be a moderate uplift in the daily tariff of \$1,500.

[15] Ms Dunn submitted that in the current economic situation together with her personal impecuniosity no order for costs should be made. No evidence has been provided to the Authority to support Ms Dunn's claim that she is impecunious and is unable to meet an award of costs.

[16] Taking all factors into consideration Ms Dunn is ordered to pay to Air New Zealand Limited the sum of \$4,500 as a contribution toward costs under clause 15 of Schedule 2 of the Act within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority