

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 2
3257779

BETWEEN E CYCLES NZ LIMITED
 Applicant

AND NICK SCOTT
 Respondent

Member of Authority: Robin Arthur

Representatives: Melissa Johnston, counsel for the Applicant
 Alex Kersjes, advocate for the Respondent

Submissions: From the applicant on 8 December 2023. None from
 the respondent.

Determination: 8 January 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority declined an application from E Cycles NZ Limited (ECNZL) for reopening of an investigation which had ended with a determination that the company's former employee Nick Scott was unjustifiably dismissed.¹ Costs in relation to that application were reserved.

[2] In a memorandum lodged by his advocate on 8 December 2023 Mr Scott sought an order requiring ECNZL to pay the costs of \$1,582.40 his advocate charged him for responding to the company's reopening application. ECNZL was given the opportunity to reply by 22 December 2023. No reply memorandum or any other response was received from counsel who acted for ECNZL in making the reopening application or from ECNZL directly.

¹ *E Cycles NZ Limited v Scott* [2023] NZERA 692.

Factors in assessing costs

[3] The Authority applies well-established tenets in exercising its jurisdiction to order a party to contribute to costs and expenses incurred by another party.²

[4] Those tenets recognise that a successful party should receive a contribution to its reasonably incurred costs and expenses; costs awards should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional ‘daily rate’ or ‘tariff’ as a starting point to assess costs.

[5] Undue rigidity in applying that tariff is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may take account of settlement offers made by either party, the financial means of a liable party to pay costs, the preparation required in particularly complex matters and whether conduct of any party unnecessarily increased the costs they incurred.

Assessment

[6] The reopening application was determined ‘on the papers’, that is from considering written submissions prepared and sent to the Authority by the parties’ representatives. No attendance at an investigation meeting was needed.

[7] Mr Scott’s advocate sought an order requiring ECNZL to pay “indemnity costs” for the reopening application because, in his submission, the application had wasted both the Authority’s time and Mr Scott’s money.

[8] Indemnity costs, meaning payment of all costs charged by a representative, are reserved for circumstances where the conduct of a party or the nature of their case is exceptionally bad.³ While Mr Scott succeeded in resisting the reopening application, and understandably has a dim view of it having been made, its nature and content did not reach the high threshold of circumstances where an order for indemnity costs was appropriate.

[9] Mr Scott is entitled to an order providing a contribution to his costs reasonably incurred in successfully resisting the reopening application. This may be sensibly

² Employment Relations Act 2000, Schedule 2, clause 15 and www.era.govt.nz/determinations/awarding-costs-remedies.

³ *Bradbury v Westpac Banking Corporation* [2009] NZCA 234 at [28].

assessed as a portion of the Authority's daily tariff of \$4,500 which is usually applied in cases where parties prepare for and attend an investigation meeting. For this matter determined on the papers, one quarter of the daily tariff was an appropriate portion to order ECNZL to pay as a contribution to Mr Scott's costs, which were reasonably incurred.

Order

[10] ECNZL must pay costs of \$1,125 to Mr Scott within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority