

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 229
3241139

BETWEEN MARK FODEN
Applicant

AND SMARTLIFE WHANGAREI
LIMITED
Respondent

Member of Authority: Jeremy Lynch

Representatives: Applicant in person
Gavin Allan for the Respondent

Submissions (and further information) received: 21 March 2024 from the Applicant
7 April 2024 from the Respondent

Date of Determination: 19 April 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 8 March 2024 which found Mr Foden had been unjustifiably dismissed by Smartlife Whangarei Limited (Smartlife) and made an award of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), together with an award of lost wages under s 123(1)(b) of the Act, holiday pay arrears, and interest.¹

[2] The parties were encouraged to resolve the question of costs but have been unable to do so. Mr Foden has applied to the Authority for an award of costs.

Mr Foden's claim for costs

[3] Mr Foden did not provide written submissions in support of his claim for costs.

¹ *Mark Foden v Smartlife Whangarei Limited* [2024] NZERA 141.

[4] Instead, he provided copies of invoices from his former advocate, totalling \$11,534.76 (including GST).

[5] Smartlife did not provide any response to Mr Foden's application for a consideration of costs.

[6] Instead, Smartlife made its own application for costs against Mr Foden.

[7] Smartlife did not provide any submissions as to why it was seeking costs against the successful party.

Costs and principles

[8] The Authority has power under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) to award costs. This power is discretionary and must be exercised in a principled manner.² Principles guiding the Authority's approach to costs, including:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdictions.
- Equity and good conscience are to be considered on a case-by-case basis.
- Costs are not to be used as a punishment or an expression of disapproval for an unsuccessful party's conduct, although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Frequently, costs are judged against a notion or daily tariff.³

[9] Another well-settled principle guiding the Authority's approach is that costs awards will be modest.

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co. Limited* [2015] NZEmpC 135.

³ For further information about the factors considered in assessing costs see:

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

Costs outcome

Starting point

[10] As Mr Foden was the successful party in the substantive matter, he is entitled to a consideration of costs. The investigation meeting lasted less than half a day. The starting point is therefore half of the Authority's notional daily costs tariff, or \$2,225.00.

[11] The next step in the assessment is to consider whether are factors which warrant an increase or decrease in the tariff. There are no factors to warrant a decrease. Mr Foden did not decline a settlement offer, which, had he accepted, would have meant he was better off.

[12] There is nothing in the invoices provided by Mr Foden to suggest that the conduct of Smartlife warrants an uplift in the daily tariff.

Actual representation costs and expenses

[13] Mr Foden appears to seek actual costs incurred from 23 March 2023, at which stage Mr Foden was still employed by Smartlife, and was approximately four months prior to him commencing his proceeding in the Authority.

[14] The invoices provided by Mr Foden in support of his claim for costs, disclose that he is seeking costs in relation to his representative's attempts to negotiate an 'exit deal' on his behalf, together with costs for attendance at mediation. Only in very rare and limited circumstances would the Authority consider awarding mediation costs. The circumstances of this matter do not justify an award of mediation costs.

[15] In addition, the costs incurred by Mr Foden in respect of the exit deal negotiations, were incurred well before he commenced his claim in the Authority. It is therefore not reasonable that he is awarded costs associated with this.

[16] In the circumstances, I decline to award the actual costs sought by Mr Foden.

[17] However, putting his advocate's fees in relation to the exit deal negotiations and mediation attendance to one side, Mr Foden has still incurred representation costs of over \$8000.00 (gross) for which he is entitled to a contribution. Despite Mr Foden's advocate not attending the investigation meeting, I am satisfied that these costs were properly incurred.

[18] In addition, as the successful party, it is appropriate that Mr Foden is reimbursed for the cost of the Authority's filing fee.

Outcome

[19] Within 28 days of the date of this determination, Smartlife Whangarei Limited is ordered to pay to Mark Foden:

- (a) \$2,225.00 as a contribution to his costs; and
- (b) \$71.55 for the Authority's lodgement fee.

Jeremy Lynch
Member of the Employment Relations Authority