IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 304
5647102

	BETWEEN	YOON CHEOL HONG Applicant
	AND	AUCKLAND TRANSPORT Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Charlotte Parkhill, Counsel for the Respondent
Submissions:	08 September 2017 from the Applicant 21 September 2017 from the Respondent
Determination:	3 October 2017

COSTS DETERMINATION OF THE AUTHORITY

A. Yoon Cheol Hong must pay Auckland Transport $11,500 as a contribution to its costs of representation to respond to his personal grievance application.

[1] Auckland Transport asked for an order requiring Yoon Cheol Hong to pay $36,500 of what it spent to successfully defend itself against his personal grievance claims. The Authority found Mr Hong was not unjustifiably dismissed from his employment as an AT parking officer and was not unjustifiably disadvantaged before his dismissal.[1] An earlier determination declined Mr Hong's application for interim reinstatement while the Authority considered his personal grievance claims.[2]

[2] The costs award AT sought comprised $35,000 for taking part in a two-day investigation meeting and $1500 for its costs to make submissions opposing Mr Hong's interim reinstatement application.

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[1] *Hong v Auckland Transport* [2017] NZERA Auckland 255.
[2] *Hong v Auckland Transport* [2017] NZERA Auckland 115.

[3] The Authority's assessment of costs typically starts from a daily tariff of $4500 for the first day and $3500 for any subsequent days. The tariff may be adjusted upwards or downwards for various factors and to take account of particular circumstances of the case.[3]

[4] AT was entitled to an award of costs because it was the successful party. Applying the typical tariff for the two day investigation meeting, held on 29 and 30 May 2017, gave $8000 as the starting point for assessing those costs. However AT said one further factor warranted an award of much more than that amount. Mr Hong had not accepted two earlier offers AT made, on a without prejudice basis, to settle his claim before that investigation meeting. On 27 April AT offered to pay Mr Hong $12,500. And on 18 May, a fortnight before the investigation meeting, AT made a higher offer to pay him $15,000. Both offers were made through counsel representing Mr Hong at the time. Only the second offer drew a response. In an email Mr Hong sent to AT's counsel himself, he rejected it. In light of the eventual outcome in the Authority's determination, AT's settlement offer was reasonably made and Mr Hong's rejection of it was unreasonable.

[5] Mr Hong's reply to AT's application for costs did not directly address its claim for an award higher than the usual tariff. Instead Mr Hong attached an affidavit about his very limited financial circumstances.

[6] Two issues required determination:

(i) Should the tariff be increased because Mr Hong had not accepted AT's earlier settlement offers; and

(ii) Should Mr Hong's financial position excuse him from having to pay any costs to AT?

Effect of the settlement offer

[7] The Authority should take a "steely" approach to costs awards where an unsuccessful party has not accepted a settlement offer that would have resulted in that party getting a better outcome than it achieved in the Authority's determination.[4] However this approach does not require an uplift of the tariff to a level that would

[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] See *Fagotti,* above n 3, at [109] confirming the Court of Appeal's remarks at [20] in *Bluestar Print Group (NZ) Limited v Mitchell* [2010] NZCA 385 also applied to assessing costs in the Authority.

provide the successful party with an indemnity for all costs incurred after the settlement offer was made. The successful party may still be left to bear the burden of some of its costs if it chose to incur legal fees at a level much higher than the tariff. As explained by the Employment Court in *Stevens v Hapag-Lloyd (NZ) Ltd*:[5]

> … Proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority's informed assessment of an appropriate notional daily rate […]) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party's right to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources to the pursuit or the defence of a claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate. …
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> In my view it will generally be inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority. …

[8] AT's actual legal costs were said to total $55,868. It submitted those were reasonably incurred for dealing with several separate claims of unjustified disadvantage by Mr Hong as well as his dismissal grievance. In seeking $35,000 as a contribution to those costs AT asked for a fourfold increase on the daily tariff. Such an increase would be well beyond what was needed as a 'steely' consequence for rejecting the settlement offer, especially in light of the principle that costs award should also be modest.

[9] An increase of 25 per cent on the tariff rate was sufficient for that 'steely' purpose. This lifted the appropriate level of a costs award from $8000 to $10,000. It was a figure consistent with the directive for a steely approach to parties who unreasonably rejected settlement offers and with the statutory imperatives the Court referred to in *Stevens*.

[10] AT had to bear its own costs for its spending above that level. It must be assumed to have chosen to spend those considerable amounts in the knowledge it was unlikely to recover much beyond the generally applied daily rate.

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[5] *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94] endorsed by the full Court in *Fagotti*, above n 3, at [107].

[11] By contrast, AT's claim for a contribution to its costs for responding to the interim reinstatement application was based on a pro-rata amount of the daily rate. The investigation meeting held to hear submissions on that interim application took only part of a day. The amount of $1500 was an appropriate award of costs for AT's participation in that part of the process.

The financial position of the unsuccessful party

[12] Mr Hong wanted any liability to pay costs to AT to be considered in light of what he said about his financial circumstances. He has filed a challenge to the Authority's determination and has applied for civil legal aid in order to pursue his claim in the Employment Court. He provided a copy of his legal aid application. In that application he had declared he had no assets of any value over $1000 and no interest in a house or any other property. He also lodged an affidavit in the Authority stating he had withdrawn all his available Kiwisaver funds, on hardship grounds, to meet his living expenses. He said he and his wife lived on her income as a home carer and his job seeker weekly benefit of $113.48. At the time of making his affidavit Mr Hong said he had $49.32 in his bank account. He said he had "no other sources to get money to pay even a modest amount of costs award against me".

[13] The question for determination was whether the amount of $11,500 as an order of costs should be reduced due to Mr Hong's very limited financial circumstances.

[14] There is a tenable argument that workers who unsuccessfully pursue employment claims should be subject to costs orders in only very limited circumstances, as is the case in the Employment Tribunals in Britain. Another tenable argument can be made that the daily rate generally applied by the Authority is too high given the very limited means of many workers. However the tariff regime in place, for the moment, is well understood. Its operation (as a starting point for assessing costs) has been approved by the Employment Court. While the power to order costs is discretionary, variations from its typical predictability should be made on a principled and consistent basis.

[15] Various Employment Court decisions have explained the relevant principles for making costs award. Those principles apply to the assessment of costs in the Authority to the extent they are appropriate to the Authority's investigative rather than adversarial jurisdiction. One such principle confirms that a party's ability to pay is a

relevant factor in assessing costs if an order to pay costs would cause undue hardship to that party.[6] Any claim of undue hardship must be supported by acceptable evidence about the party's assets and liabilities and income and expenditure. However, while hardship is a factor to be considered in exercising the discretion to award costs, it must be weighed along with other principles:[7]

> The fundamental principle of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel. I consider that care needs to be taken not to over-extend the reach of a "hardship" approach. It runs the risk of distorting generally accepted principles of costs and placing an unnecessary burden on the opposing party of shouldering the costs of defending an unsuccessful claim. It may encourage claims that lack merit but which are pursued on a nothing-to-lose basis. The successful party may, itself, be financially stretched and struggling to meet the costs of litigation that it may not have initiated.

[16] So the fact that a costs award could impose financial hardship is not, of itself, decisive. The interests of both parties, and broader public policy considerations, must also be taken into account.[8] Those interests and considerations encourage early offers of compromise in legal proceedings and discourage wasteful or unreasonable behaviour by litigants.[9]

[17] In the particular circumstances of Mr Hong's case against Auckland Transport relevant factors to weigh included:

(i) How to give effect to the principles concerning his refusal to accept a reasonable, earlier settlement offer;

(ii) The effect on Auckland Transport if no order for costs, or a much reduced one, was made; and

(iii) Allowing for potential difference between his present and his future financial circumstances.

Giving effect to the settlement offer

[18] Mr Hong was probably more well-informed than most about his risks of a costs award, if the outcome in the Authority was unfavourable, and the risk of increased costs after he declined the settlement offer. He had a law degree from Auckland University. Several years before starting work as a parking officer, he had

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[6] *Walker Procare Health Limited* [2012] NZEmpC 186 at [32].
[7] *O'Hagen v Waitomo Adventures Limited* [2013] NZEmpC 58 at [34].
[8] *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [22].
[9] *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137 at [24].

practised as a barrister. He was involved in litigation in the High Court and Court of Appeal.

[19] To excuse him from any order for costs because he now had so little money would fail to give any effect to the requirement for a 'steely' approach to costs where an earlier, reasonable and better settlement offer was refused.

Effect on AT

[20] AT, as a large public agency, was not financially stretched or likely to struggle to meet the costs of litigation. It was not the type of smaller or more fragile employer contemplated in the extract from an Employment Court decision referred to in paragraph [15] above. However AT had made diligent efforts to settle Mr Hong's claim on terms that were significantly better than the outcome he achieved in the Authority determination.

[21] The amounts AT then spent in taking part in the Authority investigation have already been discounted to the more modest tariff levels. While AT's financial viability might not be greatly affected by getting an award around those limited levels, to get nothing at all or very little would marginalise the broader public policy concerns.[10]

Mr Hong's present and potential future financial circumstances

[22] On Mr Hong's affidavit evidence and if enforced now, an award of $10,000 costs would likely cause him financial hardship. He did not appear to presently have the means to pay that amount or anything other than, perhaps, very small regular instalments. However, as the Employment Court has explained, an order for costs may still be appropriate:[11]

> … [T]here may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make

[10] *Tomo*, above n 8, at [16].
[11] *Tomo*, above n 8, at [21].

> decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

[23] Mr Hong's background, experience and qualifications meant he may be successful in securing future employment that would give him more ready means to pay the costs award. AT could then exercise its rights to collect the value of any such order.

Order

[24] For the reasons given Mr Hong must pay AT $11,500 as a contribution to the costs AT incurred in responding to his personal grievance claim.

Robin Arthur
Member of the Employment Relations Authority