

**Attention is drawn to the order prohibiting publication of certain information in this determination at paragraph [6]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 260  
3183779

BETWEEN                      IEN  
   Applicant  
  
AND                                ACF  
   Respondent

Member of Authority:      Rowan Anderson  
  
Representatives:            Alastair Hall, counsel for the Applicant  
   Prakash Mani, counsel for the Respondent  
  
Investigation Meeting:      On the papers  
  
Submissions received:      1 May 2023 from the Applicant  
   None from the Respondent  
  
Determination:                24 May 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      On 4 April 2023 the Authority issued a determination<sup>1</sup> in which I found that ACF had breached the terms of settlement agreed between the parties in accordance with s 149 of the Employment Relations Act 2000 (the Act), that a compliance order should be made requiring ACF to comply with my determination by making payment of sums ordered, and that a penalty should be imposed upon ACF for breaches in relation to s 149(3) of the Act.

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<sup>1</sup> IEN v ACF [2023] NZERA 163.

[2] Costs were reserved. Counsel for IEN has attempted to resolve the issue of costs by attempting to contact counsel for ACF. ACF has not engaged, the parties have not been able to agree on costs, and IEN now asks the Authority for orders as to the costs they incurred in pursuing their claims.

[3] IEN submits that their total costs and disbursements are \$18,320.34. They seek a significant uplift to the Authority's daily tariff on the basis that a valid Calderbank offer was made and unreasonably refused, and additionally on the basis of costs said to have been incurred due to unreasonable delays attributable to ACF.

[4] IEN submits that they were the successful party in the proceedings and as such that the starting point is that he should receive the daily tariff for a one-day investigation meeting.

[5] ACF has not lodged submissions in relation to the issue of costs. The Authority drew ACF's failure to lodge submissions within the relevant timeframe to the attention of counsel for ACF on 17 May 2023, the day after they were due. Counsel for ACF, without seeking leave, responded advising that submissions would be lodged on 19 May 2023. Despite that, ACF have not lodged submissions.

### **Non-publication order**

[6] The substantive determination contained an order prohibiting the publication of the names of the parties and witnesses, and any identifying details of the parties and witnesses in relation to these proceedings. That order was made pursuant to clause 10 of schedule 2 of the Act, was made on a permanent basis, and remains in place.

### **Analysis**

#### *Costs principles*

[7] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.<sup>2</sup>

[8] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that Calderbank

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<sup>2</sup> Employment Relations Act 2000, Schedule 2, clause 15.

offers may be taken into account in setting costs, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.<sup>3</sup>

[9] The daily tariff is usually taken as a starting point,<sup>4</sup> although is not to be used in a rigid manner, with principled adjustments made having regard to the to the particular characteristics of a case.

#### *Costs to follow the event*

[10] IEN was successful in pursuing their claims against ACF and it is appropriate that costs follow the event.

#### *Application of the daily tariff*

[11] The substantive proceeding involved the setting down of a one-day investigation meeting. However, the investigation meeting did not consume the whole day, with a significant adjournment being required having regard to the late arrival of IEN on account of an unforeseen travel delay caused by adverse weather.

[12] Having regard to the time required at the investigation meeting, I consider the appropriate starting point for daily tariff approach would see a contribution of \$3,375 as representing three-quarters of one-day.

#### *Calderbank offer*

[13] IEN made an offer of settlement on 12 October 2022, well prior to the investigation meeting or any other substantive steps being required in the Authority. ACF was provided two business days to consider and respond to the offer, that being until 14 October 2022. The settlement offer was made on the basis of a full and final settlement involving ACF being required to make payment of \$29,500 (the sum payable under the existing terms of settlement) and a contribution to IEN's costs in the amount of \$2,000 (plus GST) and reimbursement of the filing fee.

[14] I consider that the Calderbank offer made was in clear terms and was otherwise reasonable. The offer was made a relatively short time following an initial case management conference held on 7 October 2022. The offer was clearly marked "without prejudice save as to costs", the offer included a relatively modest specific sum

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<sup>3</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

<sup>4</sup> Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

attributable to IEN's costs to that point, and IEN has been successful in their application being awarded more than the sum sought by way of the Calderbank offer. Whilst the offer made provided a relatively short time frame for response, I find that it was reasonable in circumstances where ACF were legally represented and able to consider the offer absent any other undue pressure and at a very early stage of the proceedings.

[15] I consider that the offer of 12 October 2022 should be taken into account and that an uplift of \$2,500 appropriate in the circumstances.

*Conduct of the proceedings and unreasonable delays*

[16] IEN submitted that ACF's conduct in the proceedings unnecessarily increased the costs that IEN has incurred. This was primarily on the basis that ACF were on notice that its remedy for breaches it alleged on the part of IEN as to the terms of settlement did not include the payment of sums due under the terms of settlement by ACF to IEN. Despite that notice, AFC continued in its approach and the compliance proceedings brought by IEN required investigation and determination.

[17] The proceedings related to a compliance order sought by IEN. At the first case management conference, held on 7 October 2022, ACF was informed it would need to lodge its own statement of problem if it wished to progress its own claims of non-compliance. ACF advised it would do so the following day, but that did not eventuate until well after the relevant directions had been complied with, including the lodgement of witness statements and preparation for the investigation meeting.

[18] ACF's attempts to pursue its own claims in the context of IEN's application and these proceedings resulted in unreasonable and unnecessary expense to IEN. This included time in seeking instructions and preparing material in relation to claims that were inappropriately raised by ACF given the directions issued.

[19] The matters for investigation and determination by the Authority were clear and relatively uncomplex. Little of ACF's witness material or submissions concerned the issues relevant to the IEN's claims. Instead, the material largely concerned ACF's own claims improperly raised. Absent that material, there would have been relatively little cost involved in the preparation of statements and submissions dealing with the issues that were actually the subject of the proceedings.

[20] IEN also claim that an uplift is warranted having regard to several delays that occurred in relation to the proceedings. The investigation meeting was delayed on three occasions. I decline to take into account two of those delays, given that they related to explained unexpected and exceptional events relating to last minute unavailability of counsel.

[21] In relation to the other significant adjournment, I consider there was an unreasonable delay caused by ACF causing additional costs to be incurred by IEN. I accept IEN's submissions that the adjournment of the investigation meeting that was scheduled to take place on 29 November 2023 was attributable to the commercial interests of ACF, as opposed to, for example, any genuine basis for an adjournment based on exceptional circumstances. To that end, I recorded in a Minute dated 28 November 2022 that the investigation meeting would be adjourned in order ensure ACF's witness was present when the investigation meeting did proceed, but that I was not satisfied that sufficient and reasonable basis for the adjournment request.

[22] Having regard to all the submissions received and all of the relevant factors, I consider that an additional uplift equivalent to one half day of the tariff is appropriate, that being \$2,250.00

[23] The delay relating to 29 November 2022 resulted in additional expense to IEN in the form of rescheduling travel arrangements for which receipts have been provided. I decline to make an order in relation to the costs of flights for attendance at the investigation meeting itself. However, I consider it appropriate that the additional fare fee of \$50.00 be subject to payment. I decline to make any order in relation to other disbursements claimed.

### **Orders**

[24] For the above reasons I order ACF to pay IEN, within 28 days of this determination:

- (a) \$8,125.00 as a contribution to towards IEN's costs of representation;
- (b) \$50.00 as to disbursements; and
- (c) \$71.56 as reimbursement of the filing fee.

Rowan Anderson  
Member of the Employment Relations Authority