IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2022] NZERA 400
3164921

	BETWEEN	KRP Applicant
	AND	FYM Respondent

Member of Authority:	Claire English
Representatives:	Murray Grant, counsel for the Applicant Scott Worthy, counsel for the Respondent
Submissions received:	27 July and 9 August 2022 from Applicant 17 August 2022 from Respondent
Determination:	19 August 2022

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 13 June 2022, the Authority issued a determination in this matter, upholding the applicant's claims of unjustifiable disadvantage, and awarding him lost wages as well as compensation for hurt and humiliation, and disbursements.

[2] In that determination, the parties were encouraged to resolve any issue of costs between them, and the Authority made reference to its usual practice of applying the daily tariff to determine costs.

[3] The parties have not been able to resolve costs between themselves, and have filed memoranda accordingly.

[4] The applicant claims full solicitor-client costs of $67,000.

[5] The respondent submits that costs should be awarded in accordance with the Authority's usual tariff rate, which it says amounts to either $5,000 or in the alternative, $8,000.

The Appropriate Starting Point

[6] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is $4,500 for the first day of hearing, and $3,500 for subsequent hearing days[1].

[7] The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it.

[8] The investigation meeting in this matter was for 2 days, and was held in person, with both parties attending with their witnesses.

[9] The applicant suggests the appropriate starting point is based on a 2 day investigation meeting.

[10] The respondent suggests that the appropriate starting point is 1 and a half days, on the basis that approximately half of the first day was taken up by the parties discussing a particular claim and reaching a partial resolution, which was then recorded in the Authority's determination.

[11] The difficulty with the submission that only 1.5 days should be counted as the time for the investigation meeting, is that the investigation meeting was set down for 2 full days, my records show that this is the time that the investigation meeting took, and the Authority's time, as well as well as the time of the parties and their witnesses, was taken up for 2 full days[2].

[12] Accordingly, I consider that the appropriate starting point is 2 hearing days, which gives a starting point of $8,000.

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[1] For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

[2] See for further example, *Ansley v Elite Innovation Ltd*, [2013] NZERA Auckland 397.

Principles

[13] The power of the Authority to award costs is contained in s 15 of schedule 2 of the Employment Relations Act 2000.

[14] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*[3] as confirmed in *Fagotti v Acme and Co Limited*[4]. The principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment or expression of disapproval of the unsuccessful parties conduct.

[15] Here, the position of the parties is in stark contrast. The applicant seeks full solicitor-client costs of $67,000, on the basis that the respondent took (in its view) no real steps to resolve the dispute/s between the parties until after it became clear that these proceedings would be filed. In the applicant's view, but for the respondent's conduct, he would not have needed to take proceedings or incur costs at all.

[16] The respondent's view is that the amount of costs properly payable is in fact $5,000, on the basis that the applicant was not successful in all of his claims.

[17] Turning first to the applicant's plea for full solicitor-client costs, I note that the costs awards are at the discretion of the Authority, and the starting point is that the Authority may order whichever party is successful to make a contribution to the reasonably incurred costs of the other party. In other words, costs awards are a "contribution" to costs incurred, not an expectation that a party's costs will be covered in full[5].

[18] I consider that the most relevant principles in this matter are the principle that costs awards in the Authority should be modest, and that conduct of the parties that increase costs unnecessarily can be taken into account when increasing or decreasing an award of costs.

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[3] [2005] 1 ERNZ 808.
[4] [2015] NZEmpC 135 at 114.
[5] Practice Note 2: Costs in the Employment Relations Authority, at paragraph 2.

[19] It is important to note however, that costs and remedies are to be assessed separately[6], and the costs regime is not to be used to express disapproval of the acts of a party which are at issue in the substantive proceeding[7]. Rather, when considering costs the focus should be on the conduct of the parties during proceedings and the impact on the proceedings themselves, that might increase costs unnecessarily[8].

[20] I note for completeness that the respondent made a calderbank offer, which is of no effect given the outcome in favour of the applicant. The applicant notes that this offer was contingent on his employment ending, which he did not accept.

[21] Looking at the matter overall, my view is that there was nothing in the respondent's conduct of the matter before the Authority that would justify an uplift of costs compared to the daily tariff. The applicant's plea that he will have his award effectively reduced by having to pay legal costs, is not a factor that can properly be considered. The court has found that:

> It is not the function of a costs award to address any perceived deficiencies in the relief otherwise awarded to a successful party, much as it is not the function of a costs award to punish an unsuccessful party[9].

[22] Likewise, my view is that there was nothing in the applicant's conduct of the matter before the Authority that would justify a reduction in costs compared to the daily tariff, as argued for by the respondent.

[23] Accordingly, costs will be awarded in favour of the applicant on a tariff basis.

Orders

[24] The respondent is to pay to the applicant a contribution to costs of $8,000.

Claire English
Member of the Employment Relations Authority

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[6] *White v Auckland District Health Board*, [2008] ERNZ 635 CA.
[7] *Ibid,* note 2.
[8] *Ibid,* note 2.
[9] *Mattingly v Strata Title Management Ltd,* [2014] ERNZ 1, at [13].