

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

**[2025] NZERA 131  
3288100**

BETWEEN LYNN LEAUPEPE  
Applicant

AND TAMAKI HEALTH SERVICES  
LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Costs Submissions None from Applicant  
17 February 2025 from Respondent

Determination: 04 March 2025

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1] By determination [2025] NZERA 45 the Authority found that the Applicant, Ms Lynn Leaupepe, was not constructively dismissed or unjustifiably disadvantaged by the Respondent, Tamaki Health Services Limited (THS).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. However, THS has filed submissions in respect of costs.

**Costs**

[3] This matter involved a one and a half day investigation meeting. Ms Swarbrick, on behalf of THS, citing actual costs in excess of \$25,000.00 (excluding GST), is seeking a contribution to costs based on the notional daily tariff in the Authority for a one and a half day investigation meeting of \$6,250.00.

[4] Ms Leaupepe was legally aided during the course of the Investigation Meeting. In these circumstances it is normally the case that a recovery of a contribution to costs is unavailable unless there are 'exceptional circumstances' pursuant to s 45 of the Legal Services Act 2011 which states as follows:

- (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her

with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.

- (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

[5] The exceptional circumstances referred to in s45(2) of the Legal Services Act 2011 are set out in s 45 (3) as follows:

- (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
  - (a) any conduct that causes the other party to incur unnecessary cost;
  - (b) any failure to comply with the procedural rules and orders of the court;
  - (c) any misleading or deceitful conduct;
  - (d) any unreasonable pursuit of one or more issues on which the aided person fails;
  - (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution;
  - (f) any other conduct that abuses the processes of the court.
- (4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.
- (5) If, because of this section, no orders for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

## **Principles**

[6] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

### **15 Power to award costs**

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[7] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*<sup>1</sup>.

[8] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup>.

[9] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup> that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*<sup>4</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[10] It is also a principle that costs are not to be used to punish the unsuccessful party.

### **Determination**

[11] Ms Leaupepe was unsuccessful in all of the issues she brought before the Authority and as a consequence was not awarded the remedies which she had been seeking.

[12] There are no exceptional grounds against Ms Leaupepe raised in this matter.

[13] I have received no submission on the issue of costs from Ms Leaupepe.

### *Costs award if Ms Leaupepe had not been legally aided*

[14] I record that, if s 45(2) of the Legal Services Act 2011 had not limited Ms Leaupepe’s liability to pay costs to THS, I would have awarded costs at the notional daily tariff rate in the Authority on the basis of one and a half meeting.

[15] I accordingly indicate that I would have considered a \$6,250.00 contribution to THS’s costs to have been appropriate.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

---

<sup>1</sup> [1996] 2 ERNZ 622

<sup>2</sup> [2005] 1 ERNZ 808

<sup>3</sup> [2005] 1 ERNZ 808

<sup>4</sup> [2001] ERNZ 305