

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 126  
3117396

BETWEEN                      WARISSARA MATAJOD  
Applicant

AND                              CRAZY HORSE LIMITED  
Respondent

Member of Authority:      Claire English

Representatives:            Madison Prattley and Louise Taylor as co-counsel for  
the Applicant  
James Hobcraft, counsel for the Respondent

Submissions received:      9 March 2022 from Applicant  
23 March 2022 from Respondent

Determination:              5 April 2022

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

**Background**

[1] In my determination dated 23 February 2022, I found that the applicant, Ms Matajod, was entitled to be paid outstanding wages, outstanding holiday pay, payment for certain public holidays, compensation for lost wages, interest on unpaid monies, and a sum in compensation for hurt and humiliation.

[2] I reserved costs and encouraged the parties to resolve any issues of costs between themselves.

[3] The parties have been unable to do so. Ms Matajod has provided submissions in support of her claim for an award of costs payable to her by the respondent. In summary, in these submissions, Ms Matajod states that:

- a. The starting point is that of the daily tariff. The investigation meeting ran for one and a half days, and therefore, the starting point is the sum of \$6,250;
- b. A modest uplift should be awarded, of \$1,500, to recognise the delays caused the by the respondent's "persistent refusal" to file documents on time;
- c. Disbursements should also be awarded, being the filing fee of \$71.56, \$233.75 for translation services in relation to evidence filed in the Authority, and \$306.66 for the Authority's investigation meeting fee.

[4] Ms Matajod acknowledges that there were settlement offers exchanged between the parties, but submits that the total sum offered to her by the respondent was "significantly" lower than the total sum awarded to her by the Authority.

[5] The respondent has filed submissions in reply. In summary, the respondent states that Costs should lie where they fall, as:

- a. The respondent made a reasonable Calderbank offer prior to hearing;
- b. The applicant did not attempt to negotiate in good faith to avoid delays;
- c. The applicant's submissions were unnecessarily voluminous;
- d. The applicant was awarded less than she sought, and so had only mixed success;
- e. The applicant is represented by Community Law; and
- f. The respondent is not in a position to meet a costs award.

## **Principles**

[6] The power of the Authority to award costs is contained in s 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] 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*<sup>1</sup> as confirmed in *Fagotti v Acme and Co Limited*<sup>2</sup>. 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 party's substantive conduct.

[8] 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<sup>3</sup>.

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

## **Analysis**

[10] Costs are to be awarded following the event. The Court of Appeal has held that costs are discretionary, but nevertheless, "it is well settled that the party that lost should pay the costs of the party that won"<sup>4</sup>.

[11] The Court acknowledges that "determining which party has been successful can be problematic"<sup>5</sup>. However, it is "immaterial" that the applicant had not succeeded to the full extent of their claim because "... success on more limited terms is still success"<sup>6</sup>, and that success "limited as it was, could not have been achieved without lodging a claim in the Authority"<sup>7</sup>.

[12] In the present case, Ms Matajod was the successful party. It is correct that the Authority awarded Ms Matajod less than she claimed for hurt and humiliation in

---

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

<sup>2</sup> [2015] NZEmpC 135 at 114.

<sup>3</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)

<sup>4</sup> *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [35], quoted in *Coomer v JA McCallum and Son Ltd*, [2017] ERNZ 885.

<sup>5</sup> *Coomer v JA McCallum and Son Ltd*, [2017] ERNZ 885 at [37].

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, at paragraph [43].

particular, but she still achieved success under this head, and indeed, on all the other heads of claim.

[13] This does not amount to “mixed success” as the respondent argues. Ms Matajod was the successful party, and is entitled to an award of costs.

[14] The starting point is the daily tariff and the length of the investigation meeting. In the present case, the investigation meeting continued for one-and-a-half days. This means that the correct starting point is \$6,250.00.

[15] Both parties have submitted that the starting point should be adjusted. Ms Matajod seeks an uplift, and the respondent seeks a reduction. I will consider the various points made by each in turn.

#### *Delays by the respondent*

[16] Ms Matajod states that the respondent persistently failed to file documents on time, and this caused delays and additional costs. The respondent accepts that it has filed late, however, it says that at least some of these delays were because the applicant’s evidence was “voluminous”, and the director of the respondent needed to prioritise running the business.

[17] The respondent consistently and repeatedly failed to meet filing deadlines set by the Authority, even when those deadlines were extended. These delays resulted in the investigation meeting needing to be re-scheduled. Ms Matajod met filing deadlines, and I do not accept that Ms Matajod bears responsibility for the respondent’s lateness, especially where the respondent was legally represented.

#### *Evidence filed by Ms Matajod*

[18] By the same token, I do not accept as submitted for the respondent that any costs should be properly reduced on the grounds that Ms Matajod’s evidence was unnecessarily voluminous, to the extent that this requires a reduction in costs that might otherwise be properly payable to her. Again, the respondent had the benefit of legal representation here.

*No attempts to negotiate*

[19] The respondent has submitted that costs properly awarded to Ms Matajod should be reduced on the grounds that she did not attempt to negotiate in good faith to avoid delays. It is not entirely clear what the respondent means by this as there is no indication that Ms Matajod took any action that delayed the proceedings in the Authority and there was an attempt by the parties to negotiate a settlement which appears on its face to have been a genuine negotiation by both sides. The respondent goes on to say that “had the applicant been more reasonable in the circumstances, then it is likely that matters could have been resolved by settlement”.

[20] This appears to be a reference to the submission that Ms Matajod rejected a Calderbank offer made by the respondent, and put forward a counteroffer of her own that was rejected by the respondent.

[21] Both parties have referred to these settlement discussions in support of their respective (and opposing) approaches to costs.

[22] It is relevant to note that the respondent offered the applicant a total sum of \$8,000. In the event, the Authority awarded Ms Matajod a total sum of \$11,770.86. Ms Matajod has succeeded to a greater extent than if she had accepted the offer made to her by the respondent, so this does not suggest that any particular reduction in costs should be made.

*Community Law*

[23] Ms Matajod is represented by Community Law. Costs may be awarded on the usual basis, including where a party is represented by Community Law. The Court has noted:

I do not accept the submission made on behalf of the company that pro bono representation takes the cost risk out of litigation for the party concerned....

In my view the work of Community Law Centres and lawyers acting on a pro bono basis in this jurisdiction is indispensable for ensuring that the underlying purposes of the statute are met, including that those in the most vulnerable position have access to the Employment Court for ventilation of their employment disputes. That work should not be thwarted by adopting an unnecessarily restrictive approach to costs awards. More fundamentally, such an approach would risk undermining, not supporting, the underlying objectives of the Act. I conclude that the Court may order costs in circumstances where a party has been represented on a pro bono basis, consistently with its broad

discretion informed by the underlying purposes and objectives of the statutory scheme<sup>8</sup>.

[24] The respondent asks that any costs awarded are payable to Community Law, rather than to the applicant personally. Other suggestions by the respondent to the effect that Ms Matajod did not properly bear the financial burden of litigation due to the use of Community Law as her representative are refuted by the Court as quoted above.

[25] The applicant is still entitled to an award of costs, even when represented by Community Law<sup>9</sup>. In the absence of any particular information about any fee or costs arrangement between Ms Matajod and Community Law, it is appropriate to award costs to the applicant in the usual way. This puts the applicant in the same position as any other applicant receiving an award of costs, in that she will need to resolve the on-payment of any fees to her representative as agreed with that representative.

#### *Financial Circumstances of the Respondent*

[26] Finally, the respondent asks that no award of costs be made against it on financial grounds, including the on-going impact of the Covid-19 pandemic environment. The respondent has provided some financial accounts for February and March 2022, in support.

[27] Alternatively, the respondent has asked that any amounts awarded to Ms Matajod be payable by instalment, rather than by lump sum.

[28] This is a more appropriate response.

[29] Standing back and looking at the matter overall, the applicant's suggested starting point of \$6,250 for an award of costs is correct. This reflects the daily tariff, and I am not persuaded that there is any particular reason to depart from the normal tariff approach and take the approach that costs should lie where they fall, as contended for by the respondent.

[30] The uplift of \$1,500 requested by the applicant in recognition of the delays occasioned by the respondent is appropriate. The respondent repeatedly caused delays

---

<sup>8</sup> *Innovative Landscapes (2015) Ltd v Popkin*, [2020] ERNZ 226, at paragraphs [20] and [21].

<sup>9</sup> Or, by way of another comparison, an applicant represented by in-house counsel.

in both filing and the hearing of this matter and these had to be addressed by the applicant thus incurring additional cost. As I have already indicated, I do not accept that the applicant realistically contributed to the respondent's conduct here.

[31] The disbursements of \$611.97 are also reasonably sought. However, these must reflect the actual costs incurred by the applicant as required to bring the matter to hearing, and as it appears that the applicant was not in fact charged a meeting fee of \$306.66, this sum will not be awarded. Accordingly, disbursements of \$305.31 are awarded.

### **Orders**

[32] Accordingly, I order Crazy Horse Limited to pay to Ms Matajod the sum of \$7,750 towards costs, as well as disbursements of \$305.31. This is to be paid by instalments over 24 months, at the rate of \$335.64 per month.

Claire English  
Member of the Employment Relations Authority