

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 42  
3063339

BETWEEN                      LISA MAREE MATTHEWS  
Applicant

AND                              HOWARD MATERIAL  
HANDLING LIMITED  
Respondent

Member of Authority:      Geoff O’Sullivan

Representatives:            Johanne Greally, counsel for the Applicant  
Byron Cummins, counsel for the Respondent

Investigation Meeting:      On the papers

Submissions Received:      15 December 2021 from the Applicant  
20 January 2022 from the Respondent

Date of Determination:      17 February 2022

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      In my determination [2021] NZERA 519, I determined that the applicant, Lisa Maree Matthews, had been unjustifiably disadvantaged by the respondent, Howard Material Handling Limited (HMH) but had not been constructively dismissed during her employment with HMH.

[2]      Costs had been reserved in the hope that the parties would be able to resolve this issue between themselves. Unfortunately, they have been unable to do so and both parties have filed submissions in respect of costs.

[3]      The investigation involved a one-day investigation meeting and Ms Matthews is seeking an uplift on the notional tariff of \$4,500 because she says:

- (a) The applicant will be deprived of any compensation awarded as the applicant's legal costs (\$13,623.50) will be greater than the total of the amount awarded in compensation and the daily tariff (\$5,000 plus \$4,500).
- (b) The respondent was self-represented for the majority of the proceedings resulting in decreased costs to himself and increased costs to the applicant.
- (c) The obstructive actions of the respondent significantly increased the applicant's legal costs.
- (d) The respondent acted in bad faith and had no intention of resolving matters at the second and third mediation attended.

[4] Ms Matthews is therefore seeking:

- (a) An award of costs of \$13,623.50.
- (b) Reimbursement of her filing fee of \$71.56.

### *Principles*

[5] 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 the 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.

[6] The principles and the approach adopted by the Authority in which an award of costs is made are well settled and set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>1</sup> as confirmed in *Fagotti v ACME & Co. Ltd.*<sup>2</sup> The principle set out in the above cases is that costs are 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

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

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

disapproval of the unsuccessful party's conduct. However, in effect, Ms Matthews is asking for indemnity costs.

[7] As noted by the applicant, the Authority generally adopts a tariff-based approach. It has a discretion to raise or lower the tariff depending on the circumstances. In this case, the matter was disposed of in a day and the tariff would normally equate to \$4,500. Costs normally follow the event. Both parties had some degree of success. Ms Matthews succeeded in her claim for unjustified disadvantage but failed in her claim for constructive dismissal.

*Summary of the parties' submissions*

[8] Ms Matthews has submitted that because the respondent represented itself significant extra work was caused in the rearrangement and sorting of documentation. Ms Matthews invites me to consider that HMH's behaviour in that regard was deliberate. Further, it is submitted that how the parties conducted themselves in matters before the Authority has relevance to cost issues and it is submitted that in this case, that forcing Ms Matthews to attend a mediation with an employer who did not intend to make any offer towards settlement resulted in additional legal costs.

[9] HMH denies that it did anything to add to costs. In fact, it points to Ms Matthews' admission to altering documents to recreate an original and says it attempted in good faith to resolve the cost issues between the parties. HMH makes other submissions which in essence blame the applicant for any delays.

[10] Having read the submissions in full, I am not persuaded that there is any reason to depart from the Authority's normal tariff approach. Although unsuccessful in her claim of constructive dismissal, Ms Matthews was successful in her disadvantage claim.

[11] Accordingly, I order Howard Material Handling Limited to pay Ms Matthews the sum of \$4,500 towards costs together with the filing fee of \$71.56.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**