

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 101  
3106672

BETWEEN	HARLEY RANGITAAWA- KAUI Applicant
AND	UBP LIMITED Respondent

Member of Authority: Nicola Craig

Representatives: Dave Cain, advocate for the applicant  
Jo Douglas and Suzie England-Hall, counsel for the respondent

Submissions received: 14 December 2021 from the applicant  
4 March 2022 (accepted) from the respondent

Date of determination: 21 March 2022

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] The Authority issued a determination in a claim by Harley Rangitaawa-Kauī against UBP Limited (UBP or the company).<sup>1</sup>

[2] Mr Rangitaawa-Kauī was successful in his claims that he was disadvantaged by unjustifiable action by UBP and was unjustifiably dismissed by the company. UBP was ordered to pay Mr Rangitaawa-Kauī \$38,437.38 lost wages and \$20,000 compensation.

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<sup>1</sup> *Harley Rangitaawa-Kauī v UBP Limited* [2022] NZERA 527.

[3] The parties were to seek to resolve costs and a timetable set if they were unable to do so. Mr Rangitaawa-Kauī's representative sought discussion on costs but received no response from UBP.

[4] Submissions seeking costs were lodged on behalf of Mr Rangitaawa-Kauī. No submissions were received from UBP within the timetable. Prior to this, the company had been represented in the Authority by a UBP staff member.

[5] A challenge to the Authority's determination was filed in the Employment Court along with an application for a stay of proceedings. The Court granted the stay of the previous determination, requiring payment into Court.

[6] Having become aware of the challenge, the Authority clarified that it sought UBP's response on costs but nothing was provided within the time set.

[7] UBP instructed counsel on 1 February 2022 and it was only later that counsel became aware of Mr Rangitaawa-Kauī having sought costs in the Authority. Counsel advised that UBP had not been aware that it had the opportunity to lodge submissions in reply. Submissions were lodged along with an extension of time sought. In the absence of any objection on behalf of the other party, on 3 March 2022 the Authority granted the additional time and accepted submissions on behalf of UBP.

[8] The Authority then sought the parties' views on whether costs should now be dealt with. Mr Rangitaawa-Kauī sought to have costs determined now whereas UBP opposed that course. I decided to proceed with costs, as is often the Authority's practice where a challenge has been lodged.

### **What principles apply to costs?**

[9] The Authority's power under to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The power is discretionary with its use governed by principles.<sup>2</sup> These include that costs will usually follow the event and the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience.

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<sup>2</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

### **What costs should be awarded here?**

[10] Mr Rangitaawa-Kauai succeeded in both his claims and was awarded remedies. He is entitled to a contribution towards his costs.

[11] When considering costs, the starting point is the Authority's daily tariff; \$4,500 for the first day of an investigation meeting. The investigation meeting here took almost a full day with written submissions lodged after the meeting. I accept the start point of \$5,375, being a day's tariff (\$4,500) plus a quarter of a following day's tariff of \$3,500.

[12] Mr Rangitaawa-Kauai seeks an uplift in the daily tariff on the basis of a *Calderbank* offer being in place and UBP's refusal to engage in the costs issue, having generated the expense of lodging a costs memorandum. An invoice has been provided indicating he has incurred around \$10,000 in costs post-mediation, inclusive of GST and \$85.76 disbursements. Other than the Authority's filing fee, the disbursements are not broken down into individual items.

[13] Submissions for UBP emphasise the need to avoid substantial costs awards and oppose a substantial uplift or the award of indemnity costs.

#### *Calderbank offer*

[14] On 23 September 2020, subsequent to the parties attending mediation, a *Calderbank* offer was made by email. It was clearly marked "Without Prejudice Save as to Costs", refers to it being a *Calderbank* offer and spells out the effect of that. Mr Rangitaawa-Kauai's offer to settle was made well before substantial costs were incurred in preparation for and attendance at the investigation meeting. UBP was allowed sufficient time for consideration and acceptance of the offer.

[15] There is no indication of UBP attempting to make any offer in response.

[16] Mr Rangitaawa-Kauai offered to settle this matter for payment of \$10,000 compensation and a contribution to his costs. Other terms included the recording of Mr Rangitaawa-Kauai's departure as a resignation, a certificate of service and standard non-disparagement and confidentiality provisions. There was no indication for UBP of any problems with these other terms.

[17] UBP was ordered to pay substantially more than it could have settled for under the *Calderbank* offer; \$38,437.38 gross lost wages and \$20,000 compensation. Its

rejection of a very reasonable offer warrants a substantial uplift from what would otherwise have been awarded in costs

*Conduct contributing to cost*

[18] Conduct which adds unnecessarily to the time taken for a matter can be taken into account although this is not as punishment of the party.

[19] UBP's conduct contributed somewhat to the costs incurred in this matter. As is evident from the previous determination, there were complications with UBP's statement in reply. It acknowledged dismissal and asserted reasons for it, but the witness statements and evidence at the meeting did not match those assertions.<sup>3</sup> This resulted in some additional time at the investigation meeting being needed to teasing out these issues.

[20] A modest increase in costs is warranted on this basis.

**Orders**

[21] UBP Limited is ordered to pay Mr Rangitaawa-Kauī \$7,500 as a contribution to his costs and \$71.56 for the Authority's filing fee within 28 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority

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<sup>3</sup> *Harley Rangitaawa-Kauī v UBP Limited* [2022] NZERA 527 at [61] – [63] and [66] – [68].