

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 200
3119397

BETWEEN SETH-MICHAEL RAYMAN
Applicant

AND R&E ELECTRICAL
LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: Philip Ross, counsel, and Brent Tomich, advocate for
the Applicant
Shelley Kopu, counsel for the Respondent

Submissions received: 24 March 2023 from the Applicant
12 March 2023 from the Respondent

Determination: 20 April 2023

COSTS DETERMINATION OF THE AUTHORITY

A. Seth-Michael Rayman is ordered to pay R&E Electrical Limited the sum of \$5,500 as a contribution to its costs, no later than 4 pm Friday 26 May 2023.

[1] In an earlier determination of the Authority, I dismissed Seth-Michael Rayman's claim of unjustified constructive dismissal against R&E Electrical Limited (R&E Electrical or the company) because it was not established that the company had breached a duty it owed to Mr Rayman regarding his privacy.¹

[2] The question of costs was reserved and the parties were encouraged to resolve the matter between themselves. If they were unable to do so, R&E Electrical was to

¹ *Seth-Michael Rayman v R&E Electrical Limited* [2023] NZERA 10.

lodge and serve a memorandum within 21 days of the date of issue of my determination. Mr Rayman would then have 14 days to lodge a memorandum in reply.

[3] At the investigation meeting, Mr Rayman was represented by Mr Ross whose city was affected by Cyclone Gabrielle. Given counsel's personal circumstances, an extension of time was granted to Mr Rayman for the filing of his costs submissions.

The company's costs submissions

[4] Briefly stated, Ms Kopu submits that R&E Electrical was wholly successful in defending all aspects of Mr Rayman's claim. Counsel submits that the case was unmeritorious and that the company was put to additional cost when Mr Rayman included Russell Jane, a director and shareholder of the company, and an HR advisor, as second and third respondents respectively. However, this procedural issue was resolved by the Authority at a case management conference on 9 July 2021 which saw Mr Jane and the HR advisor being removed as respondents. This occurred at a relatively early stage in the proceedings before any further additional costs were incurred.

[5] Ms Kopu further submitted that Mr Rayman rejected a Calderbank offer that was presented to him prior to the parties preparing for and attending the investigation meeting. I note that the Calderbank offer was made on a without prejudice basis save as to costs and consisted of a payment by R&E Electrical of \$3,000 to Mr Tomich for his costs of representation and \$1,000 to Mr Rayman to compensate him for his hurt and humiliation. The total payment of \$4,000 payment could be split in a different way according to Mr Rayman and his advocate's preference.

[6] Ms Kopu advises that her client incurred costs of \$19,876.37 in defending the applicant's claims and that the costs directly associated with the investigation meeting amounted to \$15,665.80. The costs associated with preparing, serving and filing the company's costs submissions was \$1,600. Ms Kopu submits that R&E Electrical having both of its company directors (who are husband and wife) at the investigation meeting affected the operations of what is a small family-owned business.

[7] Mr Kopu seeks a full uplift of costs to \$10,000.

Mr Rayman's costs submissions

[8] On Mr Rayman's behalf, Mr Tomich objects to a full uplift in costs asserting that \$7,278.30 of Ms Kopu's invoices appear to have been incurred before proceedings became active in the Authority. However, it is noted that Mr Rayman's Statement of Problem was lodged on 21 September 2020 and the earliest invoice before me from Ms Kopu is dated 30 September 2020. I am satisfied that Ms Kopu's legal costs have been reasonably and actually incurred.

[9] Mr Tomich further submitted that, due to the Covid-19 lockdown in Auckland in 2021, there may have been a doubling up of work as a result of earlier investigation meeting dates being adjourned. However, even so, adjournments do happen from time and time and for various reasons. The notional daily tariff takes this into account. While the impact of the 2021 Covid-19 lockdown in Auckland resulted in a delay in the hearing of this case, there was a need for the investigation meeting to proceed in person rather than by audio-visual link.

[10] The Calderbank letter Ms Kopu relies on for an uplift in costs was sent to Mr Tomich on 10 December 2020 at 7.55 am but was open for acceptance only to 3.00 pm the following day. Mr Tomich submits that this was not a reasonable amount of time for the offer to be considered. I disagree. The Calderbank letter makes mention that the offer of settlement was the same as that proposed earlier by R&E Electrical when the parties attended mediation on 8 December 2020. When considered in context, the Calderbank letter came at the end of an earlier settlement negotiation between the parties all of whom will have been well familiar with what was being proposed. This explains the apparent short response time in the Calderbank letter which was reasonable given what had been discussed two days earlier. Had Mr Rayman accepted the Calderbank offer, both he and his former employer would have been better off.

Determination on costs

[11] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 to award costs. The principles and approach adopted by the

Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.² Those principles relevantly include:

- The discretion regarding costs is to be exercised in accordance with principle and not arbitrarily.
- Equity and good conscience are to be considered on a case-by-case basis.
- Costs are not to be used to punish or express disapproval for the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event (i.e., the unsuccessful party will normally be required to contribute to the costs of the successful party).
- *Calderbank offers* may be taken into account when setting costs.
- Awards will be modest.

[12] I consider that the circumstances are appropriate for an award of costs to be made to R&E Electrical. It was wholly successful in its defence. However, this is not to say that Mr Rayman's claim was unmeritorious because the investigation meeting established that only Mr Jane had seen the material which Mr Rayman was concerned had breached his privacy. Prior to that, Mr Rayman was operating under the mistaken but genuinely held belief that others may have seen the material as well.

[13] A determination of costs is not designed to punish Mr Rayman in the way that he conducted his case, which includes joining Mr Jane and his HR representative as second and third respondents. It is also well-established that costs follow the event and that such awards will also be modest. While I accept Mr Tomich's submission that Mr Rayman is a young man with no obvious sources of wealth, for the reasons given above, his rejection of a reasonable Calderbank letter does justify an uplift in costs against him.

[14] Taking all the circumstances into account, including that the investigation meeting took one full day, I find that the notional daily tariff for the first day of an investigation meeting of \$4,500 plus an uplift of \$1,000 for the Calderbank offer to be an appropriate award. I therefore order Seth-Michael Rayman to pay R&E Electrical

² *PBO Ltd (formerly Rush Security Ltd v Da Cruz)* [2005] 1 ERNZ 808.

Limited the sum of \$5,500 as a contribution to its costs no later than 4 pm Friday 26
May 2023.

Peter Fuiava
Member of the Employment Relations Authority