

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 487
3116812

BETWEEN BRAYDON TAYLOR
 Applicant

AND BAYLEY DEVELOPMENTS
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Alex Kersjes, advocate for the Applicant
 Hamish Burdon, advocate for the Respondent

Submissions: From the Respondent on 13 September and from the
 Applicant on 27 September 2022

Determination: 28 September 2022

COSTS DETERMINATION OF THE AUTHORITY

A. Costs are to lie where they fall.

[1] Bayley Developments Limited (BDL) sought an order for costs after the Authority declined a personal grievance claim by Braydon Taylor. The Authority found BDL acted justifiably in dismissing Mr Taylor.¹ BDL said its claim for costs was strengthened by Mr Taylor having turned down an earlier settlement offer. Its offer would have left him better off than the outcome he achieved through the Authority determination, which was nothing.

[2] However Mr Bradley also sought costs because he succeeded in his claim for a penalty to be imposed on BDL for making an unauthorised deduction from his final pay and for not promptly providing wages and time records his representative requested. BDL was ordered to pay a penalty of \$1,000 for those breaches of employment

¹ *Taylor v Bayley Developments Limited* [2022] NZERA 437.

standards. The order required the penalty to be transferred to the Crown account. No part of it was to be paid to Mr Taylor.

Factors in assessing costs

[3] The Authority’s jurisdiction to order a party to contribute to costs incurred by another party is exercised by applying some well-established “basic tenets” to the particular circumstances of the case.²

[4] Those tenets recognise that a successful party should receive a contribution to its reasonably incurred costs and expenses; costs should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional ‘daily rate’ or ‘tariff’ as a starting point to assess costs.

[5] Undue rigidity in applying that tariff is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may take account of settlement offers made by either party, the financial means of a liable party to pay costs, the preparation required in particularly complex matters and whether conduct of any party unnecessarily increased the costs they incurred.

Assessment

[6] In this case the assessment of costs requires particular attention to the notion that “costs follow the event” and to the need to take account of settlement offers that, if accepted, would have delivered a better result for the party to whom the offer was made.

[7] While BDL was successful in its response to the allegation that it acted unjustifiably in making its decision to dismiss Mr Taylor, it did not succeed in resisting his claim that the company had breached employment standards in two events following that dismissal – making a deduction and delay in providing records. This weighed against BDL’s submission that it should be awarded the Authority’s usual daily tariff of \$4,500 for a one-day investigation.

² Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

[8] Mr Taylor, in submissions made on his behalf, accepted that any costs award made in his favour should be reduced to take account of the settlement offer BDL made him but did not accept at that time.

[9] Both parties had proposed settlement offers during this employment dispute. Those made by Mr Taylor, to settle his grievance, were not relevant given the Authority's finding that his dismissal was justified. An offer BDL made on 29 March 2022 was relevant. It offered to pay Mr Taylor \$2,500 to settle his claim. The offer was made as a way of saving it from the cost of taking part in the investigation meeting rather than an acceptance of any liability. In declining that offer Mr Taylor counterclaimed by seeking a larger settlement amount which BDL did not accept.

[10] Because Mr Taylor succeeded in part of his claim, and could not have done so without lodging his application in the Authority, I have concluded that what has been called the "nuanced assessment of competing considerations" does not support making an award of costs to BDL in this case.³ Mr Taylor's success regarding the penalty claim did not however overcome the downward adjustment of costs required because he had not accepted BDL's 29 March settlement offer.⁴ If he had accepted that offer he would have saved on the considerable costs he incurred in pursuing his claims right through an Authority investigation, amounting to more than \$7,500, and he would have gained \$2,500 more than he got from its outcome. In those circumstances, no award of costs is made to him either.

[11] Because no order for costs is made to either party, the costs they each incurred in relation to this matter 'lie where they fall', that is they have to pay their own costs themselves.

Robin Arthur
Member of the Employment Relations Authority

³ *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156 at [37].

⁴ *Blue Star Printing Group (NZ) Ltd v Mitchell* [2010] NZCZ 385 at [20].