

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 434  
3184159

BETWEEN	ROBERT WHITLEY Applicant
AND	FIRSTLIGHT FROZEN LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Mike Harrison, advocate for the Applicant Adam Simperingham, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	24 July 2023 from Applicant 18 July 2023 from Respondent
Determination:	11 August 2023

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

**Substantive Determination**

[1] On 13 July 2023, the Authority issued a determination in this matter. Mr Whitley's claim of unjustified dismissal was not upheld, however, I found that he suffered an unjustified disadvantage and awarded compensation for this. In addition, Mr Whitley was awarded payments for work done on certain public holidays, other entitlements under the Holidays Act 2003, and penalties were awarded against Firstlight Frozen Limited (Firstlight).

[2] The parties were encouraged to resolve any issue of costs between them, and the determination made reference to its usual practice of applying the daily tariff to determine costs.

[3] The parties have not been able to resolve costs between themselves and have filed memoranda accordingly.

[4] Firstlight seeks a determination that costs should lie where they fall. Mr Whitley seeks an award of contribution to costs of \$4,500, being the equivalent of the daily tariff.

### **Analysis**

[5] The power of the Authority to award costs is contained in clause 15 of schedule 2 of the Employment Relations Act 2000 (the Act).

[6] 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, not to be used as a punishment, and that costs usually follow the event.

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

[8] Even when there is “mixed success” a party is entitled to costs.<sup>4</sup>

[9] The investigation meeting in this matter was for one-and-a-half days and was held in person. Both parties attended together with their respective counsel and witnesses.

[10] There has been mixed success. While I acknowledge that Mr Whitley was unsuccessful in his claim for unjustifiable dismissal, he did enjoy success in other aspects. It is on this basis that Mr Whitley seeks costs of \$4,500, being the equivalent of the tariff for a single day, when the investigation meeting ran for one-and-a-half days.

---

<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> *William Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156.

[11] In these circumstances, I consider Mr Whitley is entitled to costs as the successful party. While Mr Whitley was not completely successful in his claims, I do accept that the investigation meeting was needed to address the issues in dispute between the parties.

[12] As Mr Whitley was only partially successful, he cannot expect to receive the same level of contribution to costs entitlement he would have received if he was completely successful. For the reasons set out above, I consider it appropriate to order Firstlight to contribute to Mr Whitley's costs in the sum of \$3,125,00, which is half of the tariff rate for an investigation meeting of this duration, and which I consider is in proportion to his success.

### **Orders**

[13] I order Firstlight Frozen Limited to pay to Mr Whitley the sum of \$3,125.00 as a contribution towards his costs within 28 days of the date of this determination.

Claire English  
Member of the Employment Relations Authority