

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 167  
3201899

BETWEEN LEIGH WORTH  
Applicant

AND ALISON NICHOLSON  
Respondent

Member of Authority: Jeremy Lynch

Representatives: Grace Moore, counsel for the Applicant  
LesleyAnn Thomas, advocate for the Respondent

Submissions and further information received: 1 March 2024 from the Applicant  
Further information provided on 26 February 2024 by the Respondent

Date of Determination: 21 March 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Authority issued a determination on 16 February 2024, which found that Leigh Worth was unjustifiably dismissed by Alison Nicholson and awarded her lost wages and compensation.<sup>1</sup>

[2] The parties were encouraged to resolve the question of costs but were unable to do so. Ms Worth has applied to the Authority for an award of costs.

**Submissions from the parties**

[3] As set out at [113] and [114] of the Authority's substantive determination, Ms Worth was given 14 days in which to lodge her costs memorandum, and Ms Nicholson was given a further 14 days within which to lodge her costs

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<sup>1</sup> *Leigh Worth v Alison Nicholson* [2024] NZERA 87.

memorandum. The parties were advised that costs would not be considered outside of this timetable unless prior to leave to do so has been sought and granted.

[4] Ms Worth provided submissions on costs in accordance with the Authority's timetable direction.

[5] Ms Nicholson did not provide any submissions as to costs. However, her advocate advised the Authority on 26 February 2024 that Ms Nicholson was not in a financial position to meet the awards ordered in the Authority's substantive determination, and that because of this Ms Nicholson had instructed her accountant to commence the process to have herself declared bankrupt. No information was provided to support this position.

[6] As part of its substantive investigation, the Authority invited Ms Nicholson to provide information as to her financial position. She declined to do so then, and did not provide anything to support her advocate's claim that she had commenced an application for bankruptcy.

[7] Impecuniosity can be a relevant factor in assessing costs. However, as there was nothing before the Authority as to Ms Nicholson's financial position, no assessment could be made as to her ability to meet a costs award.

[8] For Ms Worth it was submitted:

- the daily tariff plus uplifts were sought;
- actual costs were sought, supported by the provision of her counsel's timesheet which recorded attendances to the value of over \$20,000.00 (including GST); and
- a *Calderbank* offer, and the respondent's conduct were identified as grounds for uplifts.

[9] As noted above, Ms Nicholson was to lodge her costs submissions by 15 March 2024, but chose not to lodge anything, or make any comment as to Ms Worth's costs submissions.

### **Costs principles**

[10] The Authority has power under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) to award costs. This power is discretionary and must be

used in a principled manner.<sup>2</sup> Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscious jurisdiction;
- Equity and good conscience are to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
- Costs generally follow the event; and
- Frequently, costs are judged against a notional daily tariff.<sup>3</sup>

[11] Another well settled principle guiding the Authority's approach is that costs awards will be modest.

### **Costs outcome**

#### *Starting point*

[12] As Ms Worth was the successful party in the substantive matter, she is entitled to a consideration of costs. The investigation meeting lasted one day, making \$4,500.00 the starting point under the Authority's notional daily costs tariff.

#### *Attempts to resolve*

[13] A *Calderbank* offer (that is, a without prejudice save as to costs offer) was made on Ms Worth's behalf on 9 March 2023. This offered to settle for compensation of \$17,000 under s 123(1)(c)(i) of the Act and lost wages of one week, together with a contribution to legal costs. The offer was open-ended, with no specified expiry, and was made well in advance of the 26 October 2023 investigation meeting. This was a valid *Calderbank* offer.

[14] On 23 March 2023 Ms Nicholson, through her advocate, declined the settlement proposal and made no counterproposal.

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<sup>2</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808, and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135.

<sup>3</sup> Employment Relations Authority Te Ratonga Ahumana Taimahi Practice Direction <https://www.era.govt.nz/assets/uploads/practice-direction-ofera>.

[15] The amounts awarded by the Authority to Ms Worth in respect of compensation and lost wages are in excess of the amounts contained in her Calderbank offer. Ms Worth's offer was made at a point where significant costs to both parties could have been avoided had it been accepted.

[16] I consider that an uplift of \$1,000 is justified.

### *Conduct*

[17] Ms Worth submits that Ms Nicholson's conduct prior to the investigation meeting resulted in additional and unnecessary attendances by her counsel.

[18] I am satisfied that the respondent's failure to lodge her witness statements in accordance with the Authority's directed timetable meant that a number of additional attendances were required. Ms Nicholson's repeated failures to respond to enquiries from the Authority and from Ms Worth's counsel, and her failure to comply with the Authority's timetable directions have resulted in unnecessary expenses for Ms Worth. As such, I consider a further uplift of \$500 is justified.

### *Actual legal costs and expenses*

[19] Ms Worth seeks actual costs incurred from the date on which her Calderbank offer was rejected (23 March 2023) to the date of the last submissions and information provided to the Authority following the investigation meeting (being 2 February 2024). Ms Worth seeks a total of \$18,023.00 (plus GST). In support of this, a copy of her counsel's timesheet was provided. This shows all recorded attendances from 23 March 2023 until 2 February 2024. Ms Worth submits that all costs incurred by her were reasonable and necessary.

[20] A timesheet is not an invoice and does not satisfy the Authority that all attendances have been charged to Ms Worth.

[21] In her costs submissions Ms Worth appears to be seeking costs for preparing and attending mediation. Only in very rare and limited circumstances would the Authority consider awarding mediation costs. The circumstances of this matter do not justify an award of mediation costs.

[22] In addition, Ms Worth seeks costs associated with the preparation of a common bundle of documents. Whilst it is correct that a common bundle of documents was

provided to the Authority at the investigation meeting, Ms Worth had not been directed by the Authority to compile a common bundle of documents. The preparation of a common bundle was Ms Worth's decision. It is therefore not reasonable that she is awarded costs associated with this.

[23] Furthermore, many of the steps which Ms Worth submits were necessary and reasonably incurred (such as costs associated with drafting her statement of problem, preparing witness statements, preparation for and attendance at the investigation meeting etc), are all steps reflected in the in the Authority's notional daily tariff.

[24] In the circumstances, I decline to award actual costs.

*Outcome*

[25] The starting point of \$4,500.00, together with the uplift of \$1,000.00 set out above at [16], and the additional uplift of \$500.00 set out above at [18] totals \$6,000.00. In addition, as the successful party it is appropriate that Ms Worth is reimbursed for the cost of the Authority's filing fee.

[26] Within 28 days of the date of this determination, Alison Nicholson is ordered to pay Leigh Worth:

- (a) \$6,000.00 as a contribution to her costs; and
- (b) \$71.55 for the Authority's lodgement fee.

Jeremy Lynch  
Member of the Employment Relations Authority