

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 586  
3236079

BETWEEN COURTNEY BROOKER  
Applicant

AND JAPANESE CAR PARTS  
LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Daniel Church, counsel for the Applicant  
David France, counsel for the Respondent

Submissions Received: 26 August 2024 from the Applicant  
9 September 2024 from the Respondent

Date of Determination: 3 October 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Ms Courtney Brooker, succeeded with most but not all of the claims she made in these Authority proceedings. The Authority's substantive determination was issued on 31 July 2024.<sup>1</sup> The parties were encouraged to resolve costs by agreement, but that did not occur.

[2] Ms Brooker sought an award of costs based on uplift being made to the notional starting tariff plus reimbursements of her actual disbursements.

[3] The respondent submitted that there was no reason to depart from the Authority's usual daily tariff rate approach, so it said Ms Brooker's costs should be limited to \$4,500.

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<sup>1</sup> *Brooker v Japanese Car Parts Limited* [2024] NZERA 467.

## **Legal position**

[4] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Act. Costs are discretionary, with the discretion to be exercised by the Authority on a principled basis. Costs must not be used to punish a party, but conduct that has unreasonably increased the other party's costs may be reflected in the amount of costs awarded.

[5] The Authority usually adopts a 'notional daily tariff' based approach to costs. The current tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day. The notional starting tariff is then adjusted to reflect the particular circumstances of each case.

[6] When assessing costs in this matter the Authority has had regard to the costs assessment principles identified by the Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz* and *Fagotti v Acme & Co. Limited*.<sup>2</sup>

## **Issues**

[7] The following issues are to be determined:

- (a) Should the applicant be awarded costs?
- (b) What costs and disbursements has the applicant claimed?
- (c) What is the notional starting tariff for assessing costs?
- (d) Should any adjustments be made to the notional starting tariff?
- (e) What costs and disbursements should the applicant be awarded?

### **Should the applicant be awarded costs?**

[8] There is no reason to depart from the usual principle that a successful party is entitled to a contribution towards their actual legal costs.

### **What costs and disbursements has the applicant claimed?**

[9] The applicant has claimed legal costs for the one day investigation meeting that was held in Auckland on 21 May 2024 and for the preparation of her costs submissions.

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<sup>2</sup> *PBO Limited* [2005] ERNZ 808 and *Fagotti* [2015] NZEmpC 135.

She pointed out that she had attempted to resolve costs with the respondent, but that the respondent had not replied or made any counter offer to her.<sup>3</sup>

[10] The applicant sought an award of costs in her favour of between \$10,000 - \$12,000 plus \$665.27 to reimburse her for her actual disbursements.

### **What is the notional starting tariff for assessing costs?**

[11] This matter involved a one-day investigation meeting, so the notional starting tariff for assessing costs was \$4,500.

### **Should the notional starting tariff be adjusted?**

#### *The applicant's submissions*

[12] The applicant submitted that the notional starting tariff should be increased to reflect the following factors, which had caused her to incur increased legal costs that would not otherwise have been necessary:

- (a) The respondent's conduct lengthened the time required for the investigation meeting, by putting her to the burden of proof on each of her claims, despite its own evidence proving some of her claims and/or there being incontrovertible documented evidence in support of those claims.<sup>4</sup>
- (b) The applicant needed to prepare for a key witness who did not appear at the investigation. The applicant's counsel prepared for a two-day investigation meeting which was only completed within one day because Mr Ali Hassani did not attend. His non-attendance was not communicated to the applicant or Authority until the day of the investigation meeting, so preparation was undertaken with the expectation he would need to be cross-examined.
- (c) The respondent unreasonably rejected two without prejudice save as to costs (Calderbank) offers.

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<sup>3</sup> Above, n1, at [179].

<sup>4</sup> Above, n1 at [8].

*The respondent's submissions*

[13] The respondent submitted that no uplift to the notional starting tariff was appropriate. Although the applicant was successful on most of her claims, she did not succeed on all of them.

[14] The respondent said the fact this matter had been set down for two days of investigation meeting time, but only took one day demonstrated that the respondent had not unreasonably extended the length of the investigation meeting.

[15] The respondent said it was entitled to mount a comprehensive defence to all of the claims against it, so an uplift to reflect its approach in that regard was not reasonable nor appropriate.

[16] The respondent disputed that there should be an uplift because the applicant was required to prepare for Mr Hassani to give evidence, even though he did not appear at the investigation meeting.

[17] The respondent said the conduct it was criticised for in the Authority's determination was irrelevant to the assessment of costs, because costs were not to be used to punish or express disapproval of an unsuccessful party's conduct.

[18] It said the remedies awarded had compensated the applicant for her successful claims, so costs were not to be used as an opportunity to punish or deter the unsuccessful party for conduct in the employment relationship that the Authority had ultimately determined was unjustified or did not comply with that party's statutory or contractual obligations.

[19] The respondent said that its rejection of the applicant's offer to resolve costs by agreement was reasonable because her costs offer had required it to compromise its ability to challenge the Authority's substantive determination.

*Should the notional starting tariff be decreased?*

[20] The Authority is not aware of any factors that should result in the notional starting tariff being reduced and the parties did not identify any. Accordingly, there are no factors that warrant a reduction being made to the notional starting tariff.

*Should there be an increase to the notional starting tariff?*

[21] The Authority accepted the applicant's submissions that the manner in which the respondent elected to conduct its case unnecessarily and unreasonably increased her actual legal costs.

[22] While the respondent was legally entitled to put the applicant to formal proof of each of her claims, doing so unreasonably increased her actual costs when the respondent's own evidence from the outset fundamentally undermined its defence of her claims.

[23] There were two relevant Calderbank offers that were unreasonably rejected by the respondent that need to be reflected in the level of costs awarded. There were also three other Calderbank offers that were irrelevant to an assessment of costs.

[24] The two relevant Calderbank offers were made by the applicant:

- (a) The applicant's first Calderbank offer dated 3 April 2023 stated that she would seek full indemnity costs from the expiry of the offer on the basis that her concerns could have been resolved on reasonable terms without the need for the parties to progress to the Authority. Ms Brooker's statement of problem was lodged with the Authority on 12 June 2023, so considerable legal costs would have been saved had it been settled prior to that occurring;
- (b) The applicant's second Calderbank offer dated 3 April 2024 proposed that the parties resolve their matters without the need for an Authority hearing, which she stated, "will significantly increase costs and time for both parties". The offer remained open until 5pm on 10 April 2024, at which time it expired. This offer was made prior to the applicant commencing substantive preparation work for the Authority's investigation meeting, which she advised the respondent the offer was intended to avoid.

[25] The applicant recovered more from the Authority than she had proposed to settle her claims for in April 2023 and April 2024.

[26] It is appropriate for 'a steely approach' to be taken to the unreasonable rejection of the applicant's first two Calderbank offers. Considerable time and cost would have

been saved by both parties had either of the applicant's Calderbank offers been accepted. There would have been no need for the applicant to have lodged proceedings with the Authority if the first offer had been accepted, and there would have been no need for the parties to have prepared their evidence and attended the investigation meeting had her second Calderbank offer been accepted.

[27] The Authority has avoided recording the terms of these without prejudice offers in this costs determination, because it is mindful that the respondent has lodged a challenge to its substantive determination with the Employment Court. This costs determination will therefore likely be put before the Court before the challenge has been heard.

[28] Two of the three irrelevant Calderbank offers were made by the respondent, because they offered the applicant less than she was awarded by the Authority. The first Calderbank offer was made on 15 May 2024 and the second on 28 May 2024. This first offer was made four working days before the Authority's investigation meeting and the second offer was made one week after the investigation meeting had been held.

[29] The third irrelevant Calderbank offer was made by the applicant regarding costs, but it required the respondent to forgo its challenge rights, which it has subsequently pursued.

[30] The notional starting tariff needs to be increased to \$10,000 to reflect that the respondent's unreasonable rejection of two Calderbank offers and the manner in which it elected to conduct its defence of the applicant's claims unreasonably and unnecessarily increased her actual legal costs.

### **What if any costs and disbursements should be awarded?**

#### *Costs awarded*

[31] The respondent is ordered to pay the applicant \$10,000 plus GST towards her actual legal costs incurred for the substantive matter and for these costs submissions.

#### *Disbursements awarded*

[32] The respondent is ordered to reimburse the applicant \$71.55 for her filing fee plus \$593.72 for the actual costs she incurred in having her recordings transcribed. It was reasonable and necessary for her to do so in order to support her claims. The

transcripts assisted both parties and the Authority greatly during the investigation meeting, so she should be reimbursed for transcribing them.

### **Orders**

[33] Within 28 days of the date of this determination, the respondent is ordered to pay the applicant \$10,665.27, being a \$10,000 contribution towards her actual legal costs plus \$665.27 to reimburse her actual disbursements.

Rachel Larmer  
Member of the Employment Relations Authority