

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 184  
3203859

BETWEEN	ALAN BURT Applicant
AND	TAWAROA FARMING LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Kate Henry, counsel for the Applicant No appearance for the Respondent
Submissions received:	6 February 2024 from Applicant No submissions from Respondent
Determination:	28 March 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] On 24 January 2024, the Authority issued a determination in this matter, finding that the applicant had been unjustifiably dismissed from his employment, and that unlawful deductions had been made from his wages and the respondent had failed to provide records as required by the Employment Relations Act 2000 and the Holidays Act 2003.

[2] In that determination, the parties were encouraged to resolve any issue of costs between them, and the Authority 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. The applicant has filed a memorandum accordingly, which was copied to the representatives of the respondent. Despite follow up from the Authority, the respondent has not replied

or made any submissions on costs. They are now well out of time to do so. Accordingly, I will proceed to determine the matter, as both parties have an interest in these proceedings being finally disposed of.

### **The Tariff**

[4] 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>1</sup>.

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

[6] The investigation meeting in this matter was for one day, and was held in person. The applicant attended together with his representative and a witness, and Mr Marjoribanks appeared for the respondent (although there was no response from the respondent as to costs).

[7] In the present case, the applicant seeks a contribution to his costs of \$10,000, being made up of the daily tariff for 1 day at \$4,500, plus an uplift of a further \$5,500, as the applicant says that the respondent unreasonably rejected a Calderbank offer at a relatively early stage in the proceedings.

### **Principles**

[8] The power of the Authority to award costs is contained in cl 15 of schedule 2 of the Employment Relations Act 2000 (the Act) which states:

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

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<sup>1</sup> For further information about the factors considered in assessing costs, see: <https://www.era.govt.nz/determinations/awarding-costs-remedies/>

[9] 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>2</sup> as confirmed in *Fagotti v Acme and Co Limited*<sup>3</sup>. The principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

[10] The applicant was the successful party in this matter, and was awarded a total of \$22,000. He is therefore entitled to an award of costs.

[11] As stated above, the investigation meeting in this matter was for one day and was held in person. This means that the starting point for an assessment of costs is the daily tariff for a one day hearing, being \$4,500.

[12] I must then consider whether circumstances suggest an uplift in the tariff is warranted, as requested by the applicant.

[13] A Calderbank offer that has been unreasonably rejected is grounds for an uplift.

[14] In the present case, a Calderbank offer was made on 5 May 2023, which the applicant advises occurred after the parties had attended mediation. It was also prior to the Authority's case management conference setting out timetabling directions on 4 July 2023. The applicant's offer was for a total of \$13,975. Given that it was made before the case management conference in this matter, I accept the applicant's submission that it was made before the parties incurred any substantial costs preparing for the investigation meeting.

[15] The respondent did not reply to this offer. I accept that this was an unreasonable refusal of the offer in those circumstances.

[16] The applicant states that as a result of the respondent's refusal, he has incurred a further \$10,500 in costs. He now asks for an uplift of \$5,500, being the equivalent of more than an additional day at tariff rates.

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<sup>2</sup> [2005] 1 ERNZ 808.

<sup>3</sup> [2015] NZEmpC 135 at 114.

[17] In the circumstances, my view is that an uplift equivalent to half a day based on the second day's tariff is more appropriate, that is, an uplift of \$1,750. This amounts to a total contribution to costs of \$6,250.00. Orders are made accordingly.

### **Orders**

[18] Tawaroa Farming Limited is ordered to pay to Alan Burt within 28 days of the date of this determination the sum of \$6,250 as a contribution to costs.

Claire English  
Member of the Employment Relations Authority