

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 232
3213639

BETWEEN	GERRY CAREY Applicant
AND	ALAN SMITH First Respondent
AND	PETER WALSH Second Respondent
AND	OUCH-IE POWDER COMPANY LIMITED Third Respondent
AND	BRINNSON RESEARCH LIMITED Fourth Respondent

Member of Authority:	Shane Kinley
Representatives:	Applicant in person Alan Smith, for the respondents
Investigation Meeting:	On the papers
Submissions and further information:	Up to 6 February 2025
Determination:	29 April 2025

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a preliminary determination dated 25 November 2024 I found Gerry Carey had not established that he was employed by any of the respondents, rather I considered it more likely than not the real nature of any relationship was a contracting one between Mr Carey and either Alan Smith or Brinnsion Research Limited (BRL). As I had found

Mr Carey had not established he was an employee of the respondents, I therefore did not have jurisdiction to consider further the other issues raised by Mr Carey.¹

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves.² Unfortunately, they have been unable to do so, and Mr Smith now seeks costs.

[3] The information provided by Mr Smith was treated as an application for costs and was compiled and forwarded to Mr Carey for response on 23 January 2025, with 14 days provided for him to make any submissions in response. No response was provided by Mr Carey by the allotted timeframe of 6 February 2025 and I now proceed to determine costs in relation to this matter as he was advised I would.

[4] In the preliminary determination I indicated:³

As the investigation meeting for this matter took half a day, my preliminary view is the notional daily rate for half of the first day is the appropriate starting point for a determination of costs. Given when the respondents' counsel were engaged and the amount of documentation lodged by the respondents, actual costs may be limited. Should the respondents seek costs, proof of actual costs incurred will be required.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Contribution to Costs

[6] The power of the Authority to award costs is contained in cl 15 of sch 2 of the Act. 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.⁴

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

¹ *Carey v Smith and ors* [2024] NZERA 702 at [47] and [48].

² *Ibid* at [49].

³ *Ibid* at [52].

⁴ For further information about the factors considered in assessing costs, see: <https://www.era.govt.nz/determinations/awarding-costs-remedies/>

[8] 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*⁵ as confirmed in *Fagotti v Acme and Co Limited*.⁶ 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.

Submissions

[9] Mr Smith provided information supporting an application for costs in December 2024, including an invoice from the respondents' counsel for the investigation meeting for \$1,000 excluding GST and a invoice for administration fees and travel costs in the amount of \$6,700. His application appeared to seek reimbursement of the full amount of these costs.

Analysis

[10] I consider Mr Smith is entitled to recover a reasonable contribution to the legal costs he incurred of \$1,000 and fix this amount at \$750. This is less than the quantum of costs which I indicated in my preliminary view at paragraph [4] above could have been appropriate however appropriately reflects the limited engagement of the respondents' counsel. While a modest amount, I consider this to be a reasonable contribution to costs actually and reasonably incurred.

[11] Mr Smith also sought \$6,700 based on an invoice dated 8 May 2024 which said it was for an "Admin fee" related to this matter of \$5,500 and travel totalling \$1,200 at "30km per trip". Mr Smith said his health condition meant "he was unable to do required paperwork/communication for this case". This statement was repeated on the invoice.

[12] While Mr Smith provided evidence of his medical condition, I am not satisfied the services covered by the 8 May 2024 invoice are recoverable as a disbursement as the nature of the admin services invoiced was not specified. In addition, the basis for claiming travel costs is unclear, given the investigation meeting was held by AVL.

⁵ [2005] 1 ERNZ 808.

⁶ [2015] NZEmpC 135 at 114.

[13] I decline to order any further payment based on the 8 May 2024 invoice.

Orders

[14] Gerry Carey is ordered to pay to Alan Smith within 28 days of the date of this determination the sum of \$750 as a contribution to costs.

Shane Kinley
Member of the Employment Relations Authority