

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 270
3118172

BETWEEN	SHANE CLELAND Applicant
AND	ATLAS CONCRETE LIMITED Respondent

Member of Authority: Claire English

Representatives: Danny Gelb, advocate for the Applicant
James Turner, counsel for the Respondent

Submissions received: 24 May 2022 from Applicant
7 June 2022 from Respondent

Determination: 23 June 2022

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] In my determination dated 12 May 2022, I found that the applicant, Mr Cleland, was entitled to be paid for arrears of wages and holiday pay as well as compensation, in the sum of \$15,315.78.

[2] I reserved costs, and encouraged the parties to resolve any issues of costs between themselves.

[3] The parties have been unable to do so.

[4] The applicant has submitted that the correct starting point is that there were one and three quarter days of hearing time, and the starting point for a costs award should be the daily tariff, equating to \$7,125.00. The applicant also submits that there be an

additional uplift of \$5,250, due to “the unreasonable rejection of the applicant’s offers to settle.” The applicant refers to various Calderbank offers in support of his application for this uplift.

[5] The respondent has submitted that there was one and one quarter days of hearing time, leading to a correct starting point of \$5,375 with reference to the daily tariff. In addition, the respondent states that it was reasonable in rejecting the applicant’s settlement offers, as (without taking costs into account) they were offers to settle of more than the applicant was awarded by the Authority, albeit I note by small amounts that would not exceed the daily tariff amounts.

[6] 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 days¹.

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

[8] Turning first to the duration of the investigation meeting. The investigation meeting was set down in advance. There was a change in Covid-19 Alert levels very shortly before the date set for the investigation meeting. As a result, Mr Cleland and his witnesses, who had expected to attend the investigation meeting in person, were no longer able to do so. This resulted in counsel attending the Authority on the first scheduled date, and arrangements being made for the investigation meeting to be held at a later date, with attendance via AVL. No investigation meeting took place on the first scheduled date, and neither party was at fault, as this simply resulted from steps needed in compliance with the relevant alert levels.

[9] The applicant has claimed for tariff costs of one quarter of a day in relation to the first scheduled date. The respondent says no costs are properly payable as no investigation meeting took place.

¹ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

[10] As no investigation meeting occurred, and the time occasioned in making arrangements for hearing at a later date was short, I do not consider that any tariff costs are properly payable in respect of the first scheduled date.

[11] The investigation meeting subsequently took place over two days. The respondent says that the investigation meeting lasted for one and a quarter days. The applicant says that the investigation meeting lasted for one and a half days².

[12] My records indicate that the investigation meeting lasted for one and a half days. Accordingly, the starting point is the daily tariff, calculated for one and a half days, which amounts to \$6,250.00.

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

15 Power to award costs

- (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.

[14] 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*³ as confirmed in *Fagotti v Acme and Co Limited*⁴. 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 parties conduct.

[15] The applicant was the successful party. There is no reason why he should not be awarded costs at the usual daily tariff rate. I note that the respondent responsibly

² For avoidance of doubt, the applicant's total claim for tariff costs for one-and-three-quarter days, is made up of claim for a quarter-day for the first scheduled date, plus a claim for one-and-a-half days for the investigation meeting itself.

³ [2005] 1 ERNZ 808.

⁴ [2015] NZEmpC 135 at 114.

accepts this, leaving aside the disagreement as to the correct calculation of the hearing duration as set out above.

[16] The remaining question is whether the applicant might also be entitled to an uplift in those costs. The grounds for such an uplift are said to be that the respondent unreasonably refused settlement offers, and that this justifies a total uplift of \$5,250, in a matter where I have found that the appropriate daily tariff rate amounts to \$6,250 (amounting to a total costs award to the applicant of \$12,357). This is proportionally a large uplift.

[17] The applicant has provided evidence of substantial costs invoices from his advocate. For avoidance of doubt, there is no application for full indemnity costs, and neither would the facts of this case support such a claim.

[18] Standing back, and considering the matter as a whole, the applicant has not put forward any compelling argument as to why there should be departure from the normal daily tariff rate. No conduct by either party made the hearing more lengthy or difficult. Although the respondent did reject two settlement offers from the applicant, those settlement offers were, by a small margin excluding costs, more than the Authority awarded the applicant, and rejection of these was not unreasonable.

Orders

[19] I am not persuaded that there is any reason to depart from the normal tariff approach. Accordingly I order Atlas Concrete Limited to pay to Mr Shane Cleland the sum of \$6,250 towards costs, together with the filing fee of \$71.56.

Claire English
Member of the Employment Relations Authority