

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 38  
3107956

BETWEEN                      MALIA SOANA COCKER  
   Applicant  
  
AND                                TONGAN HEALTH SOCIETY INC  
   Respondent

Member of Authority:        Lucia Vincent  
  
Representatives:              No appearance by the Applicant  
   Amelia Schaaf, counsel for the Respondent  
  
Submissions Received:      No submissions received from the Applicant  
   14 November 2022 from the Respondent  
  
Date of Determination:      26 January 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Directions of Authority**

[1]     The applicant did not attend the investigation meeting scheduled for 11 October 2022 at Auckland. The Authority dismissed the applicant's claims by way of directions dated 1 November 2022.

[2]     The Authority directed parties to lodge and serve memoranda on costs according to a timetable which was directed to be copied to the applicant at her personal address (but was not). To address this, the Authority subsequently sent the directions to the applicant and extended the timeframe for a further 14 days for the applicant to provide submissions.

[3]     The respondent has provided submissions; the applicant has not. I have considered the respondent's submissions and determined the issue of costs on the papers.

## Respondent's Submissions

[4] The respondent seeks an uplift of the notional daily tariff rate to claim an amount for a full day's hearing of \$4,500 for the following reasons:

- (a) The hearing would have lasted more than half a day had the applicant shown up.
- (b) The conduct of the applicant contributed to costs unnecessarily. For example:
  - (i) The applicant waited nearly three years from raising her personal grievance to file her application in the Authority. The delay created more work to collect emails and read the applicant's personnel file to recall what happened.
  - (ii) The applicant failed to discontinue her application earlier when the respondent made an offer by way of correspondence dated 10 February 2021 suggesting she discontinue proceedings without issue as to costs (walk away offer). If the applicant accepted the walk away offer, then it could have saved both parties further expense.
  - (iii) The respondent undertook more work to respond to the applicant's grievance due to the grounds expanding.
  - (iv) The applicant pursued unsustainable claims including claims against an individual, parts of which were invalid.
  - (v) Further costs incurred in preparing for the Authority hearing following the walk away offer including providing a statement in reply and briefs of evidence responding to the applicant's two briefs of evidence – costs the respondent says amounted to \$4,783.50 (in addition to the costs incurred up until that point of \$4,053.75).
  - (vi) Most of the respondent's witnesses were management personnel who travelled to the Authority for the investigation meeting.

[5] The respondent has provided eight invoices showing costs incurred including work writing correspondence, preparing pleadings and evidence, and an invoice from an expert witness, totalling \$8,837.25.

## Costs Principles

[6] Clause 15 of Schedule 2 of the Employment Relations Act 2000 gives the Authority discretion to order any party to a matter to pay to another party such costs and expenses as the Authority thinks reasonable.

[7] If unsuccessful, a party will usually have to contribute to the costs of the successful party, as well as meeting their own costs.

[8] The daily tariff applied by the Authority sets the starting point from which relevant factors and principles may guide an upward or downward adjustment of the amount of costs awarded. Practice Note 2 for the Authority sets the current tariff for costs at \$4,500 for the first day of any matter.<sup>1</sup>

[9] The Employment Court has endorsed the average daily tariff approach of the Authority and relevant principles governing costs in the Authority.<sup>2</sup> These include considering whether the conduct of the parties increased costs unnecessarily (warranting an adjustment up or down), without compromising the Authority's otherwise modest approach to costs.<sup>3</sup>

[10] Abandoning an appeal at a very late stage after another party's legal representative has undertaken reasonable preparation can result in an appropriate contribution to costs.<sup>4</sup> Although an imprecise science, common sense suggests the closer in time a party withdraws proceedings before an investigation meeting, the more likely parties will have fully prepared (and more reasonable to have incurred costs).<sup>5</sup>

[11] In the context of Calderbank offers, the Employment Court has commented on the disconnect between imposing significant costs awards on unsuccessful litigants and statutory imperatives underlying employment legislation - giving "full force" to Calderbank offers in the Authority can create an undesirable "chilling effect" on employees pursuing grievances.<sup>6</sup> The

<sup>1</sup> See: <https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf>.

<sup>2</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [43-47] and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [108].

<sup>3</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz*, above n 3, at [43-47].

<sup>4</sup> See for example *R & T Ostern Trading v Hunter EmpC* Auckland AC23B/01, 25 June 2001 at [10 to 11] where the Court balanced the late withdrawal factor with a limited ability to pay, awarding \$750.

<sup>5</sup> See for example *Eden v Rutherford & Bond Toyota Ltd* [2010] NZEmpC 43, at [8] where the Court did not disturb the Authority's costs determination of \$4,500 where the applicant withdrew the day before an investigation meeting.

<sup>6</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, at [95].

Court preferred the practice of the Authority of adjusting the daily rate that would otherwise apply in the circumstances of a case after assessing an appropriate contribution.<sup>7</sup>

[12] Whether or not a walk away offer warrants an uplift in costs akin to a Calderbank offer depends on the extent of any compromise contained within it.<sup>8</sup> A walk away offer with “a monetary value” may be relevant if it amounts to a “genuine compromise.”<sup>9</sup> A walk away offer made early in proceedings does not mean a party who subsequently loses must pay increased costs.<sup>10</sup>

[13] On a claim an applicant had “pursued hopeless points,” the Employment Court has acknowledged some cost can be incurred in responding to such points but not substantial costs noting that, “if a point is demonstrably hopeless, it will generally not involve a significant application of resources to respond to it.”<sup>11</sup>

[14] The Employment Court has accepted the well-established principle the Authority may consider a party's financial circumstances when determining costs, which may result in no costs being awarded if it would result in undue financial hardship.<sup>12</sup>

## **Conclusion on Costs**

### *Costs*

[15] The applicant failed to attend an investigation meeting that did not go ahead. This resulted in the application being dismissed. I accept the respondent incurred costs in preparing for the investigation meeting. I do not accept an award of costs should match or exceed what the respondent would have received had the investigation meeting proceeded and the respondent successfully defended the application.

[16] Acknowledging the respondent accepted the investigation meeting would have lasted “more than half a day,” I consider a contribution of a quarter of the notional daily tariff a reasonable amount to recognise the preparation undertaken prior. Applying that as a starting

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<sup>7</sup>Above n 4, at [98].

<sup>8</sup>*Foai v Air New Zealand Ltd* [2013] NZEmpC 50 at [19].

<sup>9</sup>*O'Hagan v Waitomo Adventures Ltd* [2013] NZEmpC 58, at [27].

<sup>10</sup>*Hira Bhana & Co Ltd v PGG Wrightson Ltd* [2007] NZCA 342 at [26].

<sup>11</sup>Above n 4, at [102].

<sup>12</sup>Above n 4, at [103].

point, I have then considered whether any conduct of the applicant warrants an uplift, keeping in mind the principles that apply to the exercise of the Authority's discretion to award costs.

[17] To the extent the respondent seeks an uplift due to expanded grounds and the applicant pursuing points without merit, I decline to award an uplift. The Authority cannot express concluded views about points pursued in a matter it did not investigate.

[18] Although the applicant waited until weeks prior to the end of the three-year statutory timeframe to bring her claim, I do not accept the delay created additional work warranting an uplift in costs (even if I considered the delay warranted an uplift). I would expect parties to review relevant emails and a personnel file when preparing for proceedings.

[19] I do not consider steps taken to prepare for an investigation meeting such as drafting statements of evidence and a statement in reply warrant an uplift. A respondent takes such steps as a matter of course and are accounted for in the tariff awarded already.

[20] I am not convinced the walk away offer warrants an uplift in costs in the circumstances. The respondent's walk away offer did not offer the applicant a genuine compromise containing financial value for the applicant. It was not unreasonable for the applicant to continue with her application in the circumstances.

[21] Taking the above factors into account, I consider a contribution of a quarter of the notional daily tariff remains reasonable and an appropriate amount to account for the preparation undertaken prior to the investigation meeting.

[22] In exercising my discretion, I have kept in mind the modest approach to costs in the Authority. I have also weighed the reference to the financial means of the applicant disclosed in her statement of evidence.<sup>13</sup>

[23] Overall, I find it is appropriate for the applicant to contribute towards costs of the respondent in the amount of a quarter of the notional daily tariff given her failure to show up to the investigation meeting, dismissal of her application, and reasonable preparation undertaken by the respondent up until that point.

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<sup>13</sup>At [48-54] where the applicant disclosed being out of work for five months and struggling to support her five children with her husband.

*Disbursements*

[24] I accept the respondent incurred expense in instructing an expert to give evidence for which it paid two invoices totaling \$2,081 (made up of one invoice for \$1,862.50 and another for \$218.50). I award this expense as a disbursement.

*Orders*

[25] The applicant must pay the respondent within 28 days of this determination, a total of \$3,206 made up of the following amounts:

- (a) Costs of \$1,125; and
- (b) Disbursements of \$2,081 for expert evidence.

**Lucia Vincent**  
**Member of the Employment Relations Authority**