

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 771
3115717

BETWEEN GARTH CUNNINGHAM
Applicant

AND HEALTHALLIANCE NZ
LIMITED
Respondent

Member of Authority: Davinnia Tan

Representatives: Applicant in person
Richard Upton, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 23 June and 12 July 2023 Respondent
6 July 2023 from Applicant

Determination: 20 December 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] On 7 June 2023 the Authority issued a determination in this matter where it dismissed the applicant’s claims in full and reserved the issue of costs.¹

[2] In that determination, Member Dumbleton provided the respondent the option to make an application for costs within 14 days of the date of his determination, and any reply by the applicant to be made within 14 days of any application made.

[3] On 23 June 2023, the respondent made an application for a costs award of \$10,000 from the applicant.

[4] This determination has not been issued within the three-month period required by s 174C(3) of the Employment Relations Act. The Chief of the Authority has decided

¹ *Cunningham v healthAlliance NZ Limited* [2023] NZERA 296.

that exceptional circumstances exist such as to allow this determination to be issued outside of the three-month timeframe required by s 174C(3) of the Act.

Submissions

Respondent

[5] Counsel for the respondent submitted that costs should follow the event and the respondent has incurred legal costs of over \$20,000.

[6] Counsel noted that the investigation meeting lasted two days and therefore in applying the Authority's daily tariff, the starting point should be \$8,000 in favour of the successful party.

[7] Counsel further noted that the applicant had unreasonably rejected a Calderbank offer that the respondent made on 19 May 2021 following mediation which would have placed the applicant in a better position than continuing with litigation. The Calderbank offer included a tax-free payment of \$8,000 and an expanded certificate of service which was rejected. As such the respondent seeks an uplift of \$2,000. Counsel submits that this will represent about less than 50% of the costs the respondent actually incurred, excluding GST.

[8] Finally counsel noted that as the applicant remains in ongoing employment, meeting a costs award should not be an issue but was open to a payment plan if this was required.

Applicant

[9] The applicant rejects that a proposal of settlement was made on the issue of costs. The applicant also submitted that the respondent's Calderbank offer can be disregarded because it was not meaningful.

[10] He further submitted that the respondent is more resourced, and any costs award will cause undue hardship. As such he seeks to have the costs lie where they fall.

Respondent's reply

[11] The respondent does not accept the applicant's assertion that the Calderbank offer should be disregarded, as it would have provided the applicant with a far more favourable outcome than the applicant achieved by pursuing with his claim which was unsuccessful in its entirety.

[12] The respondent does not consider that any costs award will result in undue hardship in the absence of supporting evidence.

Principles

[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*² as confirmed in *Fagotti v Acme and Co Limited*.³ 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, and as the Court of Appeal has stated several times, a “steely approach” is to be adopted when considering Calderbank offers.⁴

[15] 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.⁵

[16] The daily tariff is usually taken as a starting point, although is not to be used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.⁶

Analysis

[17] Having reviewed the substantive determination and the parties’ submissions on the matter, I agree that as the successful party, the respondent is entitled to costs. I also

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

³ *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 114.

⁴ *Health Waikato v Elmsly* [2004] 1 ERNZ 172 (CA) at [53] and *Blue Star Print v David Mitchell* [2010] NZCA 385 at [20].

⁵ For further information about the factors considered in assessing costs, see:

www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

⁶ Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

agree that as the investigation meeting was held over two days, the starting point is \$8,000 in line with the Authority's daily tariff.

[18] I acknowledge the applicant's submissions that he was unrepresented. However this does not negate the fact the respondent has incurred actual legal costs of \$20,000.

[19] Although I note there was non-compliance on the respondent's part with the Authority's timetable directions, Member Dumbleton accepted there had been factors outside counsel's control that contribute to the situation and accepted this did not cause any delay or obstruction.⁷

[20] In the absence of supporting evidence, I do not accept the applicant's assertion that a costs award would cause undue hardship. In determining the matter, I must balance these submissions against the factors above and the well-established principle that costs are to be modest.

[21] I consider that the respondent's Calderbank offer would have put the applicant in a better position than what resulted from the Authority's substantive determination. Despite the applicant's submissions, a proposal to settle the matter was made. It was made in the form of a Calderbank offer, that is on a "without prejudice save as to cost" basis.

[22] Stepping back and weighing up the absence of evidence to support the applicant's submissions against the actual legal costs incurred by the respondent, I consider that an uplift of \$2,000 is reasonable and appropriate to account for the Calderbank offer which was unreasonably rejected by the applicant. Together with the daily tariff, I therefore consider that the sum of \$10,000 is an appropriate and a relatively modest award of costs in these circumstances.

Orders

[23] Accordingly, I order Mr Garth Cunningham to pay the healthAlliance NZ Limited \$10,000 as a contribution to its legal costs within 28 days of the issuing of this determination.

Davinnia Tan
Member of the Employment Relations Authority

⁷ *Cunningham v healthAlliance NZ Limited* [2023] NZERA 296 at para [77].