

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 112  
3118792

BETWEEN            RICHARD GUERRA  
                                 Applicant  
  
AND                    WILSON-GRANGE  
                                 INVESTMENTS LIMITED  
                                 Respondent

Member of Authority:    Rachel Larmer  
  
Representatives:         Simon Greening, counsel for the Applicant  
                                 James Turner, counsel for the Respondent  
  
Investigation Meeting:    On the papers  
  
Submissions Received:    18 March 2022 from the Applicant  
                                 18 March 2022 from the Respondent  
  
Date of Determination:    25 March 2022

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]    The Authority issued a substantive determination on 4 March 2022 involving the applicant Richard Guerra and the respondent Wilson-Grange Investments Limited (the substantive determination).<sup>1</sup> Mr Guerra, succeeded on his three unjustified disadvantage claims but his unjustified dismissal claim was unsuccessful.

[2]    This determination addresses costs for the substantive matter.

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<sup>1</sup>    *Guerra v Wilson-Grange Investments Limited* [2022] NZERA 70.

**Authority's investigation**

[3] Although the Authority encouraged the parties to resolve costs by agreement, that has not occurred. In accordance with the costs timetable set by the Authority in paragraph [114] of its substantive determination each party has applied for a costs award in their favour.

[4] Both parties filed costs submissions that asked the Authority to award them (and not the other party) costs. Mr Guerra sought \$3,500 costs, while the respondent sought \$4,500 costs. The respondent further said that any award of costs in favour of Mr Guerra should be offset by an award of costs to the respondent or should be nil or greatly reduced.

[5] The Authority has assessed costs in this matter by conducting an 'on the papers' investigation, based on the submissions filed by each party.

**Issues**

[6] The following issues are to be determined;

- (a) Which party is the successful party?
- (b) Should the successful party be awarded costs?
- (c) What is the notional starting tariff for assessing costs in this matter?
- (d) Should the notional starting tariff be adjusted to reflect the particular circumstances of this matter?
- (e) What costs and disbursements should be awarded?

**Legal position**

[7] The Authority derives its power to award costs from cl 15 of the second schedule of the Employment Relations Act 2000 (the Act). Although costs are discretionary the unsuccessful party will normally be required to contribute to the successful party's actual legal costs.

[8] The Authority usually adopts a notional daily tariff-based approach to assessing costs. The tariff for a one-day investigation meeting is currently \$4,500, which drops to \$3,500 for each subsequent day of investigation meeting time.

[9] This determination has had regard to the ‘costs assessment’ factors that have been identified by the Employment Court in *PBO Ltd (formerly Rush Security Ltd)<sup>2</sup> v Da Cruz* and *Fagotti v Acme & Co. Ltd.<sup>3</sup>* These are so well known there is no need to set them out again here.

#### **Which party is the successful party?**

[10] Although Mr Guerra did not succeed on every claim he pursued, he was successful on three of his four claims. The Authority determines that Mr Guerra is the successful party in this matter for the purposes of assessing costs.

[11] The respondent’s submission that its success in defending the unjustified dismissal claim made it the successful party was not accepted. The dismissal grievance was only one element of the overall case, so it would be unreasonable to conclude in such circumstances that the respondent was the successful party in this matter.

[12] This finding is consistent with the Employment Court’s decision in *Coomer v JA McCallum & Son Limited* that made it clear that mixed success is nevertheless success for the purposes of awarding costs.<sup>4</sup>

[13] The fact that Mr Guerra did not succeed on every claim that he put before the Authority did not mean that he was not the successful party. Mr Guerra was required to pursue Authority proceedings in order to achieve the success that he obtained as a result of the Authority’s substantive determination. He is therefore the successful party.

#### **Should the successful party be awarded costs?**

[14] There is no reason to depart from the usual principle that costs will generally follow the event, meaning the successful party should be awarded costs.

[15] The mixed success that Mr Guerra had is a factor that can be appropriately accounted for by the Authority making adjustments to the notional starting tariff, in accordance with its usual costs assessment process. Mr Guerra’s mixed success is not a factor that should disqualify

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

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

<sup>4</sup> [2017] NZEmpC 156.

him from being awarded any costs in this particular case, given the extent of the success he had.

**What is the notional starting tariff for assessing costs in this matter?**

[16] This matter involved a one day investigation meeting, so the notional starting point for assessing costs is \$4,500, being the current one day tariff.

**Should the notional starting tariff be adjusted?**

[17] In accordance with its usual costs assessment procedure, having identified a notional starting tariff, the Authority is required to assess whether the notional starting tariff needs to be adjusted to reflect the particular circumstances of this matter.

*Should the notional starting tariff be increased?*

[18] The notional starting tariff of \$4,500 needs to be increased to \$4,900 to reflect that the Authority's investigation meeting involved a slightly longer than usual day of investigation meeting time and a slightly shorter than usual lunch break.

[19] The Authority considered that increasing the notional starting tariff by \$400 (to \$4,900) will appropriately reflect the additional investigation meeting time that was involved in this matter in comparison to the normal length of a one day investigation meeting that the tariff has been set to reflect.

[20] The Authority was not aware of any other factors that would warrant an increase being made to the notional starting tariff, and the parties have not identified any. There were no Calderbank offers made by either party in this matter.

*Should the notional starting tariff be decreased?*

[21] The Authority considered that the increased notional starting tariff of \$4,900 needed to be further adjusted to reflect Mr Guerra's mixed success.

[22] It is appropriate to reduce the tariff to reflect that Mr Guerra failed to establish any of the elements of his unjustified dismissal grievance. Mr Guerra's lack of success on that aspect of his claims put the respondent to additional time and cost, so it is a factor that needs to be appropriately reflected in the overall costs assessment.

[23] Contrary to the respondent's submissions, its mixed success did not warrant a separate award of costs in the respondent's favour.

[24] The Authority finds that a 30% decrease (being \$1,470) to the \$4,900 tariff would appropriately reflect that Mr Guerra did not succeed on his unjustified dismissal claim. That reduces the tariff to \$3,430.

[25] The Authority noted that Mr Guerra's actual legal costs, as per invoices he submitted with his submissions, were \$3,794.38 and he has sought \$3,500 costs. That meant the adjusted tariff was less than his actually incurred costs, so no further reduction was necessary.

[26] The respondent's submission that Mr Guerra should not be awarded the \$3,500 costs he has claimed because that effectively gave him indemnity costs does not succeed.

[27] The Authority's position on costs is well known and is a widely understood part of Authority proceedings. The fact that a party has engaged representation that results in the amount they have been billed lining up closely with the Authority's daily costs tariff does not create an indemnity costs situation.

[28] Mr Guerra has not been awarded indemnity costs, costs have been assessed and awarded on a tariff basis.

[29] A reduction to reflect the mixed success involved in this matter was all that was needed. Mr Guerra did not act in an inappropriate manner regarding the pursuit of his claims, so there was no reasonable basis to further reduce any costs he might be awarded.

### **What costs and disbursements should be awarded?**

[30] Mr Guerra as the successful party was entitled to an award of costs, because he would not have achieved the financial awards that were made in his favour if he had not these proceedings.

[31] After standing back and reflecting on the entire circumstances of this matter, and having taken into account the factors the Employment Court has identified that the Authority must consider when assessing costs the Authority orders the respondent to contribute \$3,430 towards Mr Guerra's actual legal costs plus \$71.56 to reimburse his filing fee.

[32] The Authority was satisfied that amount of costs was an appropriate contribution towards Mr Guerra's actual legal costs in all of the circumstances.

**Costs order**

[33] Within 28 days of the date of this determination, the respondent is ordered to pay Mr Guerra costs and disbursements totalling \$3,501.56, consisting of \$3,430 towards his actual legal costs plus \$71.56 to reimburse him for his filing fee.

**Rachel Larmer**  
**Member of the Employment Relations Authority**