IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 251
3112573

	BETWEEN	CAROLYN ION Applicant
	AND	MĀORI INVESTMENTS LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Mary Breckon, counsel for the Respondent
Memoranda received:	From the respondent on 4 May and 19 May 2022 and from the Applicant on 18 May 2022
Determination:	16 June 2022

COSTS DETERMINATION OF THE AUTHORITY

A. By no later than 28 days from the date of this determination Carolyn Ion must pay Māori Investments Limited $10,250 as a contribution to its costs of representation in this proceeding.

[1] Carolyn Ion was unsuccessful in pursuing a personal grievance about Māori Investments Limited (MIL) dismissing her on the grounds of redundancy.[1] The parties were unable to resolve the issue of costs for those proceedings between themselves. MIL sought an Authority determination of costs.

Factors in assessing costs

[2] The Authority's jurisdiction to order one party to contribute to costs incurred by the other party is exercised by applying some well-established "basic tenets" to the

[1] *Carolyn Ion v Māori Investments Limited* [2022] NZERA 152

particular circumstances of the case.[2] Those tenets recognise that a successful party should receive a contribution to its reasonably incurred costs and expenses; costs should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional 'daily rate' or 'tariff' as a starting point to assess costs. Undue rigidity in applying that tariff is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may take account of settlement offers made by either party, the financial means of a liable party to pay costs, the preparation required in particularly complex matters and whether conduct of any party unnecessarily increased the costs they incurred.

[3] The Authority's current tariff is $4,500 for the first day of any investigation meeting and $3,500 a day if it goes on longer. This amount is taken as an appropriate starting point for assessing a reasonable contribution to the costs incurred by a party in preparing for and taking part in an investigation meeting.

The parties' views

[4] In its memorandum on costs MIL asked the Authority to increase its daily tariff to take account of two settlement offers made to Ms Ion that would have left her in a better position than she achieved through the Authority's eventual determination declining her personal grievance claim. MIL also said a late request by Ms Ion to include an additional witness, which then resulted in a delay in holding the investigation meeting, had unnecessarily increased its costs.

[5] MIL said it incurred costs of $41,968 from October 2020 to the end of the Authority's investigation meeting in January 2022. It provided invoices, with narrations, detailing how those costs were incurred. It sought an order for indemnity costs or, alternatively, an uplift of the Authority's usual daily tariff to $9,500, that is up to a total of $19,000 for the two-day investigation meeting held.

[6] Ms Ion prepared her own memorandum in reply on costs as she said she could no longer afford the services of her previous representatives. She said her own costs for representation were $40,268. She said she had sold her car earlier this year to help pay those fees, which she was paying by instalments to her former advocates.

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[2] Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

[7] She said funding her case had caused her real financial hardship and requiring her to pay costs to MIL "would be a grossly disproportionate punishment" for her as she had "truly believed" her case warranted consideration by the Authority. She said losing her case had intensified the heavy physical and mental toll of the past two years on her.

[8] Ms Ion said she had declined settlement offers from MIL as she "reasonably believed that the Authority would rule in my favour" and she would get more than MIL offered her. She also said her conduct had not unnecessarily delayed the case. Rather, she said the rescheduling of the investigation meeting was necessary as she believed the late witness had important information to be tested at the meeting and the Authority member had agreed to allow that witness to give evidence.

[9] Ms Ion asked for costs to 'lie where they fall' (that is each party meet just its own costs) and for no order of indemnity costs to be made. If the Authority did apply its tariff, she asked that total costs be set at $6,250, being the tariff amounts for 1.5 days. She also asked that any consideration of an uplift in the tariff be balanced against her current financial position and the personal toll on her health.

Assessment

[10] MIL is entitled to an award of costs having successfully defended itself against the allegation that it acted unjustifiably in its decision to disestablish the position that Ms Ion worked in and, when she declined an alternative position that was available, dismissing her on the grounds of redundancy.

No indemnity costs

[11] This is not a case where an order for indemnity costs should be made, either in regard to Ms Ion's rejection of settlement offers or the delay caused by the late addition of a witness. This was well short of the kind of outstandingly bad behaviour needed to warrant such an order. The late witness, whose evidence alleged redundancy decisions were made with ulterior motives, had to be considered as part of the overall justice of the proceeding. Some adjustment of costs is necessary in relation to the settlement agreements. That is considered later in this determination.

No uplift for unnecessarily increased costs

[12] The addition of a late witness did however result in some additional costs for MIL. Three witnesses giving evidence in support of the company's actions had already lodged their witness statements. As a natural justice requirement, they had to be given the opportunity to supplement their statements to respond to allegations made by the late witness. They used that opportunity and, consequently, MIL incurred some additional legal costs in assisting preparation of those supplementary statements. This increase in MIL's costs would not have been necessary if Ms Ion had not belatedly raised her allegation, supported by the late witness, that the company's decisions about her position were motivated by some personal dislike of her and other staff members.

[13] However, Ms Ion's account was that she was not aware of what the late witness had to say until after the witness statements from her and other witnesses had been lodged. The allegations about the motive for the redundancy decisions, although not subsequently upheld in the Authority's determination, was a serious one and had to be investigated once raised. It could not therefore be fairly said to have unnecessarily increased costs, however inconvenient the late evidence proved to be for both parties.

[14] Neither was the delay in the investigation meeting sufficient to say costs were unnecessarily increased. The original investigation meeting dates were vacated only a few days before that meeting was due to be held. The representatives, and the Authority member, then had the inconvenience of having to refresh their earlier preparation closer to the dates when the investigation meeting was eventually held. However the value of the earlier preparation cannot have been lost sufficiently to say later completion of preparation amounted to an unnecessary increase in costs.

Failure to accept reasonable settlement offers warrant an uplift of costs

[15] Of more and considerable concern was the effect of Ms Ion having declined two offers made to her by MIL to settle her personal grievance. Either offer, if accepted, would have left her far better off than the outcome achieved by going ahead with the investigation.

[16] Quite early on, in September 2020, MIL offered to pay Ms Ion $5,000 distress compensation and a $5,000 contribution to her legal costs. In June 2021, around the time that the topic of evidence from a late witness arose, MIL made a further settlement offer to pay Ms Ion $15,000 distress compensation.

[17] Both offers, in my assessment, were reasonably made for the purpose of resolving issues between the parties and with the potential benefit of saving both Ms Ion and MIL from spending more in litigation costs than any likely outcome would achieve. Both offers were made on a without prejudice basis and properly notified Ms Ion that, if she did not accept them and proceeded with her claim, MIL could produce evidence of the offers in support of an application for costs.

[18] The rationale for the September 2020 offer was set out in a detailed letter to Ms Ion's representative at the time and proved to be very close to the conclusions reached in the Authority's determination. It noted MIL had consulted with its employees over options for restructuring, adjusted proposals in light of their feedback and had offered Ms Ion redeployment to an equivalent newly-created position. Instead of accepting that position (or one of two others that were also available if she wished to consider them), Ms Ion opted to take five months remuneration, comprising paid notice and redundancy compensation.

[19] The June 2021 offer also correctly predicted the Authority's eventual determination would support MIL's account of the facts.

[20] In that light Ms Ion's submission that she reasonably refused those offers, because she sincerely believed in her case and thought the Authority would rule in her favour, could not be accepted. At the time Ms Ion had to consider those offers she had the assistance of advocates in a business describing themselves as employment law specialists. The employment law referred to includes the legal principles about the effect on costs of settlement offers made but not accepted. The Court of Appeal has given a clear direction that a "steely approach" on costs needs to be taken in cases pursued for the purpose of vindication but resulting in a monetary outcome inferior to an earlier settlement offer.[3] The court's direction applies to the Authority's exercise of its discretion to award costs.[4] Accordingly, after declining those offers, Ms Ion pursued her case at her own risk of an increased costs award against her if her claim was not successful.

[21] Reviewing a sample of Authority determinations where an uplift in costs has been made to give weight to reasonable settlement offers shows such adjustments

[3] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [19].
[4] *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [109].

ranging between $1,500 and $4,000. The final costs outcome in such cases was, of course, also subject to other potential adjustments for factors such as party conduct, unnecessarily incurred costs and the financial means of the party ordered to pay costs.[5]

[22] In Ms Ion's case, balancing the need for costs in the Authority to be modest with the requirement for a "steely approach" to cases where the unsuccessful party had earlier rejected a better settlement offer, the appropriate uplift on the total tariff amount (that is for the two days of the investigation meeting) was $2,250. It is 50 per cent of the tariff at the 'first day' rate.

Financial capacity not a ground for reducing costs in this case

[23] Financial capacity to pay may be a factor in setting a costs award but requires evidence that establishes such an adjustment is necessary. The immediate means of the party who may be required to pay costs is not the sole consideration in setting the award. An amount awarded as costs may be able to be met from future business or employment earnings or from funds borrowed from a financial institution, family or friends.

[24] The Employment Court has made the following observations in considering the financial capacity of a worker who was unemployed, had no assets, had debts owing and did not presently have the means to meet an award of costs:[6]

> [16] The approach to financial circumstances raises a number of issues, including the extent to which the opposing party's interests can be protected. While the approach to undue financial hardship in this jurisdiction is said to be based on the broad discretion conferred on the Court, supported by the statutory imperative that the Court exercise its powers consistently with equity and good conscience, there is a risk that the countervailing interests of the successful party (who might also be financially stretched) and broader public policy considerations become marginalised. The principles of equity and good conscience must transcend the interests of simply one party. A broader approach is required.
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[5] See, for example, *McKeown v Universal Communications Group NZ Limited* [2018] NZERA Auckland 80 (uplift of $4,000 on tariff for a two day investigation meeting, after applying a downward adjustment for financial circumstances); *Pender v Lyttleton Port Company Limited* [2018] NZERA Christchurch 161 (uplift of $3,500 on tariff for one day investigation meeting); *Maheta v Airbus Express Limited* [2020] NZERA 52 (uplift of $3,250 on tariff for one-and-a-half day investigation meeting); *Mokaraka v Department of Corrections* [2019] NZERA 636 (uplift of $3,000 on tariff for two-and-a-half day investigation meeting); *Cuttriss v Pact Group* [2019] NZERA 706 (uplift of $2,000 on tariff for one day investigation meeting); *Dunn v Air New Zealand* [2020] NZERA 265 (uplift of $1,500 for one day investigation meeting) and *Henry v South Waikato Achievement Trust* [2021] NZERA 387 (uplift of $2,500 for three day investigation meeting).

[6] *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2.

> [21] Finally, there may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.
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> [22] There may be circumstances in which a reduced, or no, costs order is appropriate. However, the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account. …

[25] Similar considerations to those identified by the court apply to the Authority in exercising its statutory discretion to award costs and expenses in Ms Ion's case.

[26] In her memorandum on costs Ms Ion described how funding her own representation in this case had placed her under considerable financial strain but she was paying off her bills to her former advocates in instalments. Her evidence at the Authority investigation meeting indicated she was also in employment, so had an ongoing source of income. She provided no evidence about whether or not she had other assets or funds that she could call on or borrow against to meet a costs award, apart from saying she had sold her car. There was therefore not sufficient information to warrant a downward adjustment of the amount she could be called upon to contribute to MIL's costs or to set a schedule for payment by instalment of any costs awarded.

The tariff applies to two full days

[27] Ms Ion submitted that the tariff should be applied to only one-and-a-half days as the investigation meeting "did not occupy two full days". I do not agree with that description. My notes show the first day of the investigation meeting ran from 10am to 7pm, extending well into the evening with the agreement of the parties. The second day began at 9am and ended only a few minutes before 3pm. Taken together, the investigation meeting ran over what could fairly be considered two full days.

[28] The tariff amount for those two days totals $8,000 being $4,500 for the first day and $3,500 for the second day.

Outcome

[29] Balancing the relevant factors, the appropriate amount to award as a contribution to MIL's costs and expenses was $10,250. This comprises $8,000 as the tariff rate with an uplift of an additional $2,250 awarded because of Ms Ion's failure to accept a reasonable settlement offer that would have spared both her and MIL the time and expense of taking part in an investigation meeting.

Order

[30] Ms Ion must pay MIL the sum of $10,250 as a contribution to its costs and expenses by no later than 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority