

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 309  
3028115

BETWEEN                      AMAL JAMES  
   Applicant  
  
A N D                              VODAFONE NEW ZEALAND  
   LIMITED  
   Respondent

Member of Authority:      Anna Fitzgibbon  
  
Representatives:              Greg Bennett for the applicant  
   Astrid Sandberg, Counsel for Respondent  
  
Submissions Received:      11 September 2018 from Respondent  
   No submissions filed by the Applicant  
  
Date of Determination:      9 October 2018

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**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS  
AUTHORITY**

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**A.      The Applicant is to pay a contribution towards the Respondent’s costs in the sum of \$4,500 within fourteen days of the date of this determination.**

**The substantive determination**

[1]      By way of a determination dated 21 August 2018<sup>1</sup>, the Authority found that the respondent, Vodafone New Zealand Limited (Vodafone) did not terminate Mr James’ employment and there was no entitlement to redundancy. Accordingly, Mr James did not have an employment relationship problem.

[2]      Costs were reserved. The parties were invited to exchange memoranda as to costs.

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<sup>1</sup>                      [2018] NZERA Auckland 265.

### Submissions as to costs

[3] A memorandum as to costs was filed on behalf of Vodafone detailing attendances and attaching relevant invoices. Vodafone seeks an order that Mr James pay costs of \$7,729. No response has been received by Mr James.

### Costs determination

[4] The Authority's power to award costs against a party is set out in clause 15 of schedule 2 of the Employment Relations Act 2000 (the Act) which provides as follows:

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 a manner as it thinks reasonable.

[5] The Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>2</sup> when setting costs awards. These include:

- There is discretion as to whether cost would be awarded and in what amount;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience are to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;

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<sup>2</sup>

[2005] 1 ERNZ 808.

- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs, and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[6] First, I accept that it is appropriate for Mr James to make a contribution towards Vodafone's costs on the basis that costs follow the event. Vodafone successfully resisted Mr James' claims.

### **Authority's daily tariff**

[7] The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day and \$3,500 for each subsequent day. The daily tariff may be adjusted upwards or downwards by the Authority depending on the circumstances of the case. The investigation by the Authority was dealt with 'on the papers'. Affidavit evidence was filed in the Authority by both parties together with submissions.

[8] Vodafone utilised the legal services of Buddle Findlay, solicitors. Legal costs for the drafting of documents, affidavit evidence, submissions and other attendances amounted to \$7,729. Vodafone seeks full recovery of its legal costs from Mr James. Vodafone submits that the time it took to prepare the affidavit evidence and submissions was akin to a full day investigation meeting. Therefore, the submission is that the starting point is the daily tariff of \$4,500. Vodafone seeks an uplift in the daily tariff to reflect the considerable expense it says it was put to in order to defend Mr James' claims.

[9] Counsel for Vodafone says Mr James' claim lacked merit and a "without prejudice offer" of \$2,000 was made by it to Mr James to avoid further costs. The offer was made by Vodafone before drafting and filing its statement in reply. Mr James has not responded to the memorandum as to costs. It is noted that Mr James remains employed by Vodafone and, in the absence of any evidence or submissions as to his ability to pay, presumably can pay costs.

[10] I consider the amount being sought on behalf of Vodafone to be too high. Costs should be reasonable and awards modest. Costs are not to be used as a punishment. Taking guidance from these principles, taking in to account the actual costs incurred by Vodafone, the without prejudice offer made by it at a very early stage of the matter, I consider a contribution by Mr James to Vodafone of \$4,500 towards its costs, appropriate.

[11] I order Mr James to pay Vodafone the sum of \$4,500 towards Vodafone's costs. These costs are to be paid by Mr James within fourteen days of the date of this determination.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**