

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 338
3192419

BETWEEN TANIA KEANE
Applicant

AND GENUINE NEW ZEALAND
LIMITED
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Paul Mathews, advocate for the Applicant
Mr C Johnston, for the Respondent

Submissions Received: 15 April 2024 from Ms Keane
23 April 2024 from GNZ

Date of Determination: 10 June 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 22 March 2024 I found Genuine New Zealand Limited (GNZ) had not been able to justify its actions and Ms Keane was successful with her personal grievance claim that she was unjustifiably dismissed.¹

[2] Ms Keane was also successful at an earlier investigation meeting that determined the preliminary issue of her employment status. She was found to be an employee and not a contractor.²

[3] The Authority reserved the issue of costs in both matters and quantum of lost wages at the conclusion of the second matter and encouraged the parties to resolve those

¹ *Keane v Genuine New Zealand Limited* [2024] NZERA 169.

² *Keane v Genuine New Zealand Limited and Genuine NZ International Limited* [2023] NZERA 304.

issues between them. Following on from this the Authority has now received submissions from both parties seeking a determination.

Costs

[4] Costs are a matter of discretion. The discretion is to be exercised in accordance with principle and not arbitrarily. The main principle in the exercise of the discretion is that costs follow the event. If a party is successful, they will be entitled to an award of costs. Ms Keane was successful with her claims set out in the statement of problem.

[5] The starting point for costs based on the Authority's daily tariff is \$4,500.00 for the first day and \$3,500.00 for any day following. From that starting point the Authority can consider whether there are factors justifying an increase or decrease in costs.

Submissions

[6] Ms Keane seeks \$10,000.00 as a contribution to her costs from GNZ on the basis costs ought to follow the event and Ms Keane was successful in two matters. The preliminary matter heard prior to the substantive matter determined Ms Keane was an employee and not a contractor. The daily tariff for the first day is \$4,500.00 and \$3,500.00 for each day following. Ms Keane seeks an uplift of \$1,000.00 due to the conduct of GNZ because it withdrew from mediation.

[7] Ms Keane submits it is uncontentious the employment status investigation meeting lasted a full day, and the daily tariff should be applied. In relation to the substantive matter, it is submitted the daily tariff also ought to apply despite Ms Keane proceeding at the investigation without a representative. Ms Keane's representative was unable to attend at the last minute on the day of the second investigation meeting. She says she had already incurred costs in preparation and these were well in excess of the daily tariff amount.

[8] Ms Keane seeks an uplift because GNZ was directed to mediation following resolution of the employee status matter. GNZ simply withdrew from the planned mediation with no explanation two business days before the mediation was set down. This caused additional costs.

[9] GNZ accepts Ms Keane is entitled to the notional daily tariff of \$4,500.00 for the first investigation meeting but does not accept her claim for costs at the second investigation meeting are appropriate. Ms Keane chose to be unrepresented at the

hearing after Mr Mathews withdrew at the commencement of the proceedings. In such a situation Ms Keane's recoverable costs are limited to the Authority's filing fee. That submission is consistent with the case of *Ruidong Xu v Pioneer Education and Immigration Services Group*³ and the practice direction of the Employment Relations Authority. GNZ also submits costs associated with preparation for an attendance at mediation are not typically matters that are included in cost awards. In summary, GNZ submits there is nothing in this case warranting an uplift to costs, or indeed any costs for the second investigation meeting.

Discussion

[10] The Authority's first investigation meeting amounted to a day and the second to just under a day but written submissions had already been prepared and were provided by Mr Mathews directly after the investigation meeting. I consider had oral submissions been presented by Mr Mathews that the full day would have been utilised.

[11] Ms Keane was self-represented after Mr Mathews withdrew at the start of the hearing. I consider withdrawal at the start of the hearing to be immaterial as to whether or not the costs had been incurred and this is different a situation from self-representation for the duration of the proceeding. Costs associated with litigation were incurred prior to the day of the second investigation meeting and Ms Keane, due to Mr Mathews' unavailability on the day elected to proceed rather than have the matter adjourned.

[12] Noting the Authority very seldom awards costs incurred in the preparation for mediation or attendance at mediation and that Ms Keane was the successful party, I consider than an award of costs in the amount of \$8,000.00 covering both matters is appropriate.

Lost wages

[13] I reserved leave for the parties to return to the Authority if they were unable to agree on how to calculate lost wages. I had found Ms Keane was entitled to three months lost wages as reimbursement of wages lost because of the grievance. The parties have since agreed that lost wages for a three-month period amount to \$5808.00.

³ *Ruidong Xu v Pioneer Education and Immigration Services Group* [2024] NZERA 102

Orders

[14] I order Genuine New Zealand Limited to pay Tania Keane:

- (a) Lost wages in the amount of \$5808.00;
- (b) A contribution to Ms Keane's costs in the amount of \$8,000.00;
- (c) \$71.56 for the Authority's filing fee.

Sarah Kennedy-Martin
Member of the Employment Relations Authority