

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 704
3260539

BETWEEN TENNESSE LIUMAIHETAU
Applicant

AND PAN SQUARE LIMITED
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Jenny Johnson, advocate for the Applicant
John Langford, counsel for the Respondent

Submissions Received: 1 November 2024 from the Applicant
18 November 2024 from the Respondent

Date of Determination: 25 November 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 11 October 2024 I issued a determination concluding Mr Liumaihetau had a personal grievance in that he had been unjustifiably dismissed.¹ Costs were reserved and the parties were encouraged to resolve any issue of costs between themselves. They have been unable to do so and Mr Liumaihetau as the successful party now seeks a contribution towards costs incurred.

[2] The Authority generally uses a daily tariff when addressing a costs claim. The current starting point is \$4,500.00 for an investigation’s first day. From there, adjustments may be made depending on the circumstances. In this case, the daily tariff equates to \$2,250.00 for a half-day hearing.

¹ [2024] NZERA 612.

Submissions for the Parties

[3] The Authority's determination awarded Mr Liumahetau \$15,300.00. Ms Johnson his representative submits that two offers of settlement made on a without prejudice save as to costs basis were made to Pan Square Limited. The first of these was on 15 June 2023 which was for two weeks wages, \$8,000.00 compensation, and a cost payment of \$1,000.00. The offer was refused and a second offer was made on the same basis on 29 June 2023. The second offer was for \$5,000.00 in total but it is not clear from Ms Johnson's submission as to whether or not that was a Calderbank offer or a without prejudice offer. In any event, the "Calderbank" offer made on 15 June 2023 would undoubtedly have placed the parties in a better position if it had been accepted at the time.

[4] Ms Johnson has submitted invoices showing that Mr Liumahetau has incurred significant costs amounting to \$11,682.27. However, that sum includes offers made after the investigation meeting and also includes the costs related to Ms Johnson's submissions in respect of costs. Nonetheless, subtracting those costs still shows that Mr Liumahetau incurred significant costs post the Calderbank offer.

[5] For Pan Square, Mr Langford does not address the Calderbank offer but rather points out that tariff costs for a half day hearing are appropriate.

The Cost Principles

[6] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increases costs unnecessarily can be taken into account inflating or in reducing an award.
- Costs generally follow the event.
- Costs will be modest.

- Frequently costs are judged against the notional daily tariff.

[7] I have seen the Calderbank offer of 15 June 2023. I am satisfied that the Calderbank offer was a reasonable offer made well in advance of the investigation meeting. The amounts sought in the Calderbank were less than the amounts the Authority ultimately awarded by a reasonable margin. Acceptance of the offer would have put Pan Square in a significantly better position. It should be taken into account. An uplift to the tariff is appropriate to recognise the non-acceptance of the offer and I consider an uplift of \$1,500.00 to be an appropriate amount.

Conclusion and Orders

[8] For the above reasons, I order Pan Square Limited must pay Tennesse Liumahetau, within 14 days of the date of this determination, a sum of \$3,750.00 as a contribution towards costs.

Geoff O'Sullivan
Member of the Employment Relations Authority