

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 339
3133415

BETWEEN

FRANK MURRAY
Applicant

AND

WATERSHED LIMITED
Respondent

Member of Authority: Pam Nuttall

Representatives: Simon Greening, counsel for the Applicant
Scott Worthy, counsel for the Respondent
Anthony Kamphorst, counsel for the Respondent

Submissions received: 17 June 2022 from the Respondent
1 July 2022 from the Applicant

Determination: 21 July 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 19 May 2022¹ I found that the applicant, Mr Frank Murray, had not been unjustifiably dismissed from his employment and had not been unjustifiably disadvantaged in his employment.

[2] This determination followed an investigation meeting lasting one and a half days to hear from witnesses for both parties and the provision of written legal submissions by the parties' representatives.

[3] Costs were reserved and the parties were encouraged to settle this issue between themselves. Unfortunately they have been unable to do so. Both parties have filed submissions in respect of costs.

¹ *Frank Murray v Watershed Limited* [2022] NZERA 204.

Application for costs

[4] The respondent seeks an award of costs in the sum of \$8,000 on the basis that it was successful in defending the applicant's claims and that costs will generally follow the event.

[5] It is also submitted that the applicant's approach to the costs issue needlessly increased the respondent's costs by rejecting two *Calderbank* offers dated 4 May 2021 and 13 December 2021 and that an uplift from the daily tariff approach usual in the Authority would be reasonable.

[6] The applicant proposes an award of \$6,250.00 in line with the daily tariff rate. Given that he is in a compromised financial position, the applicant submits that the rejection of the *Calderbank* offers should be balanced against his limited financial means and that the Authority should not depart from the tariff.

Principles

[7] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Employment Relations Act 2000. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*²

[8] One of these principles is that costs are modest. Principles also include that costs are reasonable and that they normally follow the event. Costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct. The applicant's financial position is a relevant consideration but other factors must also be weighed.

Costs award

[9] I see no reason for not applying these principles in this case. Watershed Limited successfully defended the applicant's claims and costs normally follow the event.

[10] Costs must be moderate and reasonable. However the rejection of the *Calderbank* claims does provide a basis for an uplift in costs awarded on the grounds

² *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

submitted. However, in consideration of the applicant's financial ability to pay costs, the uplift should not be as great as that sought by the respondent.

[11] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing and \$3,500.00 for subsequent days. This matter required a one and a half day investigation meeting, which means the notional tariff rate would be \$6,250.00 for this investigation meeting.

[12] I consider it appropriate to base the level of costs on the usual tariff in the Authority as at the date of filing, with an uplift in consideration of the rejection of the *Calderbank* offers to \$7,000.00.

[13] Accordingly Frank Murray is ordered to pay Watershed Limited the sum of \$7,000.00 towards its legal costs. This amount is to be paid by monthly instalments of \$250.00 until payment is completed.

Pam Nuttall
Member of the Employment Relations Authority