

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 188
3140821

BETWEEN RASHEEL NAIDU
Applicant

AND AZAK CARS LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: David Cain and Alex Kersjes, advocates for the
Applicant
No appearance by the Respondent

Submissions and further 14 and 28 April 2022 from Applicant
information received:

Determination: 9 May 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 25 March 2022 in favour of Rasheel Naidu.¹ Mr Naidu was found to have been unjustifiably dismissed and owed annual leave by Azak Cars Limited (ACL). Costs were reserved and the parties were encouraged to resolve the issue of costs between themselves. However, that has not occurred due to ACL's non-engagement with the process. Mr Naidu now applies for costs.

Costs principles

[2] The Authority has the power under clause 15 of Schedule two of the Employment Relations Act 2000 to award costs. The principles and approach adopted

¹ *Rasheel Naidu v Azak Cars Limited* [2022] NZERA 109.

by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.² Those principles are as follows:

- The Authority has a discretion whether to award costs, and how much, but the discretion must be exercised in accordance with principle and not arbitrarily.
- The statutory jurisdiction toward costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience are to be considered on a case-by-case basis.
- Costs are not to be used to punish or express disapproval for the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- The Authority can consider whether all or any of the parties' costs were unnecessary or unreasonable.
- Costs generally follow the event (i.e. the unsuccessful party will normally be required to contribute to the costs of the successful party).
- *Calderbank offers* may be taken into account when setting costs.
- Awards will be modest.
- Frequently costs are judged against the notional daily tariff.
- The nature of the case can influence costs, which means the Authority may order those costs should lie where they fall.

[3] On 2 May 2022, Practice Note 2, Costs in the Employment Relations Authority, came into effect. Among other things, the practice note reaffirmed the Authority's use of the notional daily tariff (currently \$4,500 for the first day of any matter and \$3,500 for any subsequent day of the same matter) as the starting point in assessing costs. Various factors and principles may have the effect of increasing or decreasing the amount of costs awarded.

Costs submissions

[4] In a memorandum of 13 April 2022, Mr Kersjes submitted that he has attempted to engage with ACL in order to resolve the issue of costs but to no avail. While the issues that the Authority was required to investigate and determine were uncomplicated, Mr Kersjes stated that dealing with ACL has been "most laborious" and that the matter

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

took the majority of one half day to complete with separate submissions and now a costs application needing to be made.

[5] Mr Kersjes advised that costs in relation to Mr Naidu's matter amounted to \$5,234.76. In addition, there were disbursements of \$212.56 which included the filing fee of \$71.56 to bring the application before the Authority.

Costs analysis

[6] Mr Naidu was the successful party and I see no reason why costs should not follow the event in the usual way. While ACL has chosen not to participate with the process, its inaction has not resulted in any significant or material delay in Mr Naidu's case from being heard and determined by the Authority. The submissions to which Mr Kersjes refers above is Mr Cain's written closing submissions which I note needed to be filed because of an error in Mr Naidu's written statement concerning the calculation of annual leave.

[7] The investigation meeting was by audio-visual link which spared Mr Naidu and Mr Cain from having to travel to 280 Queen St, Auckland for an in-person investigation. The hearing started at 10 am and concluded at 12.25 pm that same day.

[8] I have considered Mr Kersjes' invoice which includes the Authority's filing fee that I have previously ordered ACL to reimburse Mr Naidu.

[9] Costs must be moderate and reasonable, judged against the notational daily tariff, and on a case-by-case basis. As affirmed in the Authority's Practice Note 2 regarding costs, cost awards are made with reference to the daily tariff which is currently set at \$4,500 for the first day of hearing.

[10] This matter required a half day to be heard. I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing.

Outcome

[11] Accordingly, Azak Cars Limited is ordered to pay Rasheel Naidu the sum of \$2,500 towards his legal costs and the sum of \$141 in disbursements no later than 4 pm Monday 23 May 2022.

Peter Fuiava
Member of the Employment Relations Authority