

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 546
3118613

BETWEEN ORX
Applicant

AND LUY
Respondent

Member of Authority: Philip Cheyne

Representatives: Jenna Riddle, counsel for the Applicant
Respondent in person

Submissions received: 7 September 2021 from the Applicant
5 October 2021 from the Respondent

Determination: 7 December 2021

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. LUY is to pay ORX costs of \$2,321.56 in costs, by no later than Tuesday 11 January 2022.**

[1] In a determination dated 2 August 2021, LUY was ordered to comply with a record of settlement and to refrain from specified actions. LUY's course of conduct in July 2020 and following, in breach of the record of settlement, was globalised as a single breach for penalty purposes. LUY was ordered to pay a penalty of \$500.00 (half to ORX), for breaching the record of settlement.

[2] Cost were reserved. I now have submissions from both parties. This determination resolves costs.

[3] It is helpful to summarise the Authority's investigation, to give some context.

[4] ORX initially sought compliance (including "take-down" orders), together with penalties for six breaches of the record of settlement and non-publication orders. There was also an application for urgency, and for orders without notice or on a *Pickwick* basis. The application and memorandum were nonetheless copied to LUY and LUY's previous counsel by counsel for ORX. LUY's previous counsel endeavoured to assist, but was not instructed. The situation was dynamic, but LUY promptly took steps in answer to some of ORX's concerns. I declined to make orders without notice or on a *Pickwick* basis but non-publication orders were made, initially on an interim basis. LUY's statement in reply largely admitted breaches. LUY then instructed counsel. An investigation meeting was scheduled. A timetable permitted LUY to lodge an amended statement in reply. The matter had to be adjourned, but not due to the parties themselves. LUY's new counsel had to be excused. No other representative was instructed. At a further case management conference, LUY confirmed there would not be an amended statement in reply. ORX's evidence had been lodged in affidavit form at the outset, so LUY's evidence was timetabled. It was lodged in accordance with the timetable, but I take from counsel's submissions that it was not served until the following day. Prior to the investigation meeting, LUY lodged and served an outline of submissions. The investigation meeting took less than half a sitting day.

[5] As a matter of principle, a successful party is usually entitled to a contribution to legal costs reasonably incurred by them.

[6] Counsel submits that ORX was "entirely successful" in its claims before the Authority. ORX obtained a compliance order and penalties. Urgency was granted, but matters were not determined without notice or on a *Pickwick* basis. In substance, no defence was put forward. In light of ORX not achieving the outcome on the basis first sought, together with the modest level of penalty achieved compared to that claimed, I do not think

that ORX was “entirely successful”. However, ORX obtained orders to enforce a record of settlement. In substance, ORX succeeded. I find that ORX is entitled to costs.

[7] Often, costs in the Authority are assessed by reference to a well-publicised daily tariff. ORX seeks an order of costs of \$9,000.00, so seeks an uplift from the amount that would otherwise be set by reference to the daily tariff.

[8] The claim is supported by a submission that LUY failed to lodge an amended statement in reply, with ORX having to prepare on the basis of needing to prove the breaches. However, LUY admitted breaches in the statement in reply. In light of social media evidence, LUY could never deny breaches. At best, an amended reply might have sought to cast a different light on admitted actions. In summary, breaches were largely admitted. Eventually, LUY confirmed that there would not be an amended reply. No uplift is warranted, based on this point.

[9] The claim is supported by a submission that LUY raised additional legal arguments and by reference to the delay with service of the statement of evidence. The delay was immaterial, for present purposes. ORX was not required to produce evidence in reply. The delay might have caused some inconvenience, but it is difficult to see it as having added to ORX’s costs.

[10] LUY’s submissions, headed “Request for approach to decision making”, lodged and served two days before the investigation meeting were in response to the Authority’s outline during case management conferences about the process for an investigation meeting. They also were intended to assist LUY’s presentation to stay focussed. The submissions were succinct and mostly relevant. The evidence and submissions did refer to views about duress, mental capacity and adequacy of representation in respect of the record of settlement. Those were views held at the time of the breach of the record of settlement, as context for LUY’s conduct then. The investigation meeting did not canvass claims of duress, mental capacity or representation adequacy with respect to the record of settlement. I do not regard this as conduct unnecessarily increasing costs reasonably incurred by ORX to achieve success to the extent that it did. The record of settlement was only before the Authority on ORX’s

application for enforcement purposes. The proceedings did not include any application by LUY. The submission does not warrant an uplift in costs from what would otherwise apply under a daily tariff approach.

[11] LUY submits that financial circumstances which supported a reduction in the level of penalty still apply. I treat LUY's capacity to pay as a factor supporting the application of the daily tariff approach, in line with the principle that costs in the Authority will be modest.¹ I am not persuaded that I should depart from the daily tariff approach here.

[12] Less than half a day of investigation meeting time was required. However, I will set costs as if the meeting had occupied a half-day at the initial daily rate (equates to \$2,250.00) to better reflect the significance of the issue for ORX and the need to initiate proceedings on an urgent basis at the outset. I will also require LUY to reimburse ORX for the lodgement fee (\$71.56). There will be an order for \$2,321.56. I allow a little time in case the parties need to discuss arrangements.

Philip Cheyne
Member of the Employment Relations Authority

¹ *Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13.