

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 651
3147705

BETWEEN	THOMAS PONGA Applicant
AND	DOUBLE J SMALLWOODS LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	Dave Cain, advocate for the applicant Libby Brown, counsel for the respondent
Investigation meeting:	On the papers
Submissions or information received:	8 and 24 November 2022 from the applicant 22 November 2022 and 7 December 2022 from the respondent
Determination:	9 December 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] I issued a determination on 25 October 2022 finding the applicant Mr Ponga was unjustifiably dismissed. I awarded \$10,800 in compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and \$3,811.50 under s 123(1)(b) of the Act.¹

[2] The parties have been unable to resolve the issue of costs between themselves. Mr Ponga has now applied for an award of costs.

[3] The respondent Double J Smallwoods Limited (DJS) has filed a challenge and application for stay of the Authority's determination.

¹ *Ponga and Double J Smallwoods Limited* [2022] NZERA 543.

What principles apply to costs?

[4] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act. The power is discretionary with its use governed by principles.² These include that costs will usually follow the event and the discretion is exercised in accordance with principle and not arbitrarily, considering equity and good conscience. When considering costs, the starting point is the Authority's daily tariff of \$4,500 for the first day of an investigation meeting and \$3,500 for subsequent days.

What costs should be awarded here?

Mr Ponga's submissions

[5] Mr Ponga seeks an award requiring DJS to pay costs of \$7,500 plus disbursements of \$314.561 for stationery, printing, travel within Gisborne and the Authority filing fee.

[6] Mr Ponga seeks the Authority's usual daily tariff for a one-day investigation meeting plus half a second day, totalling \$6,500. This is on the basis of the full day spent in the Authority itself and the subsequent filing of "rather extensive" written submissions.

[7] Mr Ponga also seeks an uplift of \$1,000 for settlement offers sent to DJS on 19 and 20 May 2022. Both offers were made on a without prejudice basis save as to costs, stated they were Calderbank offers and the consequences of non-acceptance. The first offer was to accept a global sum of \$14,000 and the second a global sum of \$10,750.00 as compensation and costs plus GST on identified costs amounts. DJS declined both offers.

[8] The investigation meeting was set down for 24 May 2022 but was adjourned for COVID-19 related reasons. On that date Mr Ponga's representative wrote to DJS referring to the 20 May offer. The parties continued correspondence and on 30 June 2022 Mr Ponga's advocate advised the Calderbank offer of 20 May was still open for acceptance. DJS responded by saying that offer remained unacceptable.

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

DJS' submissions

[9] DJS says a costs award of the usual daily tariff of \$4,500.00 is appropriate. It says there was no need for separate written submissions and counsel was prepared to present oral submissions at the end of the investigation meeting. Counsel says it was Mr Ponga's representative who preferred to file written submissions. DJS says it should not be penalised for accommodating this preference.

[10] DJS observes the first offer was sent at 5:05 pm on Friday 20 May 2022, with the offer expiring at 2pm on Monday 23 May 2022. That effectively gave DJS and its representative around five working hours to receive, consider, and respond to the offer before the original scheduled investigation meeting date of 24 May 2022. It says this was not a reasonable period of time and the parties had already incurred costs in preparation for the investigation meeting which would not have been prevented by DJS accepting the last-minute offer.

[11] DJS observes Mr Ponga has not provided a calculation of the contribution sought for disbursements or any invoices to support the claim. It says in the absence of any evidence of those costs, it is not appropriate for the Authority to award any disbursements beyond the \$71.56 Authority filing fee.

Costs assessment

[12] Mr Ponga was the successful party and is entitled to a contribution to his costs.

[13] In the circumstances I find it is not appropriate to award a further half day of the tariff to take into account the filing of written submissions. I therefore consider the notional daily tariff is the starting point, namely \$4,500.

[14] I accept DJS' submission that the first and second offers of settlement were made at a very late stage, just prior to the original investigation meeting date, when the bulk of preparation had already been completed. The time given for acceptance was not reasonable and accordingly I find no uplift to the starting point for those offers is warranted.

[15] I am satisfied, however, that a small uplift to the daily tariff is appropriate. This accounts for the fact Mr Ponga's offer of 20 May 2022 remained open for acceptance

after the original investigation meeting date was adjourned and was reiterated on 30 June 2022. I award an uplift of \$500. I would have made a higher uplift had the offer been made earlier than it was, such as prior to the preparation of witness statements.

[16] I am not satisfied an award for disbursements for stationery, printing and travel costs should be awarded. Considerable case law says parties are to pick a representative that can perform their function without additional travel costs. Further, the global approach envisaged by the tariff is considered to include an amount for photocopying and printing.

[17] It is appropriate to award reimbursement of the Authority filing fee.

Conclusion

[18] Double J Smallwoods Limited is ordered to pay \$5,000 in costs and \$71.56 (being the Authority filing fee) to Thomas Ponga within 21 days of the date of this determination.

Sarah Blick
Member of the Employment Relations Authority