

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 296
3124383

BETWEEN DARREN PYNE
 Applicant

AND INVACARE NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Paul Pa'u, advocate for the Applicant
 Emma Butcher, counsel for the Respondent

Submissions: 20 June 2022 from the Applicant and 4 July 2022 from
 the Respondent

Determination: 6 July 2022

COSTS DETERMINATION OF THE AUTHORITY

A. Invacare New Zealand Limited must pay Darren Pyne \$8,071.56 within 28 days of the date of this determination as a contribution to his costs and expenses in this matter.

[1] The Authority found Invacare New Zealand Limited (Invacare) had acted unjustifiably in making its decision to dismiss Darren Pyne on the grounds of redundancy and made orders for payments to him for lost remuneration and distress compensation.¹

[2] As the parties had then been able to resolve the issue of costs between themselves, Mr Pyne sought order for costs. He sought an award of costs totalling \$8421.16. This comprised \$8,000 as the Authority's usual tariff for a two-day investigation meeting, reimbursement of the \$71.56 fee paid to lodge his grievance

¹ *Pyne v Invacare New Zealand Limited* [2022] NZERA 240.

application and \$349.60 as disbursements for providing a bundle of documents and the cost of telephone calls.

[3] Invacare accepted Mr Pyne was entitled to costs for successfully establishing his grievance but submitted the usual tariff should be reduced because the Authority's determination had not accepted his claim for a penalty, a claim of unjustified disadvantage or awarded remedies at the level he had asked for.

[4] Invacare proposed a \$2000 reduction should be made to the usual tariff to reflect what is described as his "mixed success" and the fact that Mr Pyne's distress compensation remedy was reduced due to some conduct by him which had contributed to the situation giving rise to his grievance. It also opposed an order for payment of disbursements and office expenses no invoices were provided to support that claim.

Factors in assessing costs

[5] The Authority's jurisdiction to order a party to contribute to costs incurred by another party is exercised by applying some well-established "basic tenets" to the particular circumstances of the case.²

[6] Those tenets recognise that a successful party should receive a contribution to its reasonably incurred costs and expenses; costs should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional 'daily rate' or 'tariff' as a starting point to assess costs.

[7] Undue rigidity in applying that tariff is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may take account of settlement offers made by either party, the financial means of a liable party to pay costs, the preparation required in particularly complex matters and whether conduct of any party unnecessarily increased the costs they incurred.

[8] The starting point for an assessment of costs in this matter, as the parties accepted, was \$8,000. This sum comprised the usual rate of \$4,500 for the first day of the meeting and the usual rate of \$3,500 applied for a second or any subsequent day.

² Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

The rate provides a contribution to costs incurred in preparation for the meeting and attendance at it.

Assessment

[9] As noted in Invacare's memorandum in reply on costs the three tenets requiring particular attention in this case were:

- (a) Costs generally follow the event but should be considered on a case-by-case basis;
- (b) It is open to the Authority to consider whether all or any costs were unnecessarily or unreasonably incurred; and
- (c) Awards should be modest.

[10] Mr Pyne was substantially successful in establishing his main claim that Invacare acted unjustifiably in dismissing him on the grounds of redundancy. It is that 'event' of success which gives rise to his entitlement to an award of costs.

[11] The starting point of \$8,000 at the usual rate is not displaced by Invacare's analysis that Mr Pyne was not successful in some parts of his claim. The use of the tariff is an accepted and well-understood 'broader brush' approach, appropriate to the nature of the Authority's investigative role, than that used in the cost regimes developed by the courts where the adjudicative method used is different. The case law relied on by Invacare for its submission that reductions should be made for supposed 'mixed success' relates to the principles that may be relevant in those courts but not in the ordinary course of events in the Authority.

[12] The tenets regarding unnecessary pursuit of issues or unreasonably incurring costs are not the same as addressing whether a party was successful on a particular claim. In this case Invacare correctly identified Mr Pyne was not awarded a penalty he sought or remedies at the very high level he had asked for, but this did not mean he made those claims unnecessarily or costs were unreasonably incurred in raising them.

[13] An award at the tariff level also achieves an appropriately modest result than if costs were awarded at a higher proportion of the fees typically charged by representatives operating commercial business as advocates or lawyers.

[14] No invoices were provided to support Mr Pyne's claim for expenses relating to copying documents and what would appear to be ordinary office expenses of making phone calls about his case. No award for those expenses is made.

[15] Mr Pyne was however entitled to be reimbursed by Invacare for the expense of the fee of \$71.56 he had to pay to lodge his claim in the Authority.

Robin Arthur
Member of the Employment Relations Authority