IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI ŌTAUTAHI ROHE

Attention is drawn to an order prohibiting publication of certain information in this determination.

[2025] NZERA 253
3283519

	BETWEEN	QN Applicant
	AND	FT LIMITED Respondent

Member of Authority:	David G Beck
Representatives:	Barbara Buckett and Lucy Fisher, counsel for the Applicant Rosemary Wooders and Olivia Faulds, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	3 April 2025 from the Applicant 20 March 2025 from the Respondent
Date of Determination:	7 May 2025

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 21 February 2025, an Authority determination dismissed QN's claims that they were unjustifiably disadvantaged and then unjustifiably dismissed. The Authority made no orders in favour of QN. Despite encouraging the parties to resolve cost issues no agreement has been made and the Authority has been provided with submissions on how costs should be determined. [1]

[2] During the investigation meeting QN, pursuant to s 10(1) Schedule 2 of the Employment Relations Act 2000 (the Act) applied for an order that a non-publication order preventing publication of the parties' identities and identifying details be made. While not

[1] *QN v FT Limited* [2025] NZERA 99.

granting this application the Authority ordered interim non-publication of the parties' identities on the basis of a likely challenge to the Authority's determination. [2] That challenge is currently before the Employment Court so it is appropriate that the interim non-publication order remains in place and the parties continue to be identified as above by randomly generated letters. However, while QN's challenge is yet to be resolved this election does not operate as a stay preventing the Authority from now dealing with FT Ltd's cost application.

Submissions on costs

FT Ltd's submission

[3] FT Ltd's counsel suggested an award of costs should be made in their client's favour of $40,000 with additional sums of $6,875 for GST; $10,211.98 disbursements (flights/accommodation/meals) and $2,500 for the preparation of the cost's memorandum.

[4] In support of this claim, counsel while acknowledging the starting point is the Authority's notional daily rate approach was appropriate, seeks an uplift on the basis that they were wholly successful in resisting QN's claims and that QN declined a reasonable and timely Calderbank offer that led to FT Ltd incurring further costs of $110,211.98 (exclusive of GST but including disbursements for attendance at investigation meetings). Counsel for FT Ltd asserted there are numerous examples of determinations where the Authority has awarded an uplift on the notional daily rate. [3]

QN's submission

[5] QN's counsel while agreeing with the Authority's notional daily rate-based approach, contended that the rejection of the Calderbank was reasonable and not grounds for an uplift (discussed below).

[6] Further, QN's counsel submitted the Authority should disregard the disbursement claims as unreasonable given the FT Ltd having a choice of engaging local counsel.

Cost Principles

[7] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Act. The discretion it is accepted is guided by principles set out in

[2] Ibid at [11].
[3] Including Member Larmer's determination *Key Industries Ltd v Perrin* [2023] NZERA 172 that contains a comprehensive overview of 'above the usual daily rate' significant awards and the factors to be considered.

PBO Limited (formerly Rush Security Ltd) v Da Cruz [4] including those costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority. [5]

[8] A starting point is that costs normally follow the event and as FT Limited was wholly successful in resisting QN's personal grievance claims an award of costs is appropriate.

Applying the notional daily rate

[9] The Authority's approach is to apply a notional daily rate and only adjust that rate if persuaded that circumstances or other factors require an upward or downward adjustment.[6] The current daily rate is $4,500 for the first day of an investigation meeting and $3,500 for each day thereafter. This approach reinforces the Authority's unique jurisdiction and fact that successful parties cannot expect to be awarded court level costs. An approach, the Authority has signalled in several determinations and is supported by the Employment Court and was best put by Member Larmer in a determination cited by FT Limited's counsel, that:

> The tariff has been set at a modest level. Even where the tariff is uplifted, it usually results in a low proportion of actual costs awards being awarded. The Authority has not previously applied high multipliers to the notional starting tariff. To do so now would effectively undermine the tariff approach, because it would take the level of costs awarded in this matter outside the Authority's normal costs parameters. [7]

[10] The investigation was initially scheduled for two days in a provincial town but due to delays in flight scheduling for counsel and time expended seeking a negotiated settlement, the investigation was adjourned part heard at 3 pm on its second day. In addition, delay was caused by disclosure issues and the investigation was reconvened for a further full day in Christchurch with oral submissions taking up a further two and a half hours and written submissions were filed thereafter. For the purpose of calculating the notional daily rate the investigation meeting is deemed to have taken three and a quarter days. This is a starting notional rate before I consider any uplifts, of $12,375.

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[4] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.
[5] Section 160(2) Employment Relations Act 2000.
[6] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1
[7] Above n 3 at [115].

The impact of a settlement offer.

[11] The making of a settlement offer in the form of a 'Calderbank' offer or 'without prejudice except as to costs', is a relevant factor where such may have placed a party in a significantly better position than a later determination by the Authority. Despite the Authority's low-level jurisdiction, a *Calderbank* offer may lead to an uplift in costs to encourage early settlement as an aim of the Act and the Authority has at times approached costs in a similar vein depending upon the circumstances. [8]

[12] Counsel for QN while not challenging the content and timing of the Calderbank offer suggested it was reasonably refused on the ground the offer did not include an offer to reinstate QN. Counsel relied upon a leading authority (*Bluestar Print Group (NZ) Ltd v Mitchell)* to suggest that where a principled stance is not vindicated it should be relevant to the exercise of discretion in considering a costs uplift. While I generally concur in principle, I find it incongruous to suggest an employer after dismissing someone for what they consider to be valid reasons where trust and confidence has been fatally eroded, would offer a compromise settlement that included reinstatement unless the circumstances were extraordinary (in my view absent here). Counsel's citing of the *Bluestar Print* case expresses it well as:

> But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff. [9]

[13] Here the Calderbank offer made by FT Ltd on 21 May 2024 after mediation but some 10 weeks prior to the investigation meeting and before witness statements had been disclosed, would have provided QN with:

- $15,000 under s 123(1)(c)(i) of the Act.
- Two months' gross salary.
- A contribution to legal costs of $11,500 plus GST.
- A certificate of service thanking him for his past work.
- Non-disparaging agreement.

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[8] *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137 at [24].
[9] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385; BC201064147 at [19].

- An opportunity up until 31 May 2024 to respond.

[14] The response from QN's counsel of 31 May 2024, rejected the offer as not addressing QN's reinstatement claim or acknowledging harm and damage to reputation. I was provided no evidence of any counter settlement claim. QN's counsel cited Judge Ford's comments in *Gaut v BP Oil New Zealand Limited* to the effect that where a Calderbank offer does not address a reinstatement claim as a primary remedy, it would be unjust to consider the Calderbank offer as a basis to not award or reduce costs to the successful party. [10]

Assessment

[15] The Authority in applying discretion is also mindful that costs cannot be awarded as a punishment or disapproval of an unsuccessful parties conduct unless conduct is identified that led to a significant increase in wasted time and costs during the course of the litigation process. I do not consider in the current circumstances that QN's conduct of the investigation meeting was in question. The investigation meeting dealt with a relatively straightforward situation it was not complex and QN was co-operative in their approach. If any time were wasted it could be equally attributed to both parties counsel's conduct of the case and in any case was not significantly blameworthy nor was the investigation meeting unduly prolonged. I consider the parties witnesses' evidence was relevant and assisted the Authority's investigation.

[16] While I do have regard to the significant costs FT Ltd has incurred in defending the unjustified dismissal claim I find that only a modest uplift in costs is warranted on the basis of the relatively generous Calderbank offer being rejected out of hand and QN being wholly unsuccessful in their claim for any remedy. In this instance I find the decision of *Gaut v BP Oil New Zealand* to be distinguished on the facts and an outlier as it was in the context of a worker successfully establishing that a summary dismissal was unjustified and the gap between the amounts of money offered and the eventual award was slim. Here, QN was offered a significant offer to avoid litigation costs and the risk of being unsuccessful and I consider it should weigh against QN as overall it was an effective Calderbank offer.

[17] However, surveying the Authority's approach to uplifts when a significant Calderbank offer is rejected reveals that a modest approach is generally taken. Taking the Calderbank

[10] *Gaut v BP Oil New Zealand Limited* [2011] NZEmpC 111 at [24].

offer into account and all the contextual circumstances, I consider an uplift of $3,500 is warranted to the cumulative daily tariff.

GST and disbursements

[18] Counsel for FT Ltd has requested that GST be added to the award of costs. While I acknowledge that submission and recognise there have been cases in the past where the Authority has added GST to an award of costs, the exercise of the Authority's discretion to award costs under cl 15(1) of the Act as that relates to the addition of GST has evolved; the Authority's current approach is that the daily tariff is an all-inclusive, GST neutral figure. As a result, FT Ltd's claim for GST to be added to the daily tariff amount is declined.

[19] I am not persuaded by FT Ltd's disbursements claim that does not relate to any additional costs over and above what would normally be incurred where a party chooses to engage 'out of town' counsel. Likewise, the Authority unless persuaded of extraordinary circumstances, does not normally award additional costs for the preparation of cost submissions or take account of offers made during the post investigation period.

Order

[20] QN is to pay FT Limited within 28 days of this determination being issued the sum of $15,875 (inclusive) as a contribution to costs incurred.

David G Beck
Member of the Employment Relations Authority