

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 693
3148181

BETWEEN

NICK SCOTT
Applicant

AND

E CYCLES NZ LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Alex Kersjes, advocate for the Applicant
Melissa Johnston for the Respondent

Submissions: 22 June 2023 in Auckland

Determination: 22 November 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] Following an Authority investigation E Cycles NZ Limited (ECNZL) was found to have unjustifiably dismissed Nick Scott. ECNZL was ordered to pay Mr Scott lost wages of \$7,962.50 and distress compensation of \$15,000.¹ ECNZL applied for a reopening of that investigation but, by determination also issued today, that application has been declined.²

[2] Remaining for determination was Mr Scott's application for an award requiring ECNZL to contribute to costs and expenses he incurred in successfully pursuing his personal grievance application.

[3] In a reply memorandum on costs, ECNZL accepted it should have to pay costs at the Authority's usual daily tariff of \$4,500. It opposed Mr Scott's submissions that higher costs should be imposed, firstly, because ECNZL had declined an offer to settle his grievance for an amount lower than he was eventually awarded in the Authority's

¹ *Scott v E Cycles NZ Limited* [2023] NZERA 527.

² *E Cycles NZ Limited v Scott* [2023] NZERA 692.

determination and, secondly, because Mr Scott said his costs were increased by ECNZL acting unreasonably.

Factors

[4] The Authority's discretion to order a party to contribute to costs incurred by another party is exercised by applying well-established basic tenets to the particular circumstances of the case.³ 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' as a starting point to assess costs.

[5] Undue rigidity in applying the daily rates 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.

Assessment

[6] As the successful party Mr Scott is presumed to be entitled to an award of costs. As ECNZL submitted, assessment of those costs appropriately started in this case from the Authority's usual daily tariff of \$4,500. Contrary to the company's submission, the investigation meeting did not last only about three hours. It ran from its notified starting time of 10am until closing submissions were heard and the meeting ended just after 4pm. The tariff for a whole day applied.

[7] An uplift on the tariff rate was warranted because ECNZL had not accepted a settlement offer Mr Scott made in October 2021 for \$11,500 including costs. This was around half of the gross value of the award eventually made by the Authority. If ECNZL had accepted that offer, the company and Mr Scott would have both saved themselves the further time and expense of taking part in an Authority investigation.

[8] ECNZL submitted it was not properly informed of the potential consequences of not accepting a settlement offer. However, a copy of correspondence provided by

³ Employment Relations Act 2000, Schedule 2 clause 15(1) and www.era.govt.nz/determinations/awarding-costs-remedies.

Mr Scott's advocate shows the offer was made through an employment advocate acting for ECNZL at the time, the day after the parties had attended mediation. The letter of offer included a clear statement that Mr Scott would apply for an uplift of the normal daily tariff if the offer was not accepted, and he were later to be successful in pursuing his case in the Authority. The terms of the offer were reasonable, capable of acceptance and clearly stated the potential consequences of not accepting them.

[9] In those circumstances an uplift should be made on the costs ECNZL must now pay. In other similar cases the Authority has applied an uplift at 50 per cent of the daily tariff, that is an additional \$2,250. It is applied here.

[10] Mr Scott submitted a further uplift of the tariff should be made because of unreasonable conduct by ECNZL during these lengthy proceedings, with the investigation meeting being postponed twice. One postponement was granted because of what was said to be Covid-19-related contact and resulting isolation by the family of ECNZL director Christian Hoff-Nielsen. The second postponement was made to accommodate scheduling difficulties for the company over attending an Authority investigation meeting about an application by another former employee of ECNZL.

[11] While Mr Scott criticised the veracity of the reasons Mr Hoff-Nielsen gave for seeking to postpone the second meeting, the Authority is responsible for accepting them at the time and Mr Scott had not shown that delay increased any costs he incurred.

[12] On that assessment, an award of \$6,750 was reasonable. Mr Scott provided a copy of an invoice from his advocate showing he had incurred costs of representation of a little over \$12,000 (not including travel costs for his advocate or time spent in mediation). The sum of \$6,750 was a modest contribution to those costs. There was no information indicating ECNZL could not pay an award of that amount.

[13] Accordingly, ECNZL must pay Mr Scott costs of \$6,750 and reimburse him for the Authority fee of \$71.55 paid to lodge his successful application. These amounts must be paid within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority