

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 398  
3081638

BETWEEN                      DARYL SWAN  
   Applicant

A N D                              ALLIANCE GROUP LIMITED  
   Respondent

Member of Authority:        Peter van Keulen

Representatives:             Angela MacKenzie, counsel for the Applicant  
   Shaun Brookes, counsel for the Respondent

Investigation Meeting:        On the papers

Submissions Received:        10 August 2021 from the Applicant  
   26 July 2021 from the Respondent

Date of Determination:        9 September 2021

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1]     In a determination dated 12 July 2021, I decided that Daryl Swan could not pursue claims against Alliance Group Limited as there was a binding and enforceable Record of Settlement between the parties.<sup>1</sup>

[2]     In my determination I also reserved costs so that the parties could try to agree costs. The parties were not able to agree costs and Alliance now seeks costs.

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<sup>1</sup> *Daryl Swan v Alliance Group Limited* [2021] NZERA 294.

## **Application for costs**

[3] Counsel for Alliance seeks an order for costs on the basis that Alliance was successful in defending Mr Swan's claim against it. Alliance seeks an order for payment of \$6,000.00 this sum being based on applying the daily tariff with an uplift for Mr Swan's conduct of the case.

[4] Counsel submits Mr Swan unnecessarily increased the costs in this matter by making a wholly unfounded allegation pertaining to his previous lawyer's involvement in the settlement, by claiming there was an additional hand written note of the settlement terms (which Mr Swan was not able to produce), and by claiming he had phone records showing he had spoken to the mediator before the record of settlement was certified by the mediator. Each of these matters was relevant to the validity of the record of settlement and therefore had to be analysed in the investigation meeting and, in respect of the note and the phone records, requiring a further attendance by telephone conference after the investigation meeting.

[5] Counsel for Mr Swan responded to the application for costs by submitting that Mr Swan should not be responsible for Alliance's costs. Counsel submits:

- (a) Any costs awarded in the Authority should recognise that the Authority in its investigatory role takes on some of the functions of representatives and that unsuccessful parties should not be expected to bear the burden of enormous cost bills as this is contrary to the Authority's objectives of speed, informality and accessibility.<sup>2</sup>
- (b) Costs are not to be awarded against an unsuccessful party as a punishment or an expression of disapproval at that party's conduct of the claim.
- (c) Mr Swan's conduct of the claim did not increase the costs incurred by the parties rather, he took a sensible approach to narrowing the issues which reduced the amount of time involved.

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<sup>2</sup> *Beardsley v Canpac International Ltd* ERA Auckland AA 39A/01, 29 May 20021.

(d) Mr Swan has no means to pay any costs order made against him.

### **Analysis**

[6] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*, and other relevant Employment Court and Court of Appeal decisions.<sup>3</sup>

#### *Costs for Alliance*

[7] The first principle relating to costs in the Authority is that an award of costs should follow the event, that is, a successful party should normally be awarded costs.

[8] In this case I am not satisfied that Mr Swan's personal circumstances or the circumstances of his case are such that costs should not be awarded against him i.e. that "costs should lie where they fall".

[9] Alliance was successful in defending Mr Swan's claim and is entitled to an award of costs. I will now turn to consider the quantum of that award.

#### *Applying the daily tariff*

[10] The basic premise for quantifying the amount of a costs award in the Authority is to apply the daily tariff. The daily tariff is an amount awarded for each day of an investigation meeting at the rate of \$4,500.00 for the first day of an investigation meeting.

[11] I can depart from applying the daily tariff in certain circumstances, such as where the conduct of a case justifies actual or indemnity costs to be awarded, but there are no such circumstances here and the daily tariff should be applied.

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<sup>3</sup> *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808; *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4; *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28; *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135; *GSTech Limited v A labour Inspector of MBIE* [2018] NZEmpC 127.

[12] My investigation into this matter took one day and therefore the initial quantum based on the daily tariff is \$4,500.00.

*Adjusting the daily tariff*

[13] I must now consider if the initial quantum of \$4,500.00 should be adjusted. The daily tariff amount can be adjusted for various reasons - the factors relevant to my consideration of the increase or decrease of the daily tariff in this case include:

- (a) Costs awards in the Authority will be modest;
- (b) Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
- (c) Impecuniosity of the parties may be relevant;
- (d) A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

[14] So against the requirement that costs in the Authority should be modest and determined in line with principles bearing in mind the equity and good conscience jurisdiction of the Authority, I must consider the behaviour by Mr Swan that may have increased costs for Alliance.

[15] When I balance these factors I am persuaded that an increase in the daily tariff is not appropriate. The additional work was required as Mr Swan genuinely believed there were additional documents and that his previous lawyer had acted as alleged, and investigation meetings are all about enquiring into such positions and resolving evidential issues to be able to conclude if a party's position or claim is correct; that is what the Authority does and this was not any different. And whilst some of that investigation required additional work after the investigation meeting I believe that work is accounted for in the daily tariff as it is just part of the investigation.

[16] Equally though, I am not satisfied that any refinement of Mr Swan's claim by him is a basis for reducing the daily tariff. Any reduction in claims or issues will have the direct effect of lowering costs as less time will be spent in the investigation; so Mr Swan gets credit for reducing the amount of work through the daily tariff being applied only for the one day the investigation meeting took. And therefore an additional reduction is not required.

[17] Turning to the last submission by Mr Swan's counsel, that Mr Swan will be unable to pay any cost award, I am satisfied that this is relevant and justifies a reduction in the daily tariff.

[18] In coming to this conclusion I have considered the approach taken by the Employment Court to this aspect of costs, in *Koia v Attorney-General in Respect of the Chief Executive of the Ministry of Justice (No 2)*, *Merchant v Chief Executive of the Department of Corrections* and *Tomo v Checkmate Precision Cutting Tools Ltd*. Noting that a reduction in costs because of a party's impecuniosity should not be applied without some balance, as the principles of equity and good conscience must also account for the countervailing interests of the successful party and broader public policy considerations.<sup>4</sup>

[19] The balance here is that Mr Swan did not advance lengthy, doomed, proceedings motivated by vindictiveness. The claim was not without some merit based on Mr Swan's understanding of what happened and his memory of what occurred. And, he was motivated by what he perceived to be an unresolved underlying concern, which I believe he did not properly appreciate had been resolved and could not be pursued.

[20] That said from Alliance's perspective this was straight forward; it had settled all matters and had a binding and enforceable record of settlement. It had every right to defend its position and expect a contribution to its costs if it was successful in doing so.

[21] Overall, given the circumstances of this case, particularly Alliance's right to act on the record of settlement, Mr Swan should pay some of Alliance's costs. But Mr Swan's personal

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<sup>4</sup> *Koia v Attorney-General in Respect of the Chief Executive of the Ministry of Justice (No 2)* [2004] 2 ERNZ 274; *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 (EmpC); and *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.

financial circumstances set against his uninformed and simplistic view of wanting to remedy what he perceived to be an underlying wrong, means I should reduce the daily tariff.

[22] On this basis, I reduce the daily tariff to \$3,500.00.

**Order**

[23] Mr Swan must pay Alliance Group Limited \$3,500.00 as a contribution to its costs in this matter.

Peter van Keulen  
Member of the Employment Relations Authority