IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 491
3177267

	BETWEEN	TEPORA TAIFAU Applicant
	AND	SPRING 2017 LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Mike Harrison, advocate for the Applicant Michael Meyrick, advocate for the Respondent
Investigation Meeting:	On the papers
Submissions and other information received:	14 August 2023 from the Applicant 28 August 2023 from the Respondent
Date of Determination:	31 August 2023

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority issued its substantive determination involving these parties on 26 July 2023.[1] Ms Taifau succeeded with her unjustified dismissal and wage arrears claims against Spring 2017 Limited ("*the Respondent*").

[2] Ms Taifau as the successful party has sought an award of costs of $12,000.

[3] The Respondent said Ms Taifau was not entitled to any costs because she had not been employed for long, she had caused her own unjustified dismissal and natural justice had been breached.

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1 *Taifau v Spring 2017 Limited* [2023] NZERA 396.

The Authority's investigation

[4] Costs have been determined 'on the papers'.

[5] The substantive determination set a timetable for the exchange of costs submissions. Ms Taifau's costs submissions were due by 9 August 2023. However, it turned out Ms Taifau's advocate was away from New Zealand, so did not see the substantive determination, and therefore costs timetable, until his return.

[6] On 10 August 2023 Ms Taifau requested additional time to lodge her costs submissions on the basis she had not been aware of the costs timetable. Her request was granted and she lodged her costs submissions on 14 August 2023. These attached a "*Without prejudice except as to costs*" settlement offer ("*Calderbank offer*"), which the Respondent had not accepted.

[7] Ms Taifau's costs submissions were served on the Respondent's advocate by email on 14 August 2023. The Respondent lodged its costs submissions on 28 August 2023. These submissions did not address the well-established costs principles that apply to the Authority's assessment of costs but instead raised irrelevant matters and made untrue allegations about the way in which the Authority conducted its investigation.

Legal Position

[8] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Although costs are discretionary, a successful party will normally be required to contribute to the successful party's actual legal costs.

[9] The Authority usually adopts a notional daily tariff-based approach to assessing costs. The tariff for a one-day investigation meeting is currently $4,500 and then $3,500 for each subsequent day of an investigation meeting.

[10] The Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz* set out the costs principles that the Authority must have regard to when assessing costs.[2] These principles were affirmed by the Employment Court in *Fagotti v Acme & Co Limited*.[3]

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2 [2005] ERNZ 808.
3 [2015] NZEmpC 135.

Issues

[11] The following issues are to be determined:

(a) Should Ms Taifau be awarded costs?

(b) What is the notional starting point for assessing costs in this matter?

(c) Should adjustments be made to the notional starting tariff? and

(d) What costs and disbursements should Ms Taifau be awarded?

Should Ms Taifau be awarded costs?

[12] The Authority did not accept the Respondent's submissions that Ms Taifau should not be awarded any costs because:

(a) Her period of employment was very short; and

(b) Her behaviour brought the decision to dismiss her upon herself.

[13] These are not factors that are relevant to an assessment of costs.

[14] The Respondent's claim that natural justice had been breached was not accepted.

[15] Nor was the Respondent's submission accepted, that no costs should be awarded because the Authority had decided the matter and had made a decision on quantum on the first day of the investigation meeting, in breach of the s 27 "*right to justice*" in the New Zealand Bill of Rights Act 1990.

[16] The Respondent was represented throughout the Authority's investigation. The Respondent and its witnesses had every opportunity to be heard and to explain their decisions and actions. Considerable time was devoted to obtaining evidence from the Respondent's witnesses about relevant matters that should have, but were not, addressed in their written statements.

[17] The Respondent was given an opportunity to produce new documents during the investigation meeting, as well as after it. The Respondent also had the right to lodge submissions after the investigation meeting, although it elected not to do so.

[18] During the course of the first day of the investigation meeting, the Authority had a brief private discussion with the parties' representatives to explore whether there would be any

benefit in allowing the parties to use some of the investigation meeting time to explore settlement, as it appeared that an agreed outcome could be mutually beneficial for them.

[19] That was an unremarkable discussion that was consistent with the Authority's "*problem resolution"* focus and jurisdiction. Exploring with representatives the parties' appetite to settle their issues by agreement is not an example of the Authority 'deciding the matter' or 'fixing quantum', as alleged by the Respondent.

[20] The Employment Court in *Coomer v JA McCallum & Son Limited* made it clear that mixed success is nevertheless to be treated as success for the purposes of awarding costs.[4] Although Ms Taifau did not succeed on every claim she had put before the Authority for determination, she was very clearly the successful party, for the purposes of assessing costs.

[21] There is no reason to depart from the usual principle that costs generally follow the event, meaning that Ms Taifau, as the successful party, is entitled to a contribution towards her actual legal costs.

What is the notional starting point for assessing costs in this matter?

[22] The Authority's notional daily tariff is $4,500 for the first day of an investigation meeting and $3,500 for each subsequent day.

[23] This matter involved a two-day in person substantive investigation meeting, so the notional starting tariff for assessing costs is $8,000. Consideration must then be given to whether or not that notional starting tariff needed to be adjusted to reflect the particular circumstances of this case.

Should adjustments be made to the notional starting tariff?

Should the notional starting tariff be decreased?

[24] The Respondent's submission that the notional starting tariff should be decreased by $3,500 because the Authority had asked the representatives on the first day if they thought there would be any benefit in allowing the parties some time to explore an agreed settlement, was not a legitimate ground on which to decrease the notional starting tariff.

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4 [2017] NZEmpC 156.

[25] The Authority is not aware of any factors that would warrant the notional starting tariff being decreased, and the parties did not raise any such factors that would warrant a reduction being made.

[26] Accordingly, no decrease should be made to the notional starting tariff.

Should the notional starting tariff be increased?

[27] Ms Taifau submitted that the notional starting tariff should be increased by $4,000 to reflect the additional costs the Respondent's conduct had caused her. This proposed uplift consisted of $2,200 additional costs associated with the Authority's investigation and $1,800 associated with mediation related costs.

[28] Ms Taifau cannot recover costs associated with mediation, so the maximum amount of additional costs potentially recoverable by her is $2,200, not $4,000.

[29] Ms Taifau emailed the Calderbank offer dated 4 April 2023 to the Respondent's advocate at 8.37pm that day. She offered to settle for $15,000 distress compensation along with a contribution of $5,000 plus GST towards her legal costs. The Respondent was asked to reply by 11am the next day (5 April 2023), but it did not do so.

[30] The Calderbank offer put the Respondent on notice that if it was not accepted, and Ms Taifau was awarded more than she had been prepared to settle her claims for, then she would be seeking full indemnity costs.

[31] The Authority's investigation meeting was held on 4 and 5 April 2023, so the Calderbank offer was made after the first day, and before the second day, of the investigation.

[32] Ms Taifau was awarded $19,137.24 in the substantive determination. If the Respondent had accepted her Calderbank offer, then both parties would have avoided the legal costs they incurred for the second day of the investigation meeting.

[33] Ms Taifau clearly incurred additional costs because the Respondent declined to accept her reasonable Calderbank offer. If it had been accepted then she would not have had to incur the costs associated with the second day of the Authority's investigation, lodging her submissions, or the cost incurred for this costs application. Because the Respondent elected not to lodge any submissions or other information, it did not incur costs after the conclusion of the investigation meeting.

[34] The way in which the Respondent elected to conduct itself regarding the Authority's investigation unreasonably and unnecessarily increased the Applicant's actual legal costs. This conduct that increased Ms Taifau's actual legal costs consisted of:

(a) Unreasonably refusing to accept the Calderbank offer;

(b) Failing to comply with the Authority's agreed timetable directions;

(c) Repeatedly failing to comply with the Authority's extended timetable directions;

(d) Failing to provide copies of relevant information/documents, despite advising the Authority that it had such information;

(e) Failing to respond to multiple attempts by the Authority to engage with it;

(f) Failing to include an extensive amount of material and highly relevant evidence in its witness statements, meaning considerable time had to be taken obtaining this information from witnesses during the investigation meeting; and

(g) Pursuing arguments and positions that, based on its own evidence, were unsustainable. This included claiming it had embarked on a fair and proper graduated warning process, its prior verbal and written warnings were justified and therefore enforceable, it had met its good faith obligations and it had met the procedural fairness tests in s 103A(3) of the Act, before dismissing Ms Taifau.

[35] It is therefore appropriate to uplift the notional starting tariff by $2,200 to reflect that the Respondent's conduct regarding the way in which it elected to engage in the Authority's investigation directly and unreasonably increased Ms Taifau's actual legal costs.

[36] The notional starting tariff cannot be uplifted more than $2,200 because Ms Taifau is only entitled to recover a maximum of her actual legal costs, which after mediation related costs were removed amounted to $10,200.

[37] Accordingly, the Respondent is ordered to contribute $10,200 plus GST towards Ms Taifau's actual costs. Ms Taifau is also entitled to be reimbursed $71.55 for her filing fee.

Outcome

[38] Within 28 days of the date of this determination, the Respondent is ordered to pay Ms Taifau $10,271.55 costs and disbursements, consisting of $10,200 towards her actual costs plus $71.55 to reimburse her filing fee.

Rachel Larmer
Member of the Employment Relations Authority