

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 116
3144221

BETWEEN	TOVIO UGONE Applicant
AND	STAR MOVING LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Joshua Pietras and Natalie Moore, counsel for the Applicant Stuart Biggs for the Respondent
Investigation Meeting:	On the papers
Submissions received:	17 February 2023 from the Applicant No submissions from the Respondent
Determination:	13 March 2023

DETERMINATION OF THE AUTHORITY

Background and submissions

[1] On 3 February 2023 the Authority issued a determination in which I found that Tovio Ugone was unjustifiably dismissed by Star Moving Limited (Star Moving), and that Star Moving breached s 63(3) of the Employment Relations Act 2000 (Act).¹

[2] Costs were reserved. Counsel for Mr Ugone has attempted to resolve the issue of costs by communicating with Star Moving. Star Moving has not engaged, the parties have not been able to agree on costs, and Mr Ugone now asks the Authority for orders as to the costs he incurred in pursuing his claims.

¹ *Tovio Ugone v Star Moving Limited* [2023] NZERA 55.

[3] Mr Ugone seeks a total contribution towards its costs of \$7,052.66. Mr Ugone submits that that sum represents his total legal fees in the matter and that whilst he was in receipt of legal aid, that he will be required to pay his legal aid debt.

[4] He also submits that he was clearly the successful party in the proceedings and as such that the starting point is that he should receive the daily tariff for a one-day investigation meeting. Mr Ugone submits that an uplift to the daily tariff is also justified on the basis of a *Calderbank* offer made on 12 November 2020 and conduct by Star Moving unnecessarily increasing costs. Mr Ugone also seeks costs of \$575.00 relating to reviewing the Authority's earlier determination and preparation of costs submissions.

[5] Star Moving has not engaged with the Authority in relation to the issue of costs, nor have submissions been lodged on its behalf.

Costs principles

[6] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.²

[7] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that *Calderbank* offers may be taken into account, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.³

[8] The daily tariff is usually taken as a starting point,⁴ although not used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.

Consideration

[9] The substantive proceeding involved a one-day investigation meeting. An application of the daily tariff approach would see a contribution of \$4,500.

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

⁴ Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

[10] A Calderbank offer is said to have been made on 12 November 2020, some considerable time prior to the investigation meeting and before witness statements were lodged. The offer was made in a timely manner having regard to the relevant steps in the Authority's investigation and significant costs were subsequently incurred by Mr Ugone.

[11] The letter in question repeated earlier claims as to his having a personal grievance. I accept that Mr Ugone, resulting from the Authority's determination, received a sum well in excess of that contained in the proposed settlement. I also accept that Mr Ugone sought to encourage Star Moving to make a settlement proposal, but that it did not.

[12] Notwithstanding the above, I do not consider it appropriate to award an uplift based on the offer made on 12 November 2020. That is because the offer was not marked "without prejudice save as to costs", it did not otherwise contain any reference to pursuing costs that I consider would clearly put Star Moving on notice as to the implications of rejecting the offer made, and I do not consider it was an effective Calderbank offer. The letter itself also did not provide a timeframe for response. For those reasons I decline to make any uplift to the daily tariff on account of the rejection of the 12 November 2020 offer.

[13] Star Moving's approach to responding to Mr Ugone's personal grievance was unsatisfactory. I accept that an adjustment to the tariff based on Star Moving's repeated failure to attend mediation and resulting increased costs including the need to seek further directions from the Authority. However, I do not consider an uplift is justified based on the need to take further instructions resulting from Star Moving's late engagement in the proceedings. I consider an uplift of \$750.00 appropriate.

[14] Whilst there may have been a lack of engagement from Star Moving in relation to the issue of costs, I do not consider that a basis for any additional award of costs, and I make no order as to costs relating to expense incurred in pursuing costs.

[15] An order requiring reimbursement of the filing fee of \$71.55 was made at the time of issuing the substantive determination. That order remains in place and no further order is made as to the filing fee.

Orders

[16] I order Star Moving Limited to pay Tovia Ugone the sum of \$5,250 as a contribution towards the costs it incurred in defending his claim.

[17] Payment is to be made within 28 days of this determination.

Rowan Anderson
Member of the Employment Relations Authority