

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 595  
3148261

BETWEEN	JOHN WILSON Applicant
AND	TRANSPORT REFINISHERS LIMITED Respondent

Member of Authority: Sarah Kennedy

Representatives: Joshua Pietras, counsel for the Applicant  
Michael Gould, counsel for the Respondent

Submissions Received: 17 October 2022 from the Applicant  
21 October 2022 from the Respondent

Date of Determination: 14 November 2022

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

**Costs**

[1] John Wilson wants an order for payment of costs that he incurred in pursuing his personal grievance against Transport Refinishers Limited (Transport Refinishers). Transport Refinishers says each party had a degree of success so it is appropriate to let costs lie where they fall.

[2] In my determination dated 13 October 2022,<sup>1</sup> Mr Wilson was only partially successful in that his claim for constructive dismissal and several wage claims (other than one wage claim) were unsuccessful. I did find that he had been disadvantaged but for different reasons to those pleaded and he was awarded compensation.

---

<sup>1</sup> *John Wilson v Transport Refinishers Limited* [2022] NZERA 530

[3] In that determination, the parties were encouraged to resolve any issue of costs between them. Mr Wilson had been in receipt of legal aid throughout the proceedings so in assessing costs incurred and claimed this matter is subject to the Legal Services Act 2011.

### **Costs principles**

[4] The Authority's jurisdiction to order a party to pay reasonable costs and expenses is exercised by applying some well established principles to the particular circumstances of the case.<sup>2</sup> Those principles recognise that a successful party should receive a contribution to costs reasonably incurred in reaching that result; costs are discretionary and 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" or "tariff" as a starting point to assess costs.

[5] Undue rigidity in applying that tariff is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may account for a liable party's means to pay costs, the preparation required in particularly complex matters and where the conduct of parties has unnecessarily increased costs.

[6] The Authority's current tariff for a one-day investigation meeting is \$4,500.00. This amount is taken as an appropriate starting point for assessing a reasonable contribution to the costs incurred by a party in preparing for and taking part in an investigation meeting.<sup>3</sup>

### *Mr Wilson's application for costs*

[7] In his memorandum on costs, Mr Wilson asked the Authority to increase its daily tariff to take account of settlement offers he made to Transport Refinishers that would have left it in the same position than it achieved through the Authority's eventual determination and Mr Wilson also seeks full indemnity costs.

[8] The only ground advanced by Mr Wilson to support his claim for indemnity costs was rejection of settlement offers. As such this is not a case where an order for indemnity costs should be made.

---

<sup>2</sup> Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.

<sup>3</sup> Practice Note 2 of the Employment Relations Authority, 29 April 2022.

[9] To the extent that Mr Wilson was successful with one aspect of his claim (disadvantage) he would be entitled to an award of costs for the time involved in bringing the matter to the Authority. Although Transport Refinishers were successful at defending the constructive dismissal claim, Mr Wilson still had to argue his claim for disadvantage before the Authority. Some but not all of the same information was relevant to the Authority's investigation into the constructive dismissal claim. I estimate the disadvantage claim to have taken a half day of the Authority's time.

*Should the daily tariff be increased?*

[10] The relevant principles regarding settlement offers allow for adjustment of costs where a party has turned down an earlier offer to settle on terms better than the final outcome achieved in the Authority determination.

[11] Mr Wilson says that Transport Refinishers unreasonably rejected his very first settlement offer for \$10,000.00 before mediation and well before proceedings were lodged in the Authority. If Transport Refinishers had accepted that offer, Mr Wilson says it would have saved itself and Mr Wilson the cost of preparation and attendance at the investigation meeting.

[12] I note that the email from Transport Refinishers rejecting the initial offer of \$10,000.00 records that the grievance at the time of that first offer "remains to be clarified" and it's representative at the time said they were unable to respond because of that.

[13] At the initial stages, if Transport Refinishers were in circumstances where they needed further information, then they acted reasonably when rejecting that offer.

[14] Mr Wilson also says he has had to incur unnecessary legal costs because Transport Refinishers continued to reject further reasonable settlement offers in the months leading up to the investigation meeting.

[15] Transport Refinishers offered to resolve the proceedings by paying \$3000.00 under s123(1)(c)(i) plus \$124.80 for the wage arrears with costs lying where they fall. Then Mr Wilson made another offer that included compensation in the amount of \$15,000.00 and payment of Mr Wilsons costs to the Legal Services Commissioner in sum of \$2007.20, including GST.

[16] Mr Wilson made a further offer of \$7000.00 under s 123(1)(c)(i) plus \$3,500.00 including GST as a contribution towards his costs and shortly after offered to accept a lump sum of \$7,500.00 with costs to lying where they fall. None of those offers were accepted.

[17] Mr Wilson's actual costs up to and including the filing of costs submissions were \$7,884.00.

[18] Having considered all factors, including the timing of the offers in the lead up to the investigation meeting, I consider that a small costs award to take into account a half day of hearing time, in the amount of \$2,250.00 is appropriate.

**Order**

[19] Transport Refinishers Limited is ordered to pay the sum of \$2,250.00 together with the filing fee of \$71.56 to John Wilson within 28 days of this determination.

**Sarah Kennedy**  
**Member of the Employment Relations Authority**