

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 793  
3385443

BETWEEN            YEX  
                                 Applicant  
  
AND                    ZEK  
                                 Respondent

Member of Authority:      Rachel Larmer

Representatives:            Applicant in person  
                                 Emma Crowley, counsel for the Respondent

Investigation:                On the papers

Submissions and Other      14 October 2025 from the Applicant  
Information:                    7 October 2025 from the Respondent

Date of Determination:      8 December 2025

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The parties names'**

[1] Three random letters have been used for each party's name to ensure any potential challenge they may want to make to the Authority's determination dated 5 December 2025, which varied the interim non-publication order dated 21 July 2025, was not rendered nugatory.<sup>1</sup>

**Employment relationship problem**

[2] Both parties have applied to the Authority for a costs order in their favour. The applicant withdrew their claims for interim reinstatement and unjustified dismissal without the parties reaching agreement on costs. That occurred after the substantive matter had been set down for an investigation meeting, but before interim reinstatement application had been determined.

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<sup>1</sup> *YEX v ZEK* [2025] NZERA 789.

[3] Normally costs would not be awarded where an applicant withdrew their claims at such an early stage in the proceedings. However, the respondent submitted that there are special circumstances associated with the applicant's conduct and claims that made an award of costs in its favour appropriate in this particular matter.

[4] The applicant denied that, and further said they should be awarded costs because "their legal costs were so high". The applicant therefore sought "a modest contribution" towards their legal costs.

[5] There are no grounds for awarding costs to the applicant, as they were not the successful party. The applicant is to be viewed as the unsuccessful party for the purposes of assessing costs, as they withdrew all of their claims before they were investigated or determined.

[6] This determination therefore addressed whether the respondent should be awarded any costs.

#### **What costs were incurred by the parties?**

[7] The applicant said they had incurred in excess of \$65,000.00 in actual legal costs for their interim reinstatement application and substantive unjustified dismissal claim. The applicant had lodged a statement of problem, undertaking, request for urgency and one affidavit in support of interim reinstatement before their claims were withdrawn.

[8] The respondent said it had incurred in excess of \$42,000.00 costs up to 25 August 2025, plus at least another \$3,695.00 additional legal costs were incurred in connection with lodging this costs application.

#### **Grounds on which costs are sought**

[9] The respondent sought costs of \$11,000.00, consisting of:

- (a) \$6,750.00 for costs associated with the interim reinstatement application;
- (b) \$2,250.00 for costs associated with the substantive claim; and
- (c) \$2,000.00 for costs associated with this costs application.

[10] The respondent sent the applicant a "without prejudice except as to costs" settlement offer dated 25 August 2025 that proposed the applicant withdraw their claims and contribute

\$10,000.00. towards its actual legal costs. The offer was stated to remain open until 5pm on 17 September 2025.

[11] The respondent said it had incurred costs of \$42,000.00 up to the date it sent the “without prejudice except as to costs” settlement offer dated 25 August 2025. The applicant’s claims were withdrawn on 8 September 2025, before the Calderbank offer had expired.

### **Starting point for assessing costs**

[12] The applicant’s interim reinstatement application was to be determined ‘on the papers.’

[13] The notional starting point for assessing costs for the interim reinstatement application was \$2,250.00, being half of the notional daily tariff for a one-day investigation meeting which is currently \$4,500.00.

### **What adjustments should be made to the notional starting tariff?**

*Should the notional starting tariff be decreased?*

[14] At the time the applicant’s claims were withdrawn, the respondent had lodged a statement in reply, notice of opposition to the interim reinstatement application, three affidavits, an updated chronology, a memorandum of counsel, and an application for a witness summons.

[15] The notional starting tariff for an interim reinstatement application has been set to include all costs the parties would incur up to the determination of interim reinstatement. Because the applicant withdrew their claims on 8 September 2025, before either party had lodged their submissions on interim reinstatement, the notional starting tariff should be reduced by \$1,000.00 to reflect that.

[16] The applicant told the Authority they had been experiencing financial hardship. They were invited to lodge an affidavit that set out their financial position, but despite a number of extensions of time to enable them to do so, no affidavit was forthcoming. Accordingly, the Authority lacked the evidential grounds to reduce costs on the grounds the applicant was unable to pay them.

[17] However, the Authority did note that the applicant had lost their job and had apparently not secured new employment. These facts supported a modest costs award in the respondent's favour.

*Should the notional starting tariff be increased?*

[18] The applicant deliberately withheld their drug testing results from their employer, by revoking consent for their drug testing results to be released to their employer after the drug testing had been completed and after the applicant had been advised that drugs had been detected in their urine.

[19] The applicant also provided what appeared to be misleading information about their drug use in the affidavit they lodged with the Authority in support of their interim reinstatement application, because what they said was contradicted by the results of their drug test. Although the applicant was invited by the Authority to lodge evidence that disputed or explained the results of their drug testing, and they were given time to do so, no such evidence was provided.

[20] The applicant's actions in revoking consent for their employer to see their workplace drug test results; by failing to disclose the results of their workplace drug testing to the Authority; and by lodging an affidavit that appeared to be misleading (at best) regarding their drug use, put the respondent to the additional legal costs.

[21] These extra legal costs consisted of arose from the respondent applying for a witness summons and lodging an affidavit from the individual who conducted the applicant's workplace drug testing, which appended the results. This affidavit also responded to specific questions the Authority had asked about the applicant's drug testing results.

[22] The respondent's actions in this regard were necessary and appropriate to establish, prior to the interim reinstatement application being determined, that the applicant had lodged a misleading affidavit in support of their interim reinstatement application and to ensure the Authority had seen the applicant's drug testing results.

[23] The applicant's actions unreasonably and unnecessarily increased the respondent's actual legal costs. It is therefore appropriate to increase the notional starting tariff to reflect that.

[24] It was after the applicant's drug testing results had been provided to the Authority that the applicant withdrew their claims. However, it was significant to note the applicant already had that information prior to lodging proceedings with the Authority.

[25] The respondent said that applying for the summons and preparing and lodging an affidavit which addressed the drug testing results, had cost it an extra \$7,680.00 in additional legal costs. It is therefore appropriate for the applicant to contribute \$5,000.00 to the respondent towards the actual additional costs it had to incur because the applicant withheld their drug testing results from the Authority. Accordingly, the notional starting tariff is increased by that amount.

### **Costs contribution towards the interim reinstatement application**

[26] The applicant is ordered to contribute \$6,250.00 towards the respondent's actual legal costs that it has incurred in connection with defending the applicant's interim reinstatement application.

### **Should the applicant contribute towards the respondent's cost on the substantive claims?**

[27] It is not appropriate to apply the notional daily tariff to assessing costs on the substantive matter, because the applicant's substantive dismissal grievance was withdrawn at such an early stage in the Authority's investigation process.

[28] Normally the Authority would not award costs if a matter was withdrawn at such an early stage. However, the respondent said that usual practice should be departed from as the applicant unreasonably put it to additional unnecessary legal costs by lodging their dismissal grievance.

[29] The applicant was in receipt of their drug testing results before they lodged their statement of problem, interim reinstatement application and affidavit. The applicant was still represented by counsel when they lodged these documents. The applicant therefore ought to have known that the outcome of their drug testing results was material evidence that fundamentally undermined both the interim reinstatement application and their unjustified dismissal grievance claim.

[30] Notwithstanding that knowledge, the applicant pursued their claims until 8 September 2025, thereby putting the respondent to the costs of defending them up until that time.

[31] The parties attended a case management conference (CMC) on 5 August 2025 for the substantive claim at which agreed timetable directions were issued. The applicant's dismissal grievance was also set down for a substantive investigation meeting in January 2026.

[32] In accordance with the timetable directions, the respondent provided the applicant with a copy of its relevant documents on 25 August 2025. However, the applicant failed to provide the respondent with any relevant documents. The respondent was required to lodge a Joint Bundle (JB) of relevant documents by 12 September 2025, so it sought directions about how to proceed when the applicant had not provided any relevant documents.

[33] The Authority told the respondent to lodge the JB with the available documents and the applicant was told they could lodge a supplementary bundle of relevant documents, so the timetable could stay on track. The respondent duly collated the documents it had into a joint bundle and it obtained a draft affidavit for one witness.

[34] Although the JB was not lodged with the Authority, the respondent incurred the costs associated with preparing the JB. It also incurred the legal costs associated with drafting witness summonses for two witnesses and by preparing for the lodging of its witness statements by speaking to five of its intended witnesses. The respondent said it incurred \$4,365.00 on these activities.

[35] When the applicant withdrew their claims, they said they had intended to do so since 11 July 2025. The applicant's failure to withdraw their claims when they knew they were not going to proceed unreasonably caused the respondent to continue incurring legal costs over the period 11 July 2025 to 8 September 2025. The CMC and all actions taken after that would not have been necessary if the applicant had acted promptly to withdraw their claims after they had decided not to proceed.

[36] In such circumstances it is appropriate for the applicant to contribute \$1,500.00 towards the respondent's actual legal costs incurred in connection with the substantive claims to reflect that.

**Should the applicant have to contribute towards the respondent's costs for this costs application?**

[37] The respondent sought \$2,000.00 for the costs associated with this cost application. The respondent attempted to resolve costs by agreement, but the applicant said they wanted the Authority to determine costs. This costs application was therefore necessary.

[38] The applicant is ordered to contribute \$500.00 towards the respondent's costs for this application.

**Outcome**

[39] Within 28 days of the date of this determination, the applicant is ordered to contribute \$8,250.00 towards the respondent's actual legal costs.. This consists of:

- (a) \$6,250.00 towards the costs incurred in defending the interim reinstatement application;
- (b) \$1,500.00 towards the costs incurred in defending the substantive unjustified dismissal claim;
- (c) \$500.00 towards the costs incurred in making this costs application.

Rachel Larmer  
Member of the Employment Relations Authority