

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 437
3022532

BETWEEN IAN DAVIS
Applicant

AND ON ALL FLOORS (2016)
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Geoff Martin, advocate for the Applicant
Julie Hardaker, counsel for the Respondent

Submissions Received: 08 July 2019 from the Applicant
21 July 2019 from the Respondent

Date of Determination: 23 July 2019

COSTS DETERMINATION OF THE AUTHORITY

- A. The respondent is to pay a contribution to the applicant's costs in the sum of \$8,000 together with the filing fee of \$71.56 within 21 days of the date of this determination.**

Substantive determination

[1] By way of a determination dated 28 May 2019¹, the Authority found that the applicant, Mr Ian Davis had suffered an unjustifiable disadvantage and had been unjustifiably dismissed by On All Floors (2016) Limited (On All Floors). Remedies were awarded accordingly.

¹ [2019] NZERA 313

[2] Costs were reserved. The parties were invited to exchange memoranda as to costs.

Submissions as to costs

[3] On behalf of Mr Davis, a memorandum was filed by his advocate, Mr Martin. The total fees incurred by Mr Davis, according to the memorandum and invoices submitted on his behalf amount to \$12,450.85 (including GST).

[4] Mr Martin seeks indemnity costs, or in the alternative, a significant uplift in costs. In doing so, Mr Martin relies on a Calderbank offer² which he says was reasonable and made at an early stage of the proceedings which was rejected by On All Floors.

[5] In his memorandum in reply, Ms Hardaker seeks that costs be awarded in accordance with the Authority's notional daily rate. She says there are insufficient grounds for awarding indemnity costs or an uplift in costs.

Costs determination

[6] The Authority's power to award costs against a party is set out in clause 15 of Schedule 2 of the Act which provides as follows:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[7] The Authority has a discretionary power to award costs which must be exercised on a principled basis.

[8] In *PBO Limited (formerly Rush Security Limited) v Da Cruz*³, the Employment Court set out a range of principles to guide the Authority when assessing a costs application. The principles are well known and I do not intend re-stating them in this determination. I will refer to the relevant principles where applicable to the particular circumstances of the matter between the parties in this case.

² *Calderbank v Calderbank* [1975] 3 All ER 333

³ [2005] 1 ERNZ 808

[9] In this case, Mr Davis was successful in his claims against On All Floors. Mr Davis should recover a contribution to costs incurred by him in bringing his claims against On All Floors.

An appropriate award of costs

[10] The question for the Authority is: what is an appropriate award of costs? The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day and \$3,500 for each subsequent day.

[11] The investigation meeting took place on 4 separate dates in the Authority. A total of approximately 14 hours was spent. This equates to a 2 day investigation meeting which is a total of \$8,000. The parties agree on this starting point. Both parties were responsible for the adjournments and delays in respect of the Authority's investigation.

[12] The Authority must then take into account whether there are any particular aspects of the case that would warrant modification to the rate. Mr Martin seeks indemnity costs of or in the alternative an uplift in the Authority's daily tariff from \$8,000 to \$12,459.85 to cover his entire costs. It appears that Mr Martin has included \$3,626.91 in costs which were incurred prior to the Authority's investigation meeting and included attendances at mediation. This is not appropriate, in this case.

Without prejudice communications

[13] From the correspondence exchanged between the parties and attached to their respective memoranda as to costs, both parties attempted to settle Mr Davis' claims at an early stage. Both parties made without prejudice offers which could have avoided litigation. Unfortunately, agreement could not be reached.

[14] The Authority is a forum for the resolution of disputes at a low level and in a speedy manner.

[15] The full Court in *Fagotti v Acme and Co Limited*⁴ considered the issue of costs in the employment jurisdiction. At para 107, the Court agreed with the following statement by Judge Inglis in *Stevens v Hapag-Lloyd (NZ) Limited*⁵;

...proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority's informed assessment of an appropriate notional daily rate, currently set at \$3,500) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party's right to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources to the pursuit or the defence of a claim in the Authority in the first instance, that is a choice they make including having regard to the generally applied daily rate...

[95] In my view it will generally be inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority...

[16] I am not prepared to depart from the usual manner in which costs are dealt with by the Authority. Costs are to be moderate and non-punitive. I consider costs should be payable by On All Floors and I consider the appropriate amount to be \$8,000 for what amounted to a two day investigation meeting in the Authority.

[17] On All Floors is ordered to make a contribution of \$8,000 in total in respect of the investigation in this matter. Costs of \$8,000 together with the filing fee of \$71.56 are to be paid by On All Floors to Mr Davis within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority

⁴ [2015] NZEMPC 135
⁵ [2015] NZEMPC 28