

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 515
3063716

BETWEEN

KUKYI TUPUANGA
Applicant

AND

AUCKLAND MEAT
PROCESSORS LIMITED
First Respondent

Member of Authority: Vicki Campbell

Representatives: Sam Audeau for Applicant
Madeleine Lister for Respondent

Investigation meeting: On the papers before the Authority

Submissions received: 23 August 2019 from Applicant
21 August 2019 from Respondent

Determination: 2 September 2019

COSTS DETERMINATION OF THE AUTHORITY

- A. Mr Tupuanga is ordered to pay to Auckland Meat Processors Limited the sum of \$3,000 as a contribution toward costs within 28 days of the date of this determination.**

[1] Mr Tupuanga lodged a statement of problem in the Authority on 14 June seeking, among other things, interim reinstatement. He sought and was granted urgency for his application.

[2] The parties were directed to attend an urgent mediation. Mediation was unsuccessful. Rather than expose the parties to the costs of dealing with an interim hearing and a substantive hearing an early date to investigate and determine the substantive application was offered and accepted by the parties. That investigation meeting took place on 9 August 2019.

[3] In a determination dated 12 August 2019 I held Mr Tupuanga was not unjustifiably dismissed and that Auckland Meat Processors Limited (AMPL) did not breach its statutory duty of good faith.¹

[4] I reserved costs and invited the parties to resolve the issue between them. The parties have been unable to resolve the matter and AMPL has lodged a costs memorandum seeking a determination of the issue of costs.

[5] Mr Tupuanga has indicated that he intends filing a challenge to the Authority's determination in the Employment Court. In such situations the Authority will usually proceed to determine costs. The Court's practice directions allow a costs challenge to be incorporated into the plaintiff's existing challenge to the Authority's substantive determination.²

[6] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks' reasonable.³ The principles applying to costs are well settled and do not require repeating.⁴

[7] An assessment of costs in the Authority will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.⁵ The investigation meeting took one day so the starting point is \$4,500.

¹ *Tupuanga v Auckland Meat Processors Limited* [2019] NZERA 471.

² <https://justiceprod2-employmentcourt.cwp.govt.nz/assets/Documents/Publications/EMPLOYMENT-COURT-PRACTICE-DIRECTIONS-as-published-on-EC-Website20181214.pdf>

³ Employment Relations Act 2000, Schedule 2, clause 15.

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

⁵ Practice Note 2, Costs in the Employment Relations Authority.

[8] The Authority will take into account any offers made by the parties to settle matters:⁶

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

[9] AMPL made two Calderbank offers to Mr Tupuanga prior to the Authority's investigation meeting. The first was on 23 July, five days after Mr Tupuanga had lodged his witness statements and three days before AMPL was to lodge its statements. AMPL offered to settle Mr Tupuanga's personal grievance with the payment of \$11,000, an offer to record his dismissal as a resignation and the offer of a certificate of service highlighting Mr Tupuanga's duties and responsibilities in his role at AMPL.

[10] AMPL advised Mr Tupuanga that the payment was a global amount which he could apportion between compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and legal costs as he saw fit. Mr Tupuanga was told that if he decided to apportion an amount of the global sum to legal costs that amount would be paid with the additional GST component.

[11] Even though the offer was open for acceptance until 30 July 2019 Mr Tupuanga rejected the offer on 23 July.

[12] On 30 July a second Calderbank offer was made to Mr Tupuanga. That offer was identical to the first offer with the exception that the monetary offer was increased to \$15,000. This offer was rejected on 31 July.

[13] AMPL seeks an uplift in costs from the daily tariff on the basis that Mr Tupuanga's rejection of the two Calderbank offers was unreasonable.

[14] Mr Tupuanga submits that his rejection was not unreasonable because the offers did not address his claim for reinstatement which was the primary remedy being sought by him.

⁶ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

[15] I have concluded Mr Tupuanga's rejection of both Calderbank offers was reasonable in light of the failure by AMPL to address his claim for reinstatement.⁷

[16] Given my finding regarding the rejection of the Calderbank offer there will be no uplift in costs. I have considered whether a reduction in the daily tariff is appropriate taking into account Mr Tupuanga's personal financial circumstances. Costs are not to be used as a punishment.⁸

[17] I am mindful of not imposing a figure which does not justly compensate AMPL for the costs it has incurred while at the same time could cause an excessive or disproportionate hardship on Mr Tupuanga. I have also taken into account that costs in the Authority will generally be modest.⁹

[18] Taking all of the circumstances into account an appropriate award for costs is \$3,000.

[19] Mr Tupuanga is ordered to pay to Auckland Meat Processors Limited the sum of \$3,000 as a contribution toward costs within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority

⁷ See *Gaut v BP Oil New Zealand Limited* [2011] NZEmpC 111 at [23].

⁸ Above n 4.

⁹ Above n 4 at [44].