

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 397  
3123258

BETWEEN MICHAEL JOHNSTON  
Applicant

AND HIFX LIMITED t/a XE NEW  
ZEALAND  
Respondent

Member of Authority: Rachel Larmer

Representatives: June Hardacre and Peter Wigglesworth, counsel for the  
Applicant  
Anthony Drake and Rosie Judd, counsel for the  
Respondent

Investigation Meeting: On the papers

Submissions and Further Information: 30 July 2021 from the Applicant  
30 July 2021 from the Respondent  
6 August 2021 from the Respondent  
12 August 2021 from the Applicant

Date of Determination: 8 September 2021

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Johnston did not succeed with his interim reinstatement application and he withdrew his substantive claims after the Authority's investigation meeting but before the parties had filed submissions.<sup>1</sup> The Authority therefore did not determine his substantive claims.

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<sup>1</sup> *Johnston v HIFX Limited* [2020] NZERA 475.

[2] The withdrawal occurred without costs being resolved.

[3] The Respondent HIFX Limited, trading as XE New Zealand Limited, sought a costs contribution of \$28,363.50 towards the more than \$100,000 actual costs it incurred for the interim and substantive matters.

[4] Mr Johnston accepted that he would be required to make a contribution towards the Respondent's legal costs. He submitted that an award of \$6,750 was appropriate, consisting of \$2,250 for the interim reinstatement application and \$4,500 for the substantive matter.

### **Authority's approach to costs**

[5] The Respondent submitted that the Authority's daily tariff based approach was not appropriate for this matter.

[6] Instead the Respondent said costs should be assessed based on the District Court Rules 2014 2B costs scale, with a 50% uplift to be applied to that scale. Alternatively the Respondent submitted, if that was not acceptable, then the Authority should award such costs as it thinks reasonable.

[7] The Respondent's submission that costs should not be assessed in accordance with the Authority's usual notional daily tariff based approach to costs is rejected.

[8] Clause 15 of the Second Schedule of the Employment Relations Act 2000 (the Act) gives the Authority a wide discretion to order a party to pay another party's costs and disbursements as it thinks reasonable.

[9] The principles for assessing and awarding costs in the Authority are so well established that there is no need to set out all of these factors here, see *PBO Ltd (formerly Rush Security Ltd) v D Cruz*.<sup>2</sup>

[10] The Authority applies a 'notional daily tariff' based approach to assessing costs. The current notional daily tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.

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<sup>2</sup> [2005] 1 ERNZ 808.

[11] That approach gives the Authority a notional starting tariff, which must then be adjusted to reflect the particular circumstances of each case. There is therefore no need to adopt any other costs regime, as the Authority can adjust the notional daily tariff, on a principled basis, as required.

[12] The Authority's notional daily tariff based approach is widely understood by those appearing in the employment institutions. The notional daily tariff based approach to costs reflects the Authority's unique investigatory and problem solving role and it is an approach that has been endorsed by the Employment Court.

[13] The 'notional daily tariff' is the approach that has been used for assessing costs in this matter.

### **What costs should be awarded for the interim reinstatement application?**

[14] The interim reinstatement matter was determined on the papers, and should be treated as a half-day investigation meeting. The starting point for assessing costs is therefore \$2,250 (being half of the notional daily tariff of \$4,500).

[15] When assessing whether the notional starting tariff of \$2,250 should be adjusted, the Authority considered that the interim reinstatement claim was a straightforward application. Mr Johnston only filed one affidavit.

[16] The Respondent's submission that the starting tariff for the interim reinstatement application should be uplifted, because it was accompanied by a compliance order application that was withdrawn by Mr Johnston the day before his interim reinstatement application was determined, did not succeed.

[17] The Authority considered that the compliance order application arose from Mr Johnston's concern to protect his professional reputation and standing regarding disclosures the Respondent said it had made, and intended to make, to the Financial Markets Authority (FMA) and the Australian Securities Investments Commission (ASIC).

[18] Instead of being "*active and constructive*" or "*responsive and communicative*" in its communications with Mr Johnston about its reporting to the FMA and ASIC, the Respondent's breaches of its good faith obligations to him under s 4(1A)(b) of the Act directly caused Mr

Johnston to seek compliance orders (which was really an injunction application) regarding the Respondent's disclosures to Australian financial market regulators.

[19] The Authority considered that the Respondent caused itself to have unnecessarily incurred the costs associated with the withdrawn compliance order application, by its failure to be open or upfront with Mr Johnston about what it had reported, and what it intended to report, to FMA and ASIC about him personally.

[20] Mr Johnston's compliance order application was an attempt to protect his career and livelihood. It was only as a result of the Authority's intervention that Mr Johnston got clarity on what, if anything, the Respondent had reported to the Australian financial regulators about him. Mr Johnston's repeated attempts to obtain that same information without having to file proceedings had been unsuccessful.

[21] Having brought the costs associated with the compliance order application on itself, the Authority's view is that Mr Johnston should not be required to pay increased costs to the Respondent, due to its unreasonable approach to his repeated requests for information that related to him personally.

[22] The Authority has therefore decided that there are no factors that should result in the notional starting tariff of \$2,250 being uplifted or decreased. Accordingly, Mr Johnston is ordered to pay the Respondent \$2,250 towards the costs it incurred in connection with Mr Johnston's interlocutory applications.

**What costs should be awarded for the substantive matter?**

[23] The Authority considered that it has the discretion to be able to award costs where an investigation meeting was held but the applicant has subsequently withdrawn their claims, before a determination has been issued.

[24] The substantive matter involved a two day investigation meeting, that at the Authority's request was held over four half days of investigation meeting time. The notional starting point for assessing costs on the substantive matter is therefore \$8,000 (\$4,500 for day one plus \$3,500 for day two).

[25] The Respondent submitted that the notional daily tariff should be increased because Mr Johnston rejected a *Calderbank* offer of \$4,500 that would have been paid to him under s123(1)(c)(i) of the Act, without admission of liability.

[26] The Authority's view, based on the properly tested evidence it heard, was that Mr Johnston's rejection of the *Calderbank* offer was not unreasonable. It was clear that the Respondent had failed to fulfil its good faith obligations and it was that fundamental failing that resulted in these proceedings.

[27] The Authority therefore considered that it would be unjust in all of the circumstances to uplift costs on the basis of the rejected *Calderbank* offer, because Mr Johnston had good reasons for pursuing his claims to an investigation meeting.

[28] The full extent of the Respondent's multiple breaches of good faith were only teased out during extensive questioning of its witnesses. It was also clear that the Respondent's decision to suspend him was predetermined and therefore procedurally flawed.

[29] Mr Johnston can therefore be said to have achieved some level of vindication as a result of the Authority's investigation meeting, even though it did not result in a written substantive determination.

[30] The Respondent's claim that the starting tariff should be increased because Mr Johnston made a late application to adduce evidence from two further witnesses did not succeed.

[31] Mr Johnston initially only filed one witness statement. However, contrary to indications by the Respondent that it would only be calling one witness, it filed evidence from two additional witnesses. These witnesses introduced new evidence that Mr Johnston had to respond to. Mr Johnston therefore incurred additional unexpected costs when he had to file witness statements from two new witnesses to address the new evidence.

[32] Although the Respondent said it had to provide another witness to address the evidence given by Mr Johnston's two additional witnesses, both of the witnesses Mr Johnston relied on supported key elements of his claim. They both also credibly undermined material evidence given by the Respondent's witnesses.

[33] The Authority therefore considered that both parties should bear their own costs associated with the calling of additional witnesses to deal with new evidence. It is not a factor that should result in Mr Johnston paying the Respondent increased costs.

[34] The Authority finds that Mr Johnston's conduct did not unnecessarily or inappropriately increase the Respondent's costs. Mr Johnston discharged his claim in an efficient manner and co-operated with the Respondent and Authority.

[35] Most of the investigation meeting time was used on questioning the Respondent's witnesses, and that elicited material evidence that was not contained in their written statements. It was therefore reasonable and necessary to take the time needed to properly test the evidence the Respondent had filed.

[36] The Respondent's submission that its costs award should be increased because it had started drafting its substantive submissions before the matter was withdrawn did not succeed. The notional daily tariff generally includes the costs associated with preparing substantive submissions. In this case the withdrawal occurred before substantive submissions were filed. Mr Johnston also attempted to settle the matter before he withdrew his claims.

[37] The Respondent's submission that Mr Johnston acted cynically and vexatiously by withdrawing proceedings when he did is not accepted.

[38] There were obvious problems with the way the Respondent elected to deal with disclosure and information issues related to Mr Johnston. The full extent of these problems did not become fully visible until the Respondent's witnesses could be questioned during these proceedings and the documents relied on were able to be closely scrutinised in a way that had been unable to occur before the Authority became involved.

[39] It was reasonable for Mr Johnston to revisit his claims after all of the evidence had been tested, particularly when new evidence came to light as a result of the Authority's investigation meeting process. It is unfair for that to be categorised as cynical and/or vexatious in the specific circumstances of this particular case.

[40] If the Respondent had given Mr Johnston full visibility on the matters of concern to him, then he would have been better positioned to have understood and assessed the information that eventually came to light as a result of the investigation meeting. The

Respondent must therefore bear some responsibility for Mr Johnston's late decision to withdraw his claims.

[41] The Authority does not consider there are any factors that should result in the notional daily tariff for the substantive matter being decreased, and the parties did not identify any. Mr Johnston is therefore ordered to pay the Respondent \$8,000 towards its actual costs for the substantive matter.

### **Outcome**

[42] Within 30 days of the date of this determination, Mr Johnston is ordered to contribute \$10,250 towards the Respondent's costs, consisting of \$2,250 for the interim reinstatement application and \$8,000 for the substantive matter.

[43] The Authority was satisfied that was a reasonable amount to require Mr Johnston to contribute to the Respondent's actual costs.

**Rachel Larmer**  
**Member of the Employment Relations Authority**