

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 399
3072632
3103952

BETWEEN MARGRET ADDY
 Applicant

AND THE GREAT ADVENTURE
 TOURISM COMPANY LIMITED
 Respondent

Member of Authority: Marija Urlich

Investigation Meeting: On the papers

Representatives: Ira White, for the Applicant
 Shelley Eden, for Respondent

Determination: 10 September 2021

DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 10 August 2021 which upheld Ms Addy’s claim in part and declined the counterclaim brought by The Great Adventure Tourism Company Limited (GATC).¹ The issue of costs was reserved and a timetable set for filing memoranda if the parties were unable to resolve costs themselves.² Ms Addy now applies for a costs award in her favour.

Ms Addy’s claim for costs

[2] Ms Addy seeks a contribution to costs of \$4,500. Submissions filed on her behalf include reference to the degree of success of her claim and lack of success of GATC’s claims, that in March 2020 Ms Addy requested GATC enter without prejudice

¹ *Margret Addy v The Great Adventure Tourism Company Limited* [2021] NZERA 353.

² Above [48].

settlement discussions which it did not accept, that in her view GATC would have been better off to settle with Ms Addy and the parties attempted to settle costs between them without success.

[3] Ms Addy's total actual costs are \$5,388.78 (GST inclusive) which includes \$300 for representation at mediation, filing fee and disbursements.

GATC's response

[4] Submissions filed on behalf of GATC refer to the principles relevant to a consideration of costs. GATC's submissions also refer to information provided during the parties' costs settlement negotiations which show Ms Addy's total costs are less than the daily tariff (being \$3,869.67 (plus GST)). GATC submits a costs award cannot be greater than actual costs incurred. Additional matters GATC submits are relevant to the Authority's consideration of costs are Ms Addy's level of success including that two of three heads of claim were unsuccessful and she recovered 20% under the remaining claim, that GATC's counter claim took up significantly less preparation and hearing time than Ms Addy's and no without prejudice save as to costs offer was made. GATC submits given these circumstances a reasonable costs award would be a proportion of actual costs incurred.

Costs principles

[5] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.

- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.³

Costs analysis

[6] Ms Addy was the successful party and it is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs. It is accepted she has incurred actual costs in respect of this matter. She should receive a contribution to costs incurred.

[7] The notional daily tariff is a starting point. The applicable daily tariff is \$4,500.00. Costs for one day are sought. Decrease of the daily tariff is warranted because on the information before the Authority Ms Addy has not incurred costs for representation in respect of the investigation meeting at that level. It is accepted that a costs award should not be more than actual costs incurred. Consideration has been given to whether an award of costs should be less than actual costs incurred. A further decrease is not warranted given the modest level of actual costs incurred and that there is no information before the Authority that the costs incurred are unreasonable. There was not a settlement offer made which needs to be factored in – a request to enter settlement discussions is not a settlement offer. It is accepted the costs for mediation should not be included in the costs award. The filing fee and disbursements are reasonably recovered.

[8] The Great Adventure Tourism Company Limited is ordered to pay Ms Addy \$3869.67 (plus GST) towards the costs of representation and reimburse her disbursements of \$453.99 and the filing fee of \$71.56 within 21 days of the date of this determination.

Marija Urlich
Member of the Employment Relations Authority

³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.