

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

**[2021] NZERA 462
3089934**

	BETWEEN	TUNUHIA TUPE Applicant
	AND	THE BOARD OF TRUSTEES OF TE MANAWA O TUHOE TRUST Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Stan Austin, advocate for Applicant Alex Hope, counsel for Respondent	
Costs Submissions	05 October 2021 & 13 October 2021 from the Applicant 08 October 2021 & 12 October 2021 from the Respondent	
Determination:	19 October 2021	

COSTS DETERMINATION OF THE AUTHORITY

- [1] There have been three determinations in this matter:
- In a determination dated 31 March 2020 ([2020] NZERA 132) I determined that the Applicant, Mr Tunuhia Tupe, should be reinstated on an interim basis by the Respondent, The Board of Trustees of Te Manawa O Tuhoē Trust (the Trust);
 - In a determination dated 24 August 2020 ([2020] NZERA 348) the Trust was ordered to comply with the interim reinstatement order; and
 - In a determination dated 22 September 2021 ([2021] NZERA 411) I determined that Mr Tupe had been unjustifiably dismissed by the Trust.
- [2] Costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and both parties have filed submissions in respect of costs.

[3] Determination [2020] NZERA 132 was determined on the papers. Determination [2020] NZERA 348 was determined on the papers and by telephone. Determination [2021] NZERA 411 involved a one day investigation meeting by Zoom on 8 September 2021.

[4] Mr Austin, on behalf of Mr Tupe, is seeking a total contribution to costs award in the three investigations of \$11,673.00.

Applicant's submissions

a. Determination [2020] NZERA 132

[5] The Applicant submits that it was the successful party and costs should follow the event. Costs incurred were in the actual sum of \$4,790.50 and it is submitted that a costs award of \$3,193.67, being two-thirds of the actual cost, or alternatively \$3,100.00 being approximately 70 per cent of the actual costs, would be appropriate.

b. Determination [2020] NZERA 348

[6] This determination was an application for compliance.

[7] The Applicant submits that it was the successful party and in reply the Trust immediately provided an undertaking that it would comply with the interim reinstatement.

[8] On that basis it is submitted the application was unnecessary and costs on an indemnity basis should be awarded.

c. Determination [2021] NZERA 411

[9] The Applicant submits that although Mr Tupe was not awarded the full range of remedies sought, he was the successful party.

[10] It is submitted that the Applicant incurred additional costs in respect of the Respondent filing several late submissions of evidence related to a submission that the Trust was not the correct employer, and to the receivership of the Trust's subsidiary company Nation Logging Limited (NLL). These required a significant response including the analysis of financial records. This increased the Applicant's costs by \$3,400.00.

[11] The Applicant therefore seeks an uplift in the Authority's nominal daily tariff of \$2,300.00 and seeks a costs contribution award of \$6,800.00 on that basis.

Respondent's submissions

[12] In respect of the substantive investigation (determination [2021] NZERA 411) Mr Hope submits, on behalf of the Trust, that a significant amount of the investigation meeting time was taken up on the issues in which the Applicant was unsuccessful and that had he focussed on the issue of the timing of the dismissal and the permanent reinstatement claim the investigation meeting could have been completed in half a day.

[13] For these reasons, any claim for increased costs should be rejected and costs based on the tariff of \$4,500.00 should be reduced on the basis that the Applicant unnecessarily increased the length of the hearing.

[14] It is also submitted that the Authority should consider whether or not the costs incurred by the Applicant were reasonable and it is submitted that following the Investigation Meeting the Applicant included inappropriate further evidence in his submissions and that expenses associated with this are unreasonable.

[15] It is noted by way of submission that the common bundle of documents and evidence lodged by the Applicant for the Investigation Meeting into the substantive matter is virtually identical to the material lodged for the interim reinstatement claim. On that basis it is submitted that the level of costs claimed are to a significant extent "double dipping."

[16] Further that the Applicant unreasonably opposed the updating and fresh evidence relating to the liquidation of NLL which unnecessarily inflated the Applicant's own costs, which he now seeks to recover, as well as the Respondents costs.

[17] In respect of determination ([2020] NZERA 132 it is submitted that an appropriate costs award for the interim reinstatement application as \$2250.00 (plus \$71.56 filing fee) on the basis that (i) the matter was dealt with promptly; (ii) the facts were uncomplicated; (iii) the law is settled on interim reinstatement; (iv) there was very little evidence lodged with the Authority; (v) the facts were uncomplicated and (vi). the hearing was on the papers with a telephone call to hear submissions.

[18] In respect of determination ([2020] NZERA 348 it is submitted that an appropriate award of costs for this matter is \$1000.00 (plus \$71.56 filing fee) on the basis that it was not unreasonable for the Respondents to form the view that if the Applicant was working for NLL, a wholly owned subsidiary, and that as such the Respondents were paying indirectly for the Applicant's wages, that they had complied with the Authority's order. The Respondents

acted correctly as soon as they realised the error of their ways, did not oppose the compliance order application and immediately reinstated the Applicant.

Calderbank Offer

[19] The Respondent submits it made an offer to settle the matter in a letter dated 17 March 2020, a *Calderbank Offer*.¹ The Respondent offered to settle the matter by payment to the Applicant of two months' wages tax free, a payment equivalent to \$12,133.34. In addition the Respondent offered to pay the Applicant \$2,500.00 plus GST in respect of costs.

[20] The Respondent notes that the Applicant was ultimately unsuccessful in his reinstatement application. He was not awarded a sum in respect of lost wages since he had been fully paid throughout. His compensation award amounted to \$8000.00 with a 30 percent deduction for contribution resulting in a total award of \$5600.00. Accordingly, in the Respondent's view, costs and total should amount to no more than \$4000.00.

[21] The Applicant submits that it was reasonable of the Applicant to decline and disregard the *Calderbank Offer* since it did not address reinstatement and notes that interim reinstatement was awarded.

Principles

[22] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

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.

[23] Costs are at the discretion of the Authority².

[24] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*³.

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA).

² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

[25] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

[26] Of relevance in this instance is the principle that costs will be modest. The Employment Court further observed at para [47]:

... we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

Costs Award

[27] In this matter the Applicant was the successful party in all three determinations, although he was not awarded all the remedies sought, notably reinstatement. Costs normally follow the event.

[28] I have considered the Calderbank Offer, however given that it did not address the issue of reinstatement which was of importance to the Applicant, I am not minded to give it weight.

[29] Determination [2020] NZERA 132 was determined on the papers. The time taken to determine the matter was approximately half a day of investigation time. I consider that an appropriate costs award is \$2,250.00.

[30] Determination [2020] NZERA 348 was determined on the papers and by telephone. It involved a very short amount of Authority investigation time, the Respondent complied in a timely manner in regard to the compliance application and I consider an appropriate costs award to be \$1,000.00.

[31] Determination [2021] NZERA 411 involved a one day investigation meeting by Zoom on 8 September 2021. I accept the submission that much of the material filed was duplicated in this investigation and the earlier interim investigation and have taken this into account. I consider an appropriate costs award for this investigation to be the standard nominal Authority tariff rate of \$4,500.00.

[32] Having considered all the submissions, I award Mr Tupe a total costs award of \$7,750.00.

[33] **I order the Trust to pay Mr Tupe a contribution to costs in the sum of \$7,750.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000. The Trust is**

also ordered to pay Mr Tupe the Authority filing fees in respect of the three investigations in a total amount of \$214.68.

**Eleanor Robinson
Member of the Employment Relations Authority**