

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 189
3131737

BETWEEN	PETERASP KERSHAW Applicant
AND	CARPE DIEM RESTAURANT AND BAR Respondent

Member of Authority: Peter Fuiava

Representatives: David Cain and Alex Kersjes, advocates for the Applicant
No appearance by the Respondent

Submissions and further information received: 7 and 26 April 2022 from Applicant

Determination: 9 May 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 17 March 2022 in favour of Peterasp Kershaw.¹ Mr Kershaw was found to have been unjustifiably disadvantaged, unjustifiably dismissed and owed wages by Carpe Diem Restaurant and Bar Limited (Carpe Diem). Costs were reserved and the parties were encouraged to resolve the issue of costs between themselves. However, that has not occurred due to Carpe Diem's non-engagement with the process. Mr Kershaw now applies for costs.

Costs principles

[2] The Authority has the power under clause 15 of Schedule two of the Employment Relations Act 2000 to award costs. The principles and approach adopted

¹ *Peterasp Kershaw v Carpe Diem Restaurant and Bar Limited* [2022] NZERA 97.

by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.² Those principles are as follows:

- The Authority has a discretion whether to award costs, and how much, but the discretion must be exercised in accordance with principle and not arbitrarily.
- The statutory jurisdiction toward costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience are to be considered on a case-by-case basis.
- Costs are not to be used to punish or express disapproval for the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- The Authority can consider whether all or any of the parties' costs were unnecessary or unreasonable.
- Costs generally follow the event (i.e. the unsuccessful party will normally be required to contribute to the costs of the successful party).
- *Calderbank offers* may be taken into account when setting costs.
- Awards will be modest.
- Frequently costs are judged against the notional daily tariff.
- The nature of the case can influence costs, which means the Authority may order those costs should lie where they fall.

[3] On 2 May 2022, Practice Note 2, Costs in the Employment Relations Authority, came into effect. Among other things, the practice note reaffirmed the Authority's use of the notional daily tariff (currently \$4,500 for the first day of any matter and \$3,500 for any subsequent day of the same matter) as the starting point in assessing costs. Various factors and principles may have the effect of increasing or decreasing the amount of costs awarded.

Costs submissions

[4] In a memorandum of 6 April 2022, Mr Kersjes submitted that he has attempted to engage with Carpe Diem in order to resolve the issue of costs but to no avail. While the issues that the Authority was required to investigate and determine were uncomplicated, Mr Kersjes stated that dealing with Carpe Diem was "unnecessarily

² *PBO Ltd (formerly Rush Security Ltd v Da Cruz* [2005] 1 ERNZ 808.

laborious” and that an inordinate amount of work was done in order to resolve matters in a sensible manner.

[5] On Mr Kershaw’s behalf, Mr Kersjes invites the Authority to make an uplift of the daily tariff to take into account Carpe Diem’s conduct. The Authority was provided with a series of emails (16 August 2021, 18 October 2021, 30 November 2021, and 13 December 2021) which were sent to Carpe Diem on a Calderbank basis in order to resolve matters without the need for an investigation meeting. It does not appear that Carpe Diem responded to any of the above emails as that information or evidence was not provided to the Authority.

[6] Mr Kersjes submitted that the matter took the majority of a half day to complete with separate submissions and now a cost application needing to be made. A costs award of \$3,000 plus disbursements of \$212.56 are sought against Carpe Diem.

Costs analysis

[7] Mr Kershaw was the successful party and I see no reason why costs should not follow the event in the usual way. While Carpe Diem has chosen not to participate with this process, its inaction has not resulted in inordinate delay in Mr Kershaw’s case being heard and determined by the Authority. The submissions to which Mr Kersjes refers are Mr Cain’s written closing submissions which are usually filed as a matter of course.

[8] The investigation meeting was by audio-visual link which spared Mr Peterasp, his father, Neville, and Mr Cain from having to travel to 280 Queen St, Auckland for an in-person investigation. Further, the investigation meeting was not long, starting at 10 am and finishing at 11.15 am that same morning.

[9] I have considered Mr Kersjes’ invoice which includes as a disbursement the Authority’s filing which I have previously ordered Carpe Diem to reimburse Mr Kershaw for.

[10] Costs must be moderate and reasonable, judged against the notational daily tariff, and on a case-by-case basis. I do not agree with Mr Kersjes that an uplift in the notational daily tariff is warranted in this case. Carpe Diem’s failure to engage with

the process has not caused any material or significant delay with the Authority's investigation of Mr Kershaw's case.

[11] As affirmed in the Authority's Practice Note 2 regarding costs, cost awards are made with reference to the daily tariff which is currently set at \$4,500 for the first day of hearing. This matter required a quarter of a day to be heard. I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing.

[12] Accordingly, Carpe Diem Restaurant and Bar Limited is ordered to pay Peterasp Kershaw the sum of \$1,125 towards his legal costs and the sum of \$141 in disbursements no later than 4 pm Monday 23 May 2022.

Peter Fuiava
Member of the Employment Relations Authority