

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 28  
3122852

BETWEEN            MITCHELL JOHN McINTYRE  
                                 Applicant

AND                    HIFX LIMITED t/a XE NEW  
                                 ZEALAND  
                                 First Respondent

AND                    NATHAN CHEESEMAN  
                                 Second Respondent

Member of Authority:    Rachel Larmer

Representatives:        Aaron Lloyd and Emily Partridge, counsel for the  
                                 Applicant  
                                 Anthony Drake and Rosie Judd, counsel for the  
                                 Respondents

Investigation Meeting:    On the papers

Submissions and further    16 December 2021 from the Respondent  
Information Received:      21 January 2022 from the Applicant

Date of Determination:    4 February 2022

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**COSTS DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

[1] In a determination dated 2 December 2021 the Authority concluded that Mr McIntyre had not proved his unjustified dismissal grievance to the required standard.<sup>1</sup> The parties were encouraged to resolve costs by agreement but have been unable to do so.

## **Costs application**

[2] HIFX Limited trading as XE New Zealand (XE) seeks a costs award of \$15,000. And Mr Cheeseman seeks a costs award of \$3,500. The respondents are therefore seeking total costs against Mr McIntyre of \$18,500.

[3] The applicant accepts that, as the unsuccessful party, he is required to make a costs contribution, however he disputes the amounts claimed by each respondent. Mr McIntyre says Mr Cheeseman should not be entitled to costs because the claims against him were withdrawn. Mr McIntyre also says that XE should be awarded costs based on the notional daily tariff only, which should not be adjusted.

## **Legal principles**

### *Costs in the Authority*

[4] Clause 15 of the Second Schedule of the Employment Relations Act 2000 (the Act) gives the Authority wide discretion to direct any party to pay the other party such costs and expenses as the Authority thinks reasonable.

[5] The Authority adopts a notional daily tariff-based approach to costs. The notional starting tariff for the first day of an investigation meeting is \$4,500 and then \$3,500 for each subsequent investigation meeting day. This must then adjusted to reflect the particular circumstances of each case.

### *Costs principles*

[6] The Employment Court in *PBO Ltd formerly Rush Security Ltd v Da Cruz* set out the following principles that are to be considered by the Authority when determining costs:<sup>2</sup>

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<sup>1</sup> *McIntyre v HIFX Ltd and Cheeseman* [2021] NZERA 540.

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

- (a) There is a discretion as to whether costs will be awarded and in what amount;
- (b) The discretion is to be exercised in accordance with principle and not arbitrarily;
- (c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- (d) Equity and good conscience is to be considered on a case by case basis;
- (e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct, although conduct that unnecessarily increases another party's costs may be taken into account;
- (f) Costs generally follow the event;
- (g) Without prejudice offers may be taken into account;
- (h) Awards will be modest;
- (i) Frequently costs are judged against a notional daily rate.

#### **Application of the tariff**

[7] This matter involved a three day investigation meeting, so the notional starting tariff for assessing costs is \$11,500. That must then be adjusted, for each respondent, to reflect the circumstances of this case.

#### *Mr Cheeseman*

[8] The Authority was not satisfied that Mr Cheeseman has actually incurred any legal costs personally. He was employed by XE at the material time, his involvement was as an XE's employee, and XE's counsel represented him.

[9] While the Authority accepts that XE's counsel did have communications with the Authority and the applicant regarding the claims he had made against Mr Cheeseman personally, there was no information put before the Authority to establish that XE did not cover these costs as part of its own legal costs in connection with these proceedings.

[10] The claims against Mr Cheeseman were also withdrawn during the investigation meeting. Mr Cheeseman would have been required to give evidence on behalf of XE, even if he had not been a party. Mr Cheeseman was not required to attend the investigation meeting,

but information provided in his witness statement was considered as part of the substantive investigation.

[11] The Authority is not satisfied from the information it has available to it that significant work over and above that which would have been required for XE's defence was associated with the fact that Mr Cheeseman had been named personally as a respondent. Only four of the paragraphs of Mr Cheeseman's 44-paragraph long witness statement related to him in his capacity as the second respondent.

[12] The Authority accepts that XE's counsel also represented Mr Cheeseman. However, the Authority considers it more likely than not that doing so was part of the overall legal services provided to XE and was not treated as a separate matter, for a separate client, involving discrete billable hours, or a separate invoice concerning Mr Cheeseman as the second respondent.

[13] It is up to a party seeking to obtain a costs award in their favour to provide sufficient evidence to the Authority to support such a claim. At a minimum, that includes proof that costs have actually been incurred. That did not occur regarding Mr Cheeseman's costs claim. The Authority does not consider in these circumstances it appropriate to award any costs to Mr Cheeseman. His costs application is therefore declined.

*Xe*

[14] The Authority accepts that XE has incurred legal costs that exceed the rate of the notional daily tariff.

[15] The parties did not identify any factors that should warrant a reduction in the notional starting tariff and the Authority is not aware of any.

[16] Xe claims the notional starting tariff should be increased because Mr McIntyre unreasonably rejected a Calderbank offer to withdraw his claims and let costs lie where they fell. *This offer was made on 12 March 2021 and was rejected on 5 May 2021.*

[17] Mr McIntyre claims this offer did not meet the necessary legal elements in order to be a valid Calderbank offer. The Authority does not accept that submission.

[18] The offer was stated to be “*without prejudice except as to costs*”. It set out a settlement proposal (that Mr McIntyre withdraw his claims) and it addressed costs (by proposing they lay where they fell).

[19] The Authority is satisfied that Mr McIntyre unreasonably rejected this offer, because if it had been accepted then both parties would have avoided the time and cost associated with the substantive investigation meeting.

[20] The Authority considers that the notional starting tariff should be uplifted by \$500 a day, thereby increasing costs by a total of \$1,500, to account for the Calderbank offer. There are no other factors that warrant increasing the notional starting tariff.

### **Outcome**

[21] Within 30 days of the date of this determination, Mr McIntyre is ordered to contribute \$13,000 towards Xe’s actual legal costs. Mr McIntyre is not required to pay any costs to Mr Cheeseman.

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