

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI Ā TARA ROHE**

[2022] NZERA 283  
3103692

BETWEEN	MATHEW DOBBS Applicant
AND	ACTUS TRANSPORT (NZ) LIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Lars Hansen, counsel for the Applicant Mark Beech, counsel for the Respondent
Submissions received:	19 May 2022 from the Applicant 1 June 2022 from the Respondent
Determination:	29 June 2022

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Costs**

[1] The applicant Mathew Dobbs filed an application for an order for payment of costs that he incurred in pursuing a personal grievance against the respondent, Actus Transport (NZ) Limited (Actus). In Member Ryan's determination dated 6 May 2022, the applicant succeeded in his claim for an unjustified dismissal and remedies.<sup>1</sup>

[2] The Authority's jurisdiction to order a party to pay reasonable costs and expenses is exercised by applying some well-established principles to the particular circumstances of the case.<sup>2</sup> Those principles recognise that a successful party should receive a contribution to costs reasonably incurred in reaching that result; costs are

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<sup>1</sup> *Dobbs v Actus Transport* [2022] NZERA 186.

<sup>2</sup> Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

discretionary and should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional ‘daily rate’ or ‘tariff’ as a starting point to assess costs.

[3] Undue rigidity in applying that tariff is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may account for a liable party’s means to pay costs, the preparation required in particularly complex matters and where conduct of parties has unnecessarily increased costs.<sup>3</sup>

[4] The Authority’s current tariff for a one-day investigation meeting is \$4,500.00. This amount is taken as an appropriate starting point for assessing a reasonable contribution to the costs incurred by a party in preparing for and taking part in an investigation meeting.

### **The parties’ view**

[5] Mr Dobbs has been in receipt of legal aid throughout the proceedings and says that the estimated total cost of having representation for these proceedings (including advising on costs and filing a cost application) is \$5,425.49, inclusive of the filing fee.

[6] In its memorandum on costs Mr Dobbs asked the Authority to increase its daily tariff to take account of the settlement offer rejected by Actus, that would have left it in a better position than it achieved through the Authority’s eventual determination accepting his personal grievance claim. Mr Dobbs also referred to the Authority directing the matter on two occasions to mediation and asked this also be considered in relation to an uplift to the daily tariff.

[7] To the extent that indemnity costs are sought, Actus opposes the applicant seeking pre-proceeding costs amounting to \$667.00 because costs incurred prior to issuing of court proceedings are not consistent with the principles associated with costs awards. It also opposes costs being awarded for mediation because the expense associated with preparation for and attendance at mediation are not typically included

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<sup>3</sup> Above n2.

in costs awarded. Actus says as the hearing only lasted a half day, the costs sought by the applicant are in excess of what should be ordered and submits that a costs award of \$2,250.00 would be more appropriate.

### **Assessment**

[8] Mr Dobbs is entitled to an award of costs having successfully bought a claim for unjustified dismissal. The fixed term employment agreement between the parties could not be relied on as a basis for Mr Dobbs' dismissal which meant, as a permanent employee, the rationale for termination and the process followed by Actus could not be justified.

[9] This is not a case where an order for indemnity costs should be made, either in regard to Actus' rejection of a settlement offer, mediation or the late acceptance that the employment agreement did not comply with s 66 of the Act.

[10] I also agree with the submissions on behalf of Actus that the costs consequential to mediation, although in some circumstances appropriate, are not in this case.

[11] In his memorandum on costs, Mr Dobbs asked the Authority to increase its daily tariff to take account of a settlement offer he made to Actus that would have left it in a better position than it achieved through the Authority's eventual determination. The Authority accepted Mr Dobb's dismissal was not justified and awarded a total of \$36,150.00 to Mr Dobbs made up of lost wages, including the employer's Kiwisaver contributions (in relation to lost wages) and \$14,000.00 in compensation under s 123(1)(c)(i) of the Act.

[12] In September 2020 Mr Dobbs rejected the first offer made by Actus of \$8,500.00, under s 123(1)(c)(i) of the Act, inclusive of costs, on the basis it did not represent a reasonable offer considering the strength of his claims. After mediation on 1 December 2020, Mr Dobbs made an offer to Actus of \$20,000.00 plus costs of \$2,900.00 being a total of \$22,900.00.

[13] On 8 December 2020 Actus rejected the offer on the basis that it is "not reflective of any possible award in the Authority even if your client prevails (which is

denied).” Mr Dobbs did not accept a counteroffer from Actus of \$12,000.00 inclusive of costs.

[14] I consider that Mr Dobbs acted reasonably when he rejected the offers made by Actus as they fell well short of the Authority’s eventual award. The offer Mr Dobbs made, in my assessment, was reasonable and made for the purpose of resolving issues between the parties with the potential benefit of saving both Actus and Mr Dobbs from spending more in litigation costs than any likely outcome would achieve. That offer was made on a without prejudice basis and properly notified Actus that, if it did not accept it and proceeded to defend the claim, Mr Dobbs could produce evidence of the offer in support of an application for costs.

[15] The rationale for the December offer was set out in a detailed letter to Actus’ representative noting that a two-day hearing was scheduled and seeking to take a pragmatic approach prior to both parties incurring further costs. In balancing the need for costs in the Authority to be modest, but to take into account the fact that this is a case where the unsuccessful party had earlier rejected a better settlement offer, I consider that a small uplift of \$1000 is appropriate.

[16] Balancing the relevant factors and considering the principles referred to above, I consider the appropriate amount to award as a contribution to Mr Dobbs’ costs and expenses was \$3,321.56. This comprises \$2,250.00 as the tariff rate with an uplift of an additional \$1000 awarded because of Actus’ failure to accept a reasonable settlement offer that would have spared both it and Mr Dobbs the time and expense of taking part in an investigation meeting and includes the filing fee of \$71.56.

### **Order**

[17] Actus Transport (NZ) Limited must pay Mr Dobbs the sum of \$3,321.56 as a contribution to Mr Dobbs costs and expenses no later than 30 days after the date of this determination.

Sarah Kennedy  
Member of the Employment Relations Authority