

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 289  
3027974

BETWEEN

AJY  
Applicant

AND

THE CHIEF EXECUTIVE OF  
THE DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority: Marija Urlich

Investigation Meeting: On the papers

Representatives: Alex Hope, counsel for the Applicant  
Liz Coats, counsel for the Respondent

Determination: 30 June 2022

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**DETERMINATION OF THE AUTHORITY**

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[1] The Authority issued a determination on 2 May 2022 which found AJY had established a personal grievance for unjustifiable constructive dismissal.<sup>1</sup> Awards were made in AJY's favour to compensate her for losses suffered consequent to Corrections' actions. The issue of costs was reserved and a timetable set. The parties were invited to attempt to resolve costs themselves. The parties have filed submissions in respect of costs.

**AJY's position as to costs**

[2] AJY seeks a contribution to costs of \$27,000 plus reimbursement of total disbursements incurred of \$1,078.02.<sup>2</sup> Total costs incurred are \$30,868.41 made up of

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<sup>1</sup> *AJY v Chief Executive of the Department of Corrections* [2022] NZERA 169.

<sup>2</sup> Disbursements claimed are made up of filing fee of \$71.56, courier fees of \$22.50, photocopying and binding of \$135.00 and witness expenses of \$848.96.

\$20,421.79 (GST inclusive) paid by Legal Aid and \$10,446.62 (GST inclusive) AJY incurred as a fee-paying client after 2 February 2021. Information has been provided to support the costs claim. I am satisfied the costs incurred are actual and reasonable given the investigation meeting time involved with this matter and the complexity of AJY's claim which sounded in five personal grievances for unjustified disadvantage and a personal grievance for unjustified dismissal spanning several years, fourteen witnesses and thousands of pages of documents.

[3] AJY submits factors relevant to an uplift in the Authority's daily tariff approach are the complexity of the application, the parties' four attempts to resolve this employment relationship problem at mediation, Corrections' actions in light of the Authority determination in *Huddy v Chief Executive of the Department of Corrections* and the personal importance of this matter.

### **Corrections' position as to costs**

[4] In addition to an analysis of the total number of hearing days, which is accepted, Corrections' submits a costs award of \$18,500 would be extravagant compared to recent costs determinations and AJY's partial success, found contributory conduct and subsequent reduction in remedies and failure to engage with Corrections to attempt to resolve costs between the parties. It says a costs award of no more than 50% of the total daily tariff is warranted.

### **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. Principles guiding the Authority's approach to costs 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.

### **Costs analysis**

[6] AJY was the successful party – three of the unjustified disadvantage claims were found as was the claim of unjustified dismissal. 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 \$30,868.41 in actual costs have been incurred in respect of this matter, a portion of which must have been incurred during attendance at mediation. AJY should receive a contribution to costs which I am satisfied were reasonably incurred. What then is a fair contribution to those costs?

[7] The notional daily tariff is the starting point. The applicable daily tariff is \$4,500.00 for the first investigation meeting day with subsequent days at \$3,500.00 per day. This matter involved investigation meeting time of five days in total.<sup>3</sup> The starting point for costs is therefore \$18,500.

[8] Though it appears AJY did not respond to Corrections inquiry to see if costs could be settled between the parties and it is desirable for parties to make such attempts particularly given the Authority's invitation that they do so, in the known circumstances of this matter a reduction on this basis is not warranted.

[9] Costs for mediation are not usually awarded by the Authority and I am not persuaded this should occur here.<sup>4</sup>

[10] There were no factors which I am persuaded justify an uplift in the award. AJY had mixed success which should fairly be reflected in costs. Having considered the submissions and information received and guided by the principals applicable to a consideration of costs AJY is entitled to a costs award of \$18,000 and to recover disbursements incurred including the filing fee.

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<sup>3</sup> Four and a half days plus a further half day.

<sup>4</sup> Authority Practice Note 29 April 2022.

## **Outcome**

[11] Corrections is ordered to pay AJY \$18,000 as a contribution to AJY's costs and disbursements of \$1,078.02 within 21 days of the date of this determination.

Marija Urlich  
Member of the Employment Relations Authority