

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 441  
3118352  
3118353

BETWEEN

JORDAN RHODES  
Applicant in 3118352

CRYSTAL PEPPERELL  
Applicant in 3118353

AND

MARKEATON FARMS  
LIMITED  
Respondent

Member of Authority: Peter Fuiava

Representatives: Alex Kersjes, advocate for the Applicants  
No appearance for the Respondent

Submissions received: 8 August 2022 from the Applicants  
No submissions from the Respondent

Determination: 6 September 2022

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. Markeaton Farms Limited to pay \$7,000 as a contribution towards Jordan Rhodes and Crystal Pepperell's costs and \$71.56 being the Authority filing fee no later than 5 pm Wednesday 5 October 2022.**

[1] In a determination issued on 11 July 2022, the Authority found that Markeaton Farms Limited (Markeaton Farm) had unjustifiably dismissed Jordan Rhodes and Crystal Pepperell.<sup>1</sup>

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<sup>1</sup> *Rhodes & Pepperell v Markeaton Farms Limited* [2022] NZERA 306.

[2] The question of costs was reserved and the parties were encouraged to resolve the matter between themselves. If they were unable to do so, the applicants were to file a memorandum by 4 pm Monday 8 August 2022. Markeaton Farm was given 14 days after service to file a memorandum in reply (if any).

[3] On 8 August 2022, Mr Kersjes lodged and served a memorandum as to costs for the applicants. That same day Russell Drake, who represented Markeaton Farm at the investigation meeting, advised that he was no longer acting for the company.

[4] On 9 August 2022, the Authority forwarded Mr Drake's email to Derek Watt, Markeaton Farm's company director. There has been no response from Mr Watt or Markeaton Farm. The due date for the filing of any further submissions was 23 August 2022.

### **Costs principles**

[5] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) to award costs. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.<sup>2</sup> Those principles are as follows:

- a. 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.
- b. The statutory jurisdiction toward costs is consistent with the Authority's equity and good conscience jurisdiction.
- c. Equity and good conscience are to be considered on a case-by-case basis.
- d. 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.
- e. The Authority can consider whether all or any of the parties' costs were unnecessary or unreasonable.
- f. Costs generally follow the event (i.e., the unsuccessful party will normally be required to contribute to the costs of the successful party).

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

- g. *Calderbank offers* may be taken into account when setting costs.
- h. Awards will be modest.
- i. Frequently costs are judged against the notional daily tariff.
- j. The nature of the case can influence costs, which means the Authority may order those costs should lie where they fall.

[6] 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**

[7] In his memorandum of 8 August 2022, Mr Kersjes stated that he attempted to engage with Markeaton Farm to resolve the issue of costs but without success. The Authority was provided with *Calderbank offers* that had been made on Ms Rhodes and Ms Pepperell's behalf. An invoice was also provided which recorded that the pair had incurred costs of \$12,523.38 (GST inclusive) in relation to professional services rendered. Of that amount, \$158 related to disbursements which included the Authority's filing fee (of \$71.56).

### ***Calderbank offers***

[8] The two *Calderbank offers* mentioned above were emailed to Mr Drake on 10 December 2019 by a colleague of Mr Kersjes. The offer in relation to Ms Rhodes stated that the settlement offer was on a "Calderbank basis" and in "full and final and without liability basis". To that end, Ms Rhodes indicated that she would accept by way of settlement payment of \$7,500 pursuant to s 123 of the Act (compensation for humiliation, loss of dignity and injury to feelings) and \$2,500 + GST as a contribution towards costs.

[9] The email to settle Ms Pepperell's grievance was similarly worded but stated that she would accept a settlement payment of \$4,500 in compensation and \$2,500 + GST towards costs.

[10] In addition to being made on a Calderbank basis, both emails stated that if the investigation meeting produced the result the applicants expected, they would apply to the Authority for an uplift in costs from the daily tariff of \$4,500; costs in the vicinity of \$8,000 - \$10,000 were anticipated. Finally, the emails stated that the Calderbank offers would expire on 19 December 2019. Markeaton Farm therefore had nine days to make a decision. The settlement offers were not accepted.

[11] The investigation meeting was held on 26 January 2022 and a determination was subsequently made in the applicants' favour. By way of remedies, Ms Rhodes was awarded \$2,734.69 in lost wages, interest on lost wages, and \$12,500 in compensation for hurt and humiliation. Ms Pepperell was awarded \$1,989.32 in lost wages, interest on that amount, and \$7,500 compensation for hurt and humiliation.

[12] Mr Kersjes submits that given that valid Calderbank offers were in place, an uplift from the Authority's daily tariff of \$4,500 is warranted. This was not to punish the respondent but to avoid any further disadvantage to Ms Rhodes and Ms Pepperell. Mr Kersjes noted that the investigation meeting took the majority of a full day to complete which required an oral submission hearing and a costs application needing to be made as Markeaton Farm failed to engage with the applicants regarding costs.

### *Costs analysis*

[13] Ms Rhodes and Ms Pepperell were successful in their claims against Markeaton Farms. At [55] and [58] of the Authority's determination, it was found that neither had contributed to their own personal grievance to warrant a reduction in remedies.

[14] Markeaton Farm was given a fair and reasonable opportunity to respond to Mr Kersjes' costs memorandum but no memorandum in reply was filed. Based on the information before the Authority, I find no reason as to why costs should not follow the event in the usual way.

[15] The notional daily tariff is the starting point which is \$4,500 for the first day of hearing. The investigation meeting took a full day, finishing at 5.25 pm. Closing oral submissions were heard via audio-visual link (AVL) on 11 April 2022 which did not take long.

[16] Relevant to the costs-setting exercise are the Calderbank offers made to Markeaton Farm in December 2019. It is noted that the two emails which were largely identical do not expressly record the words “without prejudice, except as to costs.” While not ideal, the omission is not fatal as the emails were sent to Mr Drake who as a lawyer would know what was meant by the phrase “Calderbank basis”. In addition, the emails spelled out the consequences for Markeaton Farm if it failed to accept what was being offered, namely that the settlement offers would be used to apply for an uplift in costs should the applicants prevail in the Authority as they have. Cumulatively considered, I find the two settlement emails described above operate as valid Calderbank offers which I take into account in setting costs.

[17] Had Markeaton Farms accepted the Calderbank offers that were made, it would have been better off financially and spared the applicants the additional cost of having to attend a full day in person investigation meeting with their advocate Mr Cain who also attended the oral submissions’ hearing by AVL. Mr Kersjes seeks an uplift of the daily tariff to \$7,000 which I find is warranted in the circumstances.

### **Orders**

[18] Markeaton Farms Ltd is ordered to pay Jordan Rhodes and Crystal Pepperell \$7,000 as a contribution towards their costs and \$71.56 for the Authority’s filing fee no later than 5 pm Wednesday 5 October 2022.

Peter Fuiava  
Member of the Employment Relations Authority