

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 210
3151961

BETWEEN VXO
Applicant

AND NORTHLAND DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
David Grindle, counsel for the Respondent

Costs Submissions:
21 April 2023 from the Applicant
14 March 2023 from the Respondent

Determination: 28 April 2023

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 1 March 2023 ([2023] NZERA 97), the Authority found that the Applicant, VXO, had not been unjustifiably dismissed from, or unjustifiably disadvantaged in, his employment by the Respondent, Northland District Health Board (NDHB) (now known as Te Whatu Ora).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and the parties have filed submissions in support of a costs application.

[3] The Applicant informed the Authority that he was now acting for himself. On that basis, an extension to the scheduled date for the Applicant to file reply submissions on costs was provided.

[4] The matter involved two and a half days of meeting time. Mr Grindle on behalf of NDHB, citing actual costs of \$71,925.80, is seeking a significant uplift in costs in the amount of \$50,000.00 pursuant to a number of Calderbank letters.¹

NDHB's submissions

[5] Mr Grindle submits that the daily tariff should be uplifted beyond the notional daily tariff usually operating in the Authority on the basis that it was a convoluted and protracted matter in which the following factors increased costs:

- a) the applicant filing three different statement of problems that needed to be responded to;
- b) attendance at mediation;
- c) the respondent having to file an application for name suppression in respect of the complainant on the basis that the applicant refused to consent to such an order. At the determination of the application the applicant verbally applied for name suppression which the respondent did not oppose. The respondent's application was granted as per the Authority's determination dated 26 May 2020.;
- d) Unusually the respondent was required to compile a common bundle of documents and then had to make application to the authority to remove without prejudice documents that the applicant was trying to submit in evidence;
- e) An investigation meeting over three days from 15 to 17 November 2022.

[6] Mr Grindle submits that the following factors also warrant an uplift in costs:

- i The arguments contained within the applicant's statement of problem and advanced in the investigation meeting were with one minor procedural exception wholly without merit;
- ii At the commencement of the investigation meeting the applicant's witnesses were not in attendance and there was further delay while they were contacted;
- iii Despite no prior request being made, an application for the applicant to take his witness evidence via AV was made in the course of the investigation meeting even though there was no AV facilities at the investigation meeting venue;
- iv After one day of the investigation the applicant, without basis, sought an order that witnesses be excluded from the investigation meeting. The application was declined and he instructed his counsel to appeal the point to the Employment Court and adjourned the investigation meeting until that had occurred. Rather than further protracting matters the respondent conceded to the applicant's request;
- v On the third day of the investigation meeting, the applicant withdrew instructions for his counsel to continue acting and he did not appear on the third day of the investigation meeting;

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

- vi After the investigation meeting the applicant instructed his third counsel and the respondent was put to further costs in preparing a response to counsel submissions.

The Calderbank Offers

[7] The Respondent submits that there were a number of Calderbank offers made during the progress of this matter to the investigation meeting which took place on 15 to 17 November 2022.

[8] There were four Calderbank Offers in total, made on 30 July 2020, 2 November 2020, 11 May 2021 and 13 October 2021. These were made on a 'without prejudice' save as to costs basis by NDHB with a view to settling all issues between the parties.

[9] The final offer dated 13 October 2021 offered VXO the sum of \$42,500.00 pursuant to s123(1)(c) of the Act, and an additional \$8,000.00 contribution to his legal fees. The offer was declined.

[10] It is submitted that the vast majority of the fees incurred by NDHB would have been avoided if VXO had acted appropriately and accepted the Respondent's settlement offers.

[11] This investigation meeting was conducted over 15 to 17 November 2022. The tariff rate for the first day is \$4,500.00 and for every further day or part day it is \$3,000.00, the total of costs due on a tariff basis is \$11,500.00.

[12] It is submitted for NDHB that in the circumstances of this case an award of tariff costs does not adequately compensate the employer on the basis that VXO's arguments had no prospect of success and his conduct unnecessarily increased the employer's costs.

VXO's submissions

[13] VXO submits that he disagreed with the fact that name suppression was granted to the complainant by the Authority in the matter that NDHB investigated. He submits that this led to pre-supposition in which the complainant was labelled as victim and himself as the guilty perpetrator.

[14] I note that an equality in the name suppression was applied by the Authority. Name suppression also applied to the Applicant, VXO, and therefore there was no labelling as such. Both the complainant and the person to whom the complainant related, VXO, had their identities hidden from public scrutiny in the Authority proceedings.

[15] VXO submits that the venue being in Whangarei involved considerable inconvenience for himself and his witnesses.

[16] I observe that the venue in Whangarei was chosen because that had been the Applicant's place of work and the convention that the venue for the Investigation Meeting was that of the applicant's place of work was applied. At no time was the Authority asked to consider an alternate venue for the investigation hearing.

[17] VXO submits that he has incurred considerable costs in defending his unjustifiable dismissal and unjustifiable disadvantage claims and is currently unemployed.

Principles

[18] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[19] Costs are at the discretion of the Authority². The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*³.

[20] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary, modest, and awards made are consistent with the Authority's equity and good conscience jurisdiction.

[21] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 2 and a half day Investigation Meeting this would normally equate to an award of \$11,500.00.

Costs Award

[22] NDHB was the successful party in this case and costs usually follow the event.

² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

[23] I have carefully considered the submissions of the parties. It is incumbent upon me that I approach the question of costs in a principled manner and not arbitrarily, and I therefore consider each relevant ground for uplift separately as appropriate.

[24] In particular I note the following issues as meriting consideration of an uplift: VXO's opposition to the name suppression issue which then required an application to be made by NDHB; the delays which occurred to the smooth progression of the investigation meeting; completion of the common bundle of documents (CBD) by the NDHB; delayed appearance of the Applicant witnesses; application for exclusion of Respondent witnesses; and the Calderbank Offers.

[25] I accept that the progress of the Investigation Meeting was delayed by consideration of a number of issues which were presented on behalf of VXO at the start and during the progress of the Investigation Meeting, although some were relatively minor in nature, and I make no significant increased costs award in respect of them.

[26] Of more consideration for uplift is application by VXO at the start of the second day to exclude NDHB witnesses during the giving of its evidence. There was no opportunity for this application to be considered prior to the investigation meeting, and since this was accompanied by notification of VXO's intention to challenge the Authority Member's decision in the matter should it not be granted in his favour, any possibility of discussion and/or determination would have meant a delay in the investigation meeting proceeding at that date.

[27] The prospect of a delay in the matter being heard by the Authority in a timely manner encouraged NDHB to not oppose the request, but under protest and only with a view to avoiding further delay.

[28] I consider this unprofessional approach to have been disrespectful to the Authority and unfair to NDHB which were placed in an invidious position. However as a result of NDHB's pragmatic acceptance of the condition, the delay to proceedings was not of a lengthy duration, and I do not award a significant uplift in respect of it.

[29] It is necessary to consider what effect the Calderbank Offers should have upon the award of costs in this matter.

[30] The offers by NDHB to VXO made with a view to resolving the matter were repeated on four occasions, and on each occasion were made well in advance of the Authority's

investigation. The offers provided financial compensation to VXO, and a contribution to his costs. VXO was wholly unsuccessful in his claims before the Authority.

[31] I am minded to give significant consideration to the Calderbank offers. As observed in the Employment Court, the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted:

the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered.⁴

[32] Standing back and considering the matter in the round, and having had regard to the principles set out in *Da Cruz*, the time taken for the Investigation Meeting, the fact that NDHB was the successful party, and the repeated *Calderbank* offers, I consider that an uplift in the notional daily tariff rate of the Authority is merited.

[33] **I order VXO to pay to NDHB the sum of \$18,000.00 as costs pursuant to clause 15 of Schedule 2 of the Act.**

[34] It may be that NDHB is willing for VXO to make payment by instalments. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Eleanor Robinson
Member of the Employment Relations Authority

⁴ *Lancom Technology Limited v Forman* [2018] NZEmpC 30 at [38]