

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 373  
3127114

BETWEEN	JANE SHERARD Applicant
AND	TRANSPORTATION AUCKLAND CORPORATION LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Shelley Kopu, counsel for the applicant Simon Laphorne, counsel for the respondent
Submissions received:	9 June 2023 from the applicant 29 June 2023 from the respondent
Determination:	13 July 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] A determination was issued in Jane Sherard's matter with Transportation Auckland Corporations Limited (TACL).<sup>1</sup>

[2] Ms Sherard was successful in establishing unjustified disadvantage and dismissal grievances although aspects of her claims were not successful. She was awarded compensation for the disadvantage grievance and lost wages and compensation for the dismissal grievance.

[3] The parties were encouraged to resolve the costs question between themselves. A timetable was set if they were unable to do so. It appears that extensive efforts were

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<sup>1</sup> *Jane Sherard v Transportation Auckland Limited* [2023] NZERA 228.

made, with extra time allowed by the Authority but ultimately no agreement was reached.

[4] Ms Sherard now seeks costs, supplying submissions. TACL has provided submissions in response.

### **Submissions for Ms Sherard**

[5] Ms Sherard identified preferences for a costs award:

(a) either her actual costs of \$30,755.80 (incl GST) incurred after a 6 September 2020 *Calderbank* offer;

(b) alternatively, costs totalling \$24,000 being:

(i) costs at the notional daily tariff rate, uplifted by 100% to \$16,000 to reflect the *Calderbank* offer; and

(ii) two days of preparation costs at the notional subsequent day tariff rate, amounting to of \$7,000; and

(c) reimbursement of the \$71.56 filing fee.

### **Submissions for TACL**

[6] TACL considers that a costs award of \$6,000 would be appropriate. Alternatively, an award of \$8,000 reflecting the notional daily tariff is proposed.

[7] TACL accepts there was a reasonable offer to settle proceedings but notes the offer related to settlement of matters which were not entirely captured by the proceedings and only successful in a limited way. The offer was made prior to the filing of proceedings.

[8] A reduction in the daily tariff rate is supported due to Ms Sherard's mixed success and pursuit of a health and safety issue which was accepted at late notice to be part of the good faith claim.

## Costs consideration

[9] Total is governed by principles.<sup>2</sup> These include that costs will usually follow the event. The Authority specifies a notional daily tariff system with reductions and uplifts permitted.<sup>3</sup>

[10] I must start from the daily tariff assessment. I do not accept that there is any basis for an award of actual costs even after the *Calderbank* offer. Indemnity costs require a party to have behaved badly or very unreasonably.<sup>4</sup> That was not the case here.

[11] The starting point thus becomes the length of the investigation meeting. The hearing of evidence took almost two full days in person plus additional time for the hearing of submissions which was sought and occurred by way of audio-visual link. This equates to a total tariff of \$9,500.

[12] The *Calderbank* offer is accepted as a reasonable offer. I agree that aspects of the matters claimed at that point were either not the same as the Authority claims or relate to claims which were unsuccessful.

[13] It is suggested for Ms Sherard that other attempts at settlement were made but no additional *Calderbank* offers are provided so I can only focus on the one offer made.

[14] I conclude that an increase to the tariff should be allowed for the *Calderbank* offer but less than what might otherwise have been allowed, had the bases for the claim at that point matched more closely to Ms Sherard's success in the determination.

[15] An increase is also sought for complexity. It was argued that events occurring around the same time got caught up in the redundancy process, but I do not accept the suggestion that that made this a particularly complex case. Costs should be modest.

[16] Preparation time is built into the Authority's tariff rate and I do not agree that an additional amount should be added for it, particularly in this case which should not have required an unusually high amount of preparation.

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<sup>2</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

<sup>3</sup> Employment Relations Authority Practice Note 2 - Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi, <https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf>.

<sup>4</sup> *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400.

[17] Ms Sherard was not entirely successful in her claims. She was successful in her unjustified dismissal claim and her disadvantage claim about the incident of aggressive behaviour toward her. However, although as good faith formed part of the dismissal findings, no penalty was awarded about that. Ms Sherard's assertions about the management of Covid concerns were not successful as personal grievances.

[18] The subsuming of the Health and Safety at Work Act 2015 element into the good faith issue at the start of the investigation meeting somewhat increased TACL's costs.

[19] I have weighed up an uplift for the *Calderbank* offer and a decrease for the time spent on Ms Sherard's unsuccessful claims and conclude that TACL is to pay Ms Sherard within 21 days of the date of this determination:

(a) \$12,000 as a contribution to her costs; and

(b) \$71.56 for the Authority's filing fee.

Nicola Craig  
Member of the Employment Relations Authority