

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 402
3152905

BETWEEN	TRACY TAITE Applicant
AND	J AND R (2019) LIMITED (T/A VILLAGE GREEN CAFÉ) Respondent

Member of Authority:	Davinnia Tan
Representatives:	Alex Kersjes, advocate for the Applicant Joga Singh Chamber, for the Respondent
Submissions received:	13 June 2023 from Applicant No submissions from the Respondent
Determination:	28 July 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] On 30 May 2023, the Authority issued a determination in this matter, finding in favour of the applicant's claim of unjustifiable dismissal and awarded the applicant \$20,000.00 in compensation for the unjustified dismissal.

[2] In that determination, the parties were encouraged to resolve any issue of costs between them.

[3] The parties have not been able to resolve costs between themselves. The applicant has filed a memorandum to Costs. The Respondent has not responded.

[4] I now consider the applicant's submissions to assist in exercising the Authority's inherent discretion.

Applicant's submissions

[5] The applicant's advocate made a submission for cost award of \$4000.00 plus disbursements of \$71.56. An attached invoice of a total of \$9,084.69 accompanied the submissions.

[6] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days¹.

[7] The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it.

[8] The investigation meeting in this matter took less than half a day and was held in person. The applicant attended together with her advocate. There was no appearance for the Respondent.

[9] In the present case, the applicant is not seeking actual costs nor an uplift. The applicant submits that this is appropriate as this amount is both "fair and reasonable", and reflects the outcome of the determination. The applicant submits that this amount is set at a pragmatic level noting that determination well exceeded the *Calderbank* offer of \$6000.00 which was rejected.

Principles

[10] The power of the Authority to award costs is contained in s 15 of schedule 2 of the Employment Relations Act 2000 (the Act) 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.

¹ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

[11] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*² as confirmed in *Fagotti v Acme and Co Limited*³. The principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment, and as the Court of Appeal has stated several times, a “steely approach” is to be adopted when considering Calderbank offers.⁴

Assessment

[12] Principles⁵ of particular relevance in these circumstances:

- a. Costs not used as punishment;
- b. Costs generally follow the event;
- c. Awards will be modest;
- d. Frequently costs are judged against notional daily rates.

[13] In these circumstances, the applicant was successful in her unjustified dismissal claim and obtained an award of \$20,000.00. The Authority did not find any contributory conduct to the situation on the part of the applicant. Applying the principles set out above, I am persuaded that the costs of \$4000.00 plus disbursements is warranted.

Costs award

[14] Accordingly I order the respondent to pay the applicant the sum of \$4000.00 as a contribution to legal costs and disbursements (including the Employment Relations Authority filing fee) of \$71.56 within 28 days of the issuing of this determination.

Davinnia Tan
Member of the Employment Relations Authority

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

³ *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 114.

⁴ *Health Waikato v Elmsly* [2004] 1 ERNZ 172 (CA) at [53] and *Blue Star Print v David Mitchell* [2010] NZCA 385 at [20].

⁵ Above n3.