

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 502
3143123

BETWEEN ANTONY MARTIN
 Applicant

AND MAHARISHI FOUNDATION
 INCORPORATED
 Respondent

Member of Authority: Shane Kinley

Representatives: Costas Mastis, counsel for the Applicant
 Ramses Hunt, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 17 and 21 July 2023 from the Applicant
 30 June 2023 and 10 August 2023 from the Respondent

Determination: 6 September 2023

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] On 12 June 2023 I issued a determination in relation to an employment relationship problem that found Antony Martin’s claim that he was unjustifiably dismissed by the Maharishi Foundation Incorporated (MFI) was unsuccessful and no remedies followed.¹ The primary reason for this finding was that I was not convinced that the real nature of the relationship between Mr Martin and MFI was an employment relationship.²

¹ *Martin v Maharishi Foundation Incorporated* [2023] NZERA 302 at [71].

² *Ibid* at [61] with supporting reasoning at [62] and noting matters that were investigated but did not require findings discussed at [63] to [70].

[2] Costs were reserved and the parties were encouraged to resolve this matter between themselves. I suggested, in light of discussion during the presentation of submissions, that MFI consider further whether seeking costs, should it be the successful party, was consistent with the value that it was placing on achieving harmony.³

[3] Unfortunately the parties have been unable to reach and Mr Hunt has filed submissions on behalf of MFI in support of a contribution to costs

[4] The discretion to award costs, whilst broad, is to be exercised in a principled way. 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)*.⁴

[5] The primary principle is that costs ‘follow the event’. The Authority has power to award any party to pay to any other party such costs and expenses as the Authority thinks reasonable.⁵ Costs are awarded in the Authority generally starting from the daily tariff, currently \$4,500 for the first day and \$3,500 for each subsequent day, with upward and downward adjustments made if appropriate to the circumstances of the case.⁶ In this case the investigation meeting took two full days, with oral submissions presented separately and taking approximately two and a quarter hours, so the appropriate starting point is the daily tariff for between two and a quarter days, and two and a third days.

The parties’ submissions

[6] MFI claimed the starting point should be \$9,167, based on the daily tariff for two and a third days. MFI sought an uplift based on six Calderbank offers that it made between 10 May 2022 and 27 March 2023, for costs incurred after the rejection of the 10 May 2022 offer. The uplift sought was to actual costs incurred after 20 May 2022 of \$42,213.43, on the basis that Mr Martin rejected the first offer on that date. Invoices were provided to support those costs having been incurred, as well as copies of the Calderbank offers and Mr Martin’s counteroffers.

³ Ibid at [72].

⁴ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁵ Employment Relations Act 2000, schedule 2, clause 15.

⁶ For further information about the factors considered in assessing costs, see: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>.

[7] MFI submitted that the first series of offers were made after substantial engagement between the parties but before detailed preparations had been made for the investigation meeting. MFI further submitted that the offers were made:

as a gesture of goodwill [and MFI] made earnest efforts to resolve the matter amicably, aiming to prevent the present situation where it was compelled to defend itself in the Authority and pursue Mr Martin for costs.

[8] MFI also raised concerns that Mr Martin's conduct in bringing his claims before the Authority may not have been in good faith, with reference to other matters including those investigated by the Charities Service. MFI also suggested that the investigation meeting duration was extended due to Mr Martin attempting to relitigate matters that were outside the scope of his claim before the Authority, including matters that had been addressed in other forums, and due to a break granted for Mr Martin to obtain additional evidence. Finally MFI submitted that determining the status between the parties was complicated and a time-consuming undertaking, which was necessary due to the potential implications for other teachers affiliated with MFI.

[9] In addition to the costs set out above at paragraph [6], MFI sought as disbursements travel costs of \$1,211.60 and the costs of a second opinion, which it said was necessary due to the complicated nature of the dispute, of \$3,560.

[10] Mr Martin accepts that costs should follow the event, he was the unsuccessful party and the appropriate starting point based on the daily tariff would be \$9,167. He claims there was significant confusion around the legal status of his relationship and the identity of the contracting party, which he claims MFI's position changed on at a late stage in proceedings.

[11] Mr Martin rejected MFI's submissions that his claim was not genuine or brought in good faith, or that he focussed on matters that were outside the scope of his claim before the Authority, rather he says that MFI focussed on those issues.

[12] Mr Martin strongly disputes that the award sought of indemnity costs is appropriate and proposed a modest award of costs only, saying that while without prejudice offers can be taken into account they do not have to be and should not lead to punitive costs awards. Mr Martin submitted that MFI had treated his claim as a test case of sorts, which he should not be liable for any extra costs of. He further submitted that the invoices provided appeared to include items unrelated to his claim and that the costs of a second opinion were not claimable.

[13] Mr Martin advised that he had few assets and the house he lives in is owned by a Trust of which he is an interim rather than final beneficiary. He also says he has minimal income, which means he cannot meet any significant costs award, reiterating his position that no more than a modest costs award was appropriate.

[14] In response, MFI requested that the Authority “consider some creativity” in relation to its costs determination, putting forward a proposal for costs to be recovered in an agreed manner between Mr Martin, the trustees of his home and MFI, with recovery deferred until Mr Martin no longer needed to live in his home. MFI also disputed Mr Martin’s claim that it was seeking costs that were not claimable.

Conclusion and orders

[15] MFI was the successful party in this case and costs usually follow the event. I consider a reasonable starting point for costs is \$9,000, slightly below the amount identified by Mr Martin and MFI, as the final day where submissions were presented by both parties took somewhere between a quarter and a third of a day. This amount allows \$1,000 for the part day for presenting submissions.

[16] The practice direction of the Authority notes that:

3. The Authority uses a notional daily tariff as the starting point for assessing costs. The tariff is based on the length of the investigation meeting held in each matter. This tariff may then be adjusted upwards or downwards according to the circumstances of each case. ...

9. For instance, where a successful party’s behaviour unnecessarily increased its costs, the Authority may reduce the daily tariff amount. Conversely, if an unsuccessful party turned down an effective settlement offer, the Authority may increase the costs above the daily tariff.

[17] I consider that MFI is entitled to rely on the Calderbank offers that it presented to Mr Martin and an uplift to costs is appropriate. All of the settlement offers made by MFI would have provided a better financial outcome than Mr Martin achieved, given his claim that he was unjustifiably dismissed by MFI was unsuccessful and no remedies were awarded to him.

[18] I consider it appropriate to base an assessment of uplift on the fourth Calderbank offer, which was for \$9,000 on 7 February 2023. There are two reasons for this. First, is that an investigation meeting was originally scheduled for 14 and 15 February 2023, before being vacated due to Cyclone Gabrielle on 13 February 2023. Both parties were otherwise prepared for that investigation meeting to occur. Second, the fifth of MFI’s

settlement offers for \$11,000 on 15 March 2023 included additional conditions, which were withdrawn with the sixth and final settlement offer on 27 March 2023, although that was for a lower amount of \$8,500 reflecting the higher costs that MFI had incurred in the intervening period. The fourth and sixth settlement offers being for similar amounts would both support the approach to an uplift to MFI's costs that follows.

[19] I have taken into account the Court of Appeal's comments that a "steely" approach should be taken when a party has rejected what turned out to be a reasonable offer to settle.⁷ MFI's first four settlement offers were all presented sufficiently in advance of the eventual date of the investigation meeting to allow for the majority of the additional costs claimed by MFI to have been avoided. I do not consider, however, that this is a case where an uplift of the magnitude sought by MFI, to effectively full indemnity costs from the rejection of its initial settlement offer, is appropriate.

[20] I have considered other Authority determinations where uplifts have been awarded, including *Gazeley v Oceania Group (NZ) Ltd*⁸ which was referred to by MFI. In that case the Authority applied an uplift to the daily rate which applied at the time of \$3,500 per day to \$5,000 per day (an uplift of approximately 43%), applied to six days on investigation meetings.⁹

[21] I have also taken into account the following factors, but do not consider they warrant any additional uplift:

- a. the complexity of this matter, which I consider could be described as of average, or slightly above average at best, complexity in terms of both legal and factual issues that fell to be investigated and determined; and
- b. whether the conduct of either party extended the duration of the investigation meeting, including by focussing on matters that had been addressed in other forums, however, I do not consider that this was the case on the part of either party.

[22] In the above circumstances, I consider an uplift in the daily tariff of a third to be appropriate. Based on my view that a reasonable starting point for costs is \$9,000, this results in an uplift to \$12,000.

⁷ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20].

⁸ [2013] NZERA Christchurch 67.

⁹ *Ibid* at [37].

[23] Mr Martin has raised impecuniosity as a reason for me to make a modest award of costs only, although he did not specifically suggest what an appropriate modest award of costs would be. I accept that it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However, I also note the observation of the Court that:¹⁰

... the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account. ...

[24] Taking this into account, I consider it appropriate to reduce the costs awarded to \$8,000.

[25] In relation to disbursements, MFI was entitled to instruct a representative of its choosing. However, costs associated with engaging out-of-town counsel are not usually recoverable. There is no reason to depart from that approach here. Neither do I consider it appropriate to allow MFI the claimed amount for a second opinion, reflecting my view at paragraph [21]a. above that this matter was of average, or slightly above average at best, complexity, which would not support the need for a second opinion.

[26] I order that Antony Martin must pay the Maharishi Foundation Incorporated \$8,000 as a contribution towards the costs it incurred in responding to his claims.

[27] In relation to MFI's request that I consider some creativity in relation to this costs determination, I recommend that MFI discuss its proposal further with Mr Martin, as well as exploring instalment payment options which take into account Mr Martin's limited income. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Shane Kinley
Member of the Employment Relations Authority

¹⁰ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [22].