IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2023] NZERA 602
3232759

	BETWEEN	RICHARD HARDING Applicant
	AND	ZIWI LIMITED First Respondent
	AND	AMAZONIA 1 HOLDINGS LIMITED Second Respondent

Member of Authority:	Claire English
Representatives:	Stephen Corlett, counsel for the Applicant Blair Edwards, counsel for the Respondent
Submissions received:	15 August and 9 October 2023 from Applicant 29 August 2023 from Second Respondent
Determination:	16 October 2023

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 1 August 2023, the Authority issued a determination in this matter, upholding the applicant's claim that the record of settlement he signed 17 May 2023 is binding and enforceable on him and on the respondents, and that the record of settlement should be performed in accordance with its terms.

[2] In that determination, the parties were encouraged to resolve any issue of costs between them, and the Authority made reference to its usual practice of applying the daily tariff to determine costs. The parties have not been able to resolve costs between themselves, and have filed memoranda accordingly.

[3] On behalf of Mr Harding it is submitted that although the matter was determined "on the papers", the appropriate starting point was the daily tariff for a one-day hearing, (that is $4,500) due to the complexities of the documentation and factual background. To that should be added an uplift of 50%, to take into account that the second respondent pursued what were described as a number of arguments which were "untenable and had no prospect of success". Accordingly, the applicant claims the total sum of $6,750 as a contribution to costs, which he says is significantly less than his actual costs.

[4] The second respondent says that significant costs awards should not be imposed on unsuccessful litigants. It takes the position that no costs should be awarded in this matter, on the grounds that the applicant did not provide invoices in support of his claim for costs.

[5] In the alternative, it submits that half of the daily tariff (that is, $2,250) would be an appropriate award, given that the matter was determined "on the papers" and only one affidavit was filed. The second respondent resists the application for any uplift, on the grounds that is well established that costs in the Authority are not to be used as a punishment or as an expression of disapproval.

[6] The applicant's counsel has subsequently filed invoices demonstrating the costs actually incurred by the applicant.

Principles

[7] 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**
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> (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.
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> (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.

[8] Costs are to follow the event. In this matter, the applicant was wholly successful in his claims. He incurred legal costs. He is therefore entitled to a contribution to his costs.

[9] As both parties have pointed out, the matter was heard "on the papers", which means I need to consider what equivalent of the daily tariff might be appropriate, either the equivalent of 1 day, as contended for by the applicant, or the equivalent of half a day, as contended for by the second respondent.

[10] A significant amount of documentary material had to be transversed in preparing the determination. In addition, both parties made substantial written submissions on both the facts and the relevant law. Given the complexity of the issues and the importance of the matter to the parties, my view is that the appropriate comparator is the equivalent of a 1 day investigation meeting, eg the standard tariff of $4,500.

[11] In considering whether there should be any departure from this starting point, my view is that the relevant principles set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*[1] as confirmed in *Fagotti v Acme and Co Limited*[2] are that costs are to be modest, and are not to be used as a punishment or expression of disapproval of the unsuccessful parties conduct. The conduct of both parties in this matter was unexceptional, and does not suggest any uplift in the daily tariff is warranted. Accordingly, no adjustments will be made.

Orders

[12] Amazonia 1 Holdings Limited is ordered to pay to Richard Harding within 28 days of this determination the sum of $4,500 as a contribution to costs.

Claire English
Member of the Employment Relations Authority

[1] [2005] 1 ERNZ 808.
[2] [2015] NZEmpC 135 at 114.