

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 642  
3177409

BETWEEN	GREGG SMITH Applicant
AND	CHIEF OF DEFENCE FORCE Respondent

Member of Authority:	Davinnia Tan
Representatives:	Victor Corbett, counsel for the Applicant Channy Mao, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	24 July 2023 from Applicant 2 August 2023 Respondent
Determination:	31 October 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] On 13 July 2023 the Authority issued a determination in this matter where it did not make any orders against Chief of Defence Force (CDF) but recommended that CDF make a Loyalty Payment (as defined in the determination) to Mr Smith.<sup>1</sup>

[2] In that determination, Member Dumbleton indicated that it would be fair and just that the parties bear their own costs given the unusual circumstances of the employment relationship problem but provided the option of either party to apply for legal costs.

[3] CDF has not acted on the Authority's recommendation to pay Mr Smith the Loyalty Payment. Mr Smith seeks an order for costs against CDF.

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<sup>1</sup> *Smith v Chief of Defence Force* [202] NZERA 371 at [76].

[4] CDF considers that Member Dumbleton's observations as they relate to costs should stand.

## **Submissions**

### *Mr Smith*

[5] Counsel for Mr Smith submitted that CDF has not acted on the recommendations of the Authority to pay Mr Smith the Loyalty Payment and considers that the Authority's factual findings and recommendation in Mr Smith's favour deems him to be the successful party in the substantive matter.

[6] Counsel for Mr Smith also noted that proceedings had cost Mr Smith around \$9000.00 in legal costs and that he should not be left out of pocket in these circumstances. Counsel further submitted that it was due to CDF's inactions that Mr Smith had to bring proceedings to pursue payment of the Loyalty Payment.

[7] Counsel for Mr Smith seeks a costs award of \$4,500.00 to reflect the daily tariff, with a 50% uplift owing to CDF's behaviour, which is a total of \$6,750.00.

### *CDF*

[8] Counsel for CDF submitted that where parties have "mixed outcomes", the correct approach is to stand back and assess matters "in the round".<sup>2</sup> Counsel submitted that costs awards are expected to be modest<sup>3</sup>.

[9] Reference was made to the Authority's finding that there was a breach of good faith in relation to the Loyalty Payment but also the unsuccessful penalty claims which had not been brought within the statutory timeframe. Counsel for CDF submitted that a single finding alone should not entitle Mr Smith to a full award of costs, let alone a significant uplift, and that the unsuccessful penalty claims are not findings characteristic of a successful party.

[10] Counsel for CDF further submitted that if the Authority were to make a costs award then it should consider reducing any figure due to the applicant's conduct given that neither the statement of problem or the amended statement of problem specified a

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<sup>2</sup> *Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156.

<sup>3</sup> *Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13.

penalty for the Loyalty Payment as a remedy and so CDF did not have an opportunity to provide evidence to address that remedy. Counsel also observed that the Authority noted that the claim for a penalty was not made until two weeks after the investigation meeting.<sup>4</sup>

[11] Counsel for CDF considers that it would be fair and just to let costs lie where they fall in these circumstances where there have been mixed outcomes and no orders were made against CDF.

## Principles

[12] 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.

[13] 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*<sup>5</sup> as confirmed in *Fagotti v Acme and Co Limited*.<sup>6</sup> 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.<sup>7</sup>

[14] 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 days.<sup>8</sup>

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<sup>4</sup> *Smith v Chief of Defence Force* [202] NZERA 371 at [52].

<sup>5</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

<sup>6</sup> *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 114.

<sup>7</sup> *Health Waikato v Elmsly* [2004] 1 ERNZ 172 (CA) at [53] and *Blue Star Print v David Mitchell* [2010] NZCA 385 at [20].

<sup>8</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)

[15] The daily tariff is usually taken as a starting point, although is not to be used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.<sup>9</sup>

### **Analysis**

[16] The investigation meeting in this matter was for one day. Both parties attended together with their respective counsel and witnesses.

[17] I accept both parties' submissions that the circumstances are unusual in that there have not been any orders made against CDF notwithstanding the Authority's findings of a breach of good faith and its recommendation to CDF to pay Mr Smith a Loyalty Payment.

[18] This, in my view, is not a typical scenario where it can be said that there has been "mixed success". A determination where there has been mixed success typically involved the Authority making a substantive finding and a corresponding order in relation to that finding. This is not the situation here and I consider that Member Dumbleton had turned his mind to those factors when he stated that it "may seem fair and just that the parties should bear their own costs".<sup>10</sup>

[19] Having reviewed parties' submissions on the matter, I am not persuaded that CDF's inactions to date to pay Mr Smith the Loyalty Payment is a factor that can be appropriately held against them as far as the issue of costs is concerned as costs should not be used as a punishment. I am also cognisant that the penalty claims in relation to the Loyalty Payment were raised only following the commencement of proceedings on other matters in which Mr Smith has been unsuccessful. Hence, although the Authority's recommendation is to an extent supportive of Mr Smith's claim to be paid the Loyalty Payment, it did not go further than that. Coupled with the principle that costs awards are expected to be modest, I see no reason why parties should not bear their own costs in these circumstances.

[20] Submissions for CDF were critical of Mr Smith's conduct, but again, costs are not to be used as punishment. The unusual nature of this case and the need for the

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<sup>9</sup> Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

<sup>10</sup> *Smith v Chief of Defence Force* [202] NZERA 371 at [75].

Authority to make a determination also lead me to endorse Member Dumbleton's indication that costs should lie where they fall.

**Orders**

[21] Costs are to lie where they fall.

Davinnia Tan  
Member of the Employment Relations Authority