

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 770
3172482

BETWEEN	PAUL HARRIS Applicant
AND	EFS LIMITED T/A Engineering Full Stop Respondent

Member of Authority:	Claire English
Representatives:	Alex Kersjes, advocate for the Applicant No appearance for the Respondent
Submissions received:	22 March and 14 November 2023 from Applicant None received from Respondent
Determination:	20 December 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] On 9 March 2022, the Authority issued a determination in this matter, upholding the applicant's claim of unjustifiable dismissal, and making various awards in favour of the applicant, including awards for lost remuneration, sick leave, compensation for hurt, humiliation and injury to feelings, and penalties payable to the Crown account.

[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.

[3] The parties have not been able to resolve costs between themselves. Submissions for the applicant seeking costs were filed on 22 March 2022. There was then some delay, as it appears the respondent changed its address. The applicant's cost

submissions were served on the respondent on 13 November 2022, and the respondent was asked to provide its response to these submissions.

[4] A person called Hayley Smith (also using the name Hayley Williams in her email address) then contacted the Authority on 14 and 15 November behalf of the respondent, asking for an unspecified extension of time to allow the respondent's lawyer to respond, as "he cannot attend to this for another 2 weeks". No details were given as to the lawyer or why he could not attend to the filing of submissions within the usual timeframe.

[5] I exercised my discretion to grant a short extension of time. That time has now well and truly expired. No further contact has been received on the part of the respondent. The respondent is aware of the application for costs, has been in contact with the Authority, and is aware of the opportunity to file submissions on the matter. As the respondent has not filed any submissions, I will now proceed to determine the matter on the information before me.

[6] It is submitted for the applicant that a costs award of \$5,000 should be made, plus the reimbursement of the filing fee of \$71.56.

[7] This is on the grounds that the investigation meeting took half a day, plus time for submissions and the provision of further information post the investigation meeting, thus the starting point should be three-quarters of the daily tariff. In addition, a modest uplift should be given in recognition of the additional time spent by the applicant in attempting to engage with the respondent which was ultimately unsuccessful, and because the applicant made an offer to settle which was rejected by the respondent, which offer was significantly below the awards made by the Authority.

Analysis

[8] 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.

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

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

[10] 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 or expression of disapproval of the unsuccessful parties conduct.

[11] As the successful party, Mr Harris is entitled to costs.

[12] The key principle in this matter is that costs are to be modest, but that a party's conduct may need to be taken into account when setting a costs award.

[13] The investigation meeting in this matter was for one half day, and was held in person. The applicant attended together with his representative and witness. There was no appearance for the respondent. A short amount of additional time was allowed for the filing of a further document and written submissions following the hearing.

[14] The starting point is therefore half the daily tariff, being \$2,250. The allowance of a further quarter day for the filing of subsequent submissions is reasonable and in line with other determinations of the Authority, and increases the starting point to \$3,375.00.

[15] The applicant has then requested an uplift of \$1,625 to take into account both that the respondent turned down an offer to settle that was more favourable (by a reasonable margin) than the awards made by the Authority, and in recognition of the delays, trouble, and expense resulting from the respondent's persistent non-participation.

[16] I accept that both of these matters should properly result in a modest uplift, as the applicant has requested. I am satisfied that the sum of \$5,000 is a fair and appropriate costs award in these circumstances.

² [2005] 1 ERNZ 808.

³ [2015] NZEmpC 135 at 114.

[17] As Mr Harris was successful in his claim, he is also entitled to the reimbursement of the filing fee.

Orders

[18] For the reasons set out above, I order EFS Limited to pay to Paul Harris within 28 days of the date of this determination:

- a. The sum of \$5,000 as a contribution to legal costs; and
- b. the filing fee of \$71.56.

Claire English
Member of the Employment Relations Authority