

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 246  
3158483

BETWEEN                      STUART YOUNG  
   Applicant  
  
AND                              PORT OF TAURANGA  
   LIMITED  
   Respondent

Member of Authority:        Peter Fuiava  
  
Representatives:              Liz Lambert, advocate for the Applicant  
   Shima Grice and Lucy Nolan, counsel for the  
   Respondent  
  
Submissions received:        11 March 2024 from the Applicant  
   25 January and 15 February 2024 from the Respondent  
  
Determination:                30 April 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] By determination dated 18 January 2024,<sup>1</sup> I dismissed a claim brought by Stuart Young who alleged that he had been unjustifiably dismissed from his role as tug engineer by the Port of Tauranga (the Port) because he was not vaccinated against COVID-19. The question of costs was reserved and if the parties were not able to resolve matters themselves, timetabling directions were made for the filing of memoranda which have been received and considered.

**What are the parties positions concerning costs?**

[2] The Port seeks an uplift in costs for a two-day investigation meeting because of the way in which Mr Young conducted his case. Mr Young submits that costs should lie where they fall.

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<sup>1</sup> *Stuart Young v Port of Tauranga Limited* [2024] NZERA 26.

### **What is the Authority's approach to costs?**

[3] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 to award costs. However, the discretion to order a party to pay costs to another party must be exercised in accordance with principle. The principles and the Authority's approach to costs are well settled and are outlined in its practice note which is publicly available.<sup>2</sup> Further information on the Authority's approach to costs may also be found in its Practice Direction.<sup>3</sup>

[4] Informing the Authority's approach to costs is relevant caselaw such as *PBO v Da Cruz* in which the Employment Court observed that, since its inception, the Authority has held to some basic tenets concerning costs which relevantly include:<sup>4</sup>

- Conduct which increased unnecessarily can be taken into account in inflating or reducing an award.
- That costs generally follow the event.
- That without prejudice offers can be taken into account.
- That awards will be modest.
- That frequently costs are judged against a notional daily rate.
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

### **Should costs be uplifted or should the parties bear their own costs?**

[5] The starting point for a two-day investigation meeting is \$8,000 because the daily tariff approach would see a contribution of \$4,500 for the first day of an investigation meeting and \$3,500 for the second day. However, the Port says that it is entitled to an uplift to \$12,000 because of Mr Young's conduct which increased its costs and his rejection of two settlement offers from the Port that were not accepted which would have avoided further unnecessary costs from being incurred.

[6] Regarding the way in which Mr Young conducted his case in the Authority, reference was made to his election to have his employment problem removed to the Employment Court and his failure to comply with the Authority's timetable directions in relation to the filing of his evidence. As for the settlement offers, while these were made on a "walk away" basis, I note that the Port was entitled to costs having

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<sup>2</sup> [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).

<sup>3</sup> [www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf](http://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf)

<sup>4</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 at [44].

successfully opposed Mr Young's application for interim reinstatement,<sup>5</sup> as well as his application for removal.<sup>6</sup> It therefore cannot be said that the walk away offers made were 'nil offers' because the Port was prepared to forego its entitlement to costs for the preliminary matters so there was a monetary value that amounted to a genuine compromise.

[7] Mr Young has challenged my determination to the Employment Court and submits that the public are interested in his court case because the Port as an organisation is subject to the New Zealand Bill of Rights Act 1990. However, Mr Young says that the public will never get to hear the court's decision if he is required to pay costs and because his case involves a matter of public interest, costs should lie where they fall especially as the substantive effect of the COVID-19 Vaccinations Order in the workplace is yet to be heard in the Employment Court.

[8] Mr Young refers to *GF v OO* [2022] NZEmpC 1 where Chief Judge Inglis let costs lie where they fell. Mr Young submits that her Honour did this to encourage applicants to pursue cases that would otherwise 'fall by the wayside' if unduly restricted by costs. However, that submission is not supported by the express wording of the judgment and the fact that the respondent in *GF v OO* was a public sector organisation (which the Port is not) was a determinative factor for the court in not imposing costs (see [20]).

### **Consideration**

[9] By any measure, the Port was the successful party having defended itself against Mr Young's claims, both preliminary and substantive. The general rule that costs follow the event applies.

[10] The investigation meeting took two days and a straight application of the Authority's notional tariff results in a starting point of \$8,000. This amount represents a fraction of what it has cost the Port to defend itself. Copies of tax invoices rendered by the Port's counsel amount to \$46,315.13 which cover the period from 31 March 2023 to 31 October 2023. I note that the Port had initially engaged different

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<sup>5</sup> *HLI v VMZ* [2022] NZERA 164.

<sup>6</sup> *HLI v VMZ* [2023] NZERA 59.

counsel to oppose Mr Young's application for interim reinstatement. As such, there would have been costs associated with that legal work as well.

[11] In addition to successfully opposing that application, the Port was also successful in resisting a subsequent application by Mr Young to remove his employment problem to the Employment Court. These interim applications were determined on the papers to minimise costs for both sides. For an on-the-papers determination, as a general rule, half the daily tariff for the first day of an investigation meeting could apply. Given the nature of the interim reinstatement application which was factually dense, I fix costs at \$2,250 which is one half of the notional tariff. However, for the removal application, I fix costs at \$1,000 because the issues for consideration were more confined.

[12] Ms Lambert's concern about the chilling effect of costs is noted. However, costs in the Authority are modest and it is appropriate that Mr Young contributes to the Port's actual and reasonable costs a significant proportion of which could have been avoided had he accepted either of its two settlement offers that were validly made from a position of strength as noted above. Further, Mr Young's delay in filing his written witness statement directly resulted in an adjournment of the investigation meeting. Both these matters have added to the Port's costs and must be factored in bearing in mind that costs are not only modest but are not intended to be punitive either. On balance, a further uplift of \$750 is warranted.

[13] Mr Young's appeal to the Employment Court is yet to be resolved. Even so, his challenge does not operate as a stay and I see no reason why the issue of costs in the Authority cannot be dealt with now.

## **Order**

[14] The Authority orders Stuart Young to pay the Port of Tauranga \$12,000 within 40 days of this costs determination as a contribution towards the Port's costs in successfully defending itself against his various claims.

Peter Fuiava  
Member of the Employment Relations Authority