

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 300
3152321

BETWEEN	ROCKIT PACKING COMPANY LIMITED First Applicant
AND	ROCKIT TRADING COMPANY LIMITED Second Applicant
AND	ROCKIT GLOBAL LIMITED Third Applicant
AND	AUSTIN PAUL MORTIMER Respondent

Member of Authority:	Rowan Anderson
Representatives:	Peter Crombie and Patrick Anderson, counsel for the Applicants Alex Kersjes, advocate for the Respondent
Investigation Meeting:	On the papers
Submissions received:	Up to and including 8 May 2024 from the Applicants Up to and including 15 May 2024 from the Respondent
Determination:	22 May 2024

COSTS DETERMINATION OF THE AUTHORITY

The determination

[1] On 15 January 2024, I issued a determination in which I found that Mr Mortimer was employed solely by Rokit Trading Company Limited (RTCL), that he breached the terms of a record of settlement, and his good faith obligations.¹ A penalty of \$6,000 was imposed upon Mr Mortimer. The issue of costs was reserved, and the parties have not been able to agree on costs.

¹ *Rokit Packing Company Limited & Ors v Austin Mortimer* [2024] NZERA 19.

Background

[2] The applicants did not lodge a memorandum seeking costs within the timeframe provided for in the substantive determination. Mr Mortimer objected to the application made for costs on the basis that prior leave was not sought for an extension to the relevant timeframe and that the applicants first sought costs approximately 60 days after the substantive determination had been issued.

[3] The applicants sought leave, belatedly, on 14 March 2024, referencing a change in Mr Mortimer's representation and attempts to resolve costs as between the parties as having commenced during the applicable timeframe. Mr Mortimer referred to an offer of settlement in relation to costs as being made through the new representative prior to the expiry of the relevant timeframe and a rejection of the same approximately 50 days before leave was sought by the applicants.

[4] On 5 April 2024, I issued a Minute in which I recorded that, such as it might be required, leave was granted for the costs application to be raised outside of the timeframes in the determination. As noted in that Minute, costs are in issue, and I consider the Authority is required to deal with that issue. I recorded in that Minute that I am satisfied that leave should be granted having regard to attempts having been made to resolve the issue of costs as between the parties.

Submissions for the applicants

[5] RTCL was successful in pursuing its claims and the applicants seek a costs award, based on the Authority's daily tariff, in the amount of \$9,750, plus an uplift of at least \$1,500.

[6] The applicants submitted that the starting point in terms of the Authority's daily tariff should be \$4,500 for the first day, \$3,500 for the second day, and \$1,750 for an additional half day by AVL. I am satisfied that the applicants' costs significantly exceeded the contribution claimed.

[7] An uplift was sought by the applicants on the basis that Mr Mortimer's conduct unnecessarily increased the applicants' costs. That submission related to what was said to be a late concession by Mr Mortimer that his interest in Cylinder Pac International Limited (CPI) might have interfered with the proper performance of the duties he owed

to RTCL. It was submitted that the issue resulted in more time being required at the investigation meeting than would have been the case if he had conceded the point earlier.

[8] In response to claims raised by Mr Mortimer as to without prejudice save as to costs offers being relevant, the applicants submitted that the quantum of penalties sought were not the focus of the proceedings and that there was a deterrence aspect to the penalty claims. The applicants submitted that a relevant counteroffer made by them required a public admission, that Mr Mortimer did not accept that, and that vindication was a significant issue. They contend that the proceedings were brought almost entirely on principle and that the applicants' rejection of the relevant offers was not unreasonable.

[9] In relation to a claim by Mr Mortimer that the lack of success by the First Applicant and Third Applicant should impact costs, it was submitted that the Authority accepted that all of the pleaded duties were owed to RTCL and that any costs associated with the First Applicant and Third Applicant would have been minimal.

Submissions for Mr Mortimer

[10] Mr Mortimer seeks an award of costs against the First Applicant and Third Applicant on the basis that they were unsuccessful in their claims and that he was successful in defending those claims. It was submitted that RTCL secured only a relatively small penalty of \$3,000 and that the matter involved mixed success.

[11] Mr Mortimer also submitted that his position was consistent throughout the proceedings and that there was no conduct warranting an uplift against him. Further, Mr Mortimer claims that there were two effective *Calderbank* offers made to the applicants, one on 28 March 2023 and another on 26 July 2023. The first of those offers was said to have been made on the basis that costs were to lie where they fell.

[12] The second offer was said to have provided for Mr Mortimer to make payment of \$5,000 to the applicants, together with an acknowledgement to the effect that Mr Mortimer should have been more transparent and more conscious as to his involvement CPI and Cylinder Pac (NZ) Limited.² Mr Mortimer submitted that the offer was refused,

² Two entities in relation to which Mr Mortimer was said to have had dealings with in conflict with his obligations to the applicants.

that RTCL only secured a penalty of \$3,000, and that the applicants would have been better off if they had accepted the offer.

[13] Mr Mortimer referred to the proposed acknowledgement in his settlement offer as being appropriate having regard to a counteroffer from the applicants that included proposed resolution on the basis Mr Mortimer pay them \$25,000. Mr Mortimer accepted that the counteroffer sought more detail as to the form of acknowledgement but stated that the financial component dominated the offer. He contends that the form of the acknowledgement he proposed would have provided any relevant vindication to the applicants. It was also submitted that the counteroffer provided for confidentiality and as such a public acknowledgement was not sought by the applicants, a fact disputed by the applicants.

[14] Mr Mortimer says that he incurred total costs of \$78,690 and incurred wasted costs in the amount of \$30,018.23 due to the applicants unreasonable progression of the proceedings having regard to the settlement offer made. He seeks a contribution of \$8,666.67 based on two-thirds of the daily tariff.

[15] Mr Mortimer acknowledges that costs on costs are not generally considered but submitted that the applicants' late application for costs should be considered.

Discussion and analysis

[16] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.³

[17] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that *Calderbank* offers may be considered in setting costs, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.⁴

[18] The daily tariff is to be taken as a starting point.⁵ Principled adjustments may, if necessary, be made having regard to the to the particular characteristics of a case.

³ Employment Relations Act 2000, Schedule 2, clause 15.

⁴ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

⁵ Practice Direction of the Employment Relations Authority, issued 1 February 2024.

[19] The Authority's investigation initially took place on 8 and 9 August 2023, concluding at approximately 2.00pm on the second of those days. The investigation meeting was reconvened by AVL on 28 September 2023 for approximately two and a half hours and written submissions were received in lieu of oral submissions. Any starting point based on the Authority's daily tariff would be 2.5 days and \$9,750.

[20] The applicants are related entities and on one view have had some success in pursuing the claims made. However, it is also the case that the applicants made a deliberate decision to seek to establish breaches occurred as against each of the individual entities. RTCL was partially successful; the First Applicant and Third Applicant were wholly unsuccessful. I consider that the absence of success by the First Applicant and Third Applicant, and Mr Mortimer's successful defence of those claims, are a factor that should be considered in the assessment of costs.

[21] I do not accept that Mr Mortimer's conduct in the proceedings was of such a nature that would justify an uplift in costs. Even if the applicants were correct as to what was said to be a late concession from Mr Mortimer, I do not consider that the Authority's investigation was significantly or unreasonably prolonged on that basis.

[22] I consider an adjustment would have been appropriate on the basis that the applicants rejected the second offer made by Mr Mortimer to resolve the matter on 26 July 2023. That offer was made some time prior to the investigation meeting and provided a reasonable time for response. While I accept there was an element of vindication being sought by the applicants, I am not persuaded that that was of such significance, noting the applicants are corporate entities, as would provide a reasonable justification for the rejection of the offer on the basis of personal vindication. Significant sums were expended by both parties following the rejection of that offer.

[23] In addition to the above matters, I also consider the timing of the application for costs to be relevant. While I have granted leave, and albeit that I have found that the Authority is required to deal with the application for costs, I consider the timing an issue relevant to my discretion.

[24] Having regard to all the circumstances, I consider that costs should lie where they fall.

Conclusion

[25] For the above reasons costs are to lie where they fall.

Rowan Anderson
Member of the Employment Relations Authority