

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 381
3137981

BETWEEN RORY MCCORMACK
Applicant

AND MARIN CONSTRUCTION
LIMITED
Respondent

Member of Authority: Alex Leulu

Representatives: David Fleming, counsel for the Applicant
Ray Parmenter, counsel for the Respondent

Submissions received: 29 May 2024 from the Applicant
11 June 2024 from the Respondent

Determination: 26 June 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 15 May 2024 the Authority upheld Rory McCormack’s claims against Marin Construction Limited (Marin) for unjustified disadvantage and unjustified dismissal.¹

[2] As part of its determination, the Authority reserved its decision on costs. A timetable was also set for memoranda to be filed if the parties were unable to resolve the issue of costs themselves.

[3] The parties were unable to resolve the issue of costs amongst themselves. On 29 May 2024 Mr McCormack filed and served a memorandum asking the Authority to make a further determination for an award of costs against Marin. In response, Marin filed and served its costs memorandum on 11 June 2024.

¹ *McCormack v Marin Construction Limited* [2024] NZERA 111.

Costs principles

[4] Clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) gives the Authority discretion to order any party to a matter to pay to another party such costs and expenses as the Authority thinks reasonable.

[5] The unsuccessful party will usually have to contribute to the costs of the successful party, as well as meeting their own costs. A daily tariff applied by the Authority sets a starting point from which relevant factors and principles may guide an upward or downward adjustment of the amount of costs awarded.² The current tariff for costs is \$4,500 for the first day of any matter and \$3,500 for any proceeding days.

[6] Relevant principles governing costs in the Authority include consideration of whether the conduct of the parties increased costs unnecessarily, warranting an adjustment up or down, without compromising the Authority's otherwise modest approach to costs.³

[7] Costs should not be used to punish a party or express disapproval of an unsuccessful party's conduct.

Should costs be awarded?

[8] The investigation meeting for this matter proceeded for less than a full day. Prior to the investigation meeting, the Authority investigated a preliminary matter to determine whether Mr McCormack's claims were raised within the statutory timeframe (the preliminary matter).⁴ The Authority issued its preliminary determination on 21 July 2023.⁵

[9] Mr McCormack sought an order of a contribution of costs against Marin for a total of \$6,750 and reimbursement of the Authority's filing fee. This amount was made up of the Authority's notional daily tariff, being \$4,500 for the first day; and an additional amount of \$2,250 representing half of the notional daily tariff.

[10] Mr McCormack said the investigation meeting should be treated as having been the equivalent of one full day because:

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

³ See www.era.govt.nz/determinations/awarding-costs-remedies.

⁴ Employment Relations Act 2000, s 114.

⁵ *McCormack v Marin Construction Limited* [2023] NZERA 389.

- (a) Both parties submitted detailed statements of evidence which minimised the time needed for questioning by the Authority;
- (b) Marin's cross examination of Mr McCormack was brief; and
- (c) Closing written submissions were handed up to the Authority (but not addressed orally to the Authority at the investigation meeting).

[11] Mr McCormack also sought an additional amount of \$2,250 which was claimed in respect of legal costs associated with preparation and representation in addressing the preliminary matter. Mr McCormack also claimed he was entitled to the additional amount because he was largely successful in respect of the preliminary matter.

[12] Marin did not specifically oppose Mr McCormack's costs claim for a full day for an investigation meeting. However, Marin disputed Mr McCormack's claim to costs related to the preliminary matter.

[13] Marin argued the investigation into the preliminary matters was necessary because of the deficiencies in Mr McCormack's initial claims against Marin. In support of its view, Marin referred to Mr McCormack lodging an amended statement of problem as a result of the Authority's preliminary determination.

Outcome

[14] Mr McCormack was the successful party and costs should follow the event. He is entitled to a contribution to his legal costs. However, after considering the views of both parties, there are no compelling reasons to award costs outside the notional daily tariff.

[15] I accept Marin's arguments in respect of Mr McCormack costs claims for the preliminary matters. Both parties were partially successful and determining the preliminary matter assisted the Authority's investigation by clarifying Mr McCormack substantive claims. Accordingly, no further costs are awarded in respect of the preliminary matter.

[16] In applying the tariff for a less than one full day investigation meeting, the appropriate award of costs is \$3,500. Considering all the available information, there were no compelling reasons for an adjustment to this amount.

Alex Leulu
Member of the Employment Relations Authority