

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 383
3090392

BETWEEN YFX
Applicant

AND CHIEF OF THE NEW
ZEALAND DEFENCE
FORCE
Respondent

Member of Authority: Natasha Szeto

Representatives: Amy De-La Cruz and Adam Mapu, advocates for the Applicant
Jordan Boyle, counsel for the Respondent

Submissions received: 8 April 2024 from the Applicant and 23 April 2024 from the Respondent

Date: 27 June 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] On 16 February 2024, the Authority issued a determination¹ in which YFX was found to have a personal grievance, in that she had been constructively dismissed. The New Zealand Defence Force (NZDF) was ordered to pay YFX the sum of \$40,000 (forty thousand dollars) as compensation for humiliation, loss of dignity and injury to

¹ *YFX v Chief of the New Zealand Defence Force* [2024] NZERA 86.

feelings. A non-publication order was made for the applicant, which I continue in this determination.²

[2] In the determination, the Authority referred to its usual practice of applying the daily tariff to determine costs and the parties were encouraged to resolve any issue of costs between them. They have been unable to do so.

[3] YFX lodged and served a memorandum as to costs on 8 April 2024. She says the matter was heard over four days and the starting point for costs based on the Authority's daily tariff is therefore \$15,000.00.

[4] YFX also refers to two settlement offers, the first of which was made on 5 March 2021 and was for approximately \$30,000.00 plus \$15,000.00 in costs (the *Calderbank* offer). A further without prejudice save as to costs offer was made on 26 February 2024 following the Authority's determination, of \$35,000.00 plus GST only in relation to costs (the costs settlement offer). Neither offer was accepted by NZDF.

[5] YFX says NZDF's conduct warrants doubling the daily tariff based on the following factors, which I have summarised and grouped:

- (a) NZDF's unexplained rejection of a reasonable *Calderbank* offer.
- (b) NZDF's non-engagement with a proposed costs settlement, necessitating the filing of further memoranda.
- (c) Matters outlined in the determination including NZDF's failure to address YFX's concerns promptly; NZDF's inadequate handling of health and safety complaints; NZDF's inappropriate management responses; a lack of transparency and support, delay and avoidance in mediation process, and non-compliance with Authority orders.

[6] YFX also seeks reasonable disbursements of the Authority's application fee, courier costs and fees for summoning a witness.

[7] NZDF filed submissions on costs in response on 23 April 2024. It accepts YFX was the successful party, but says she was not wholly successful in that a number of disadvantage claims were determined to have not been raised within the 90 day period, and she was not awarded claimed lost wages. NZDF also says the factors YFX raises

² Above n1 at [101].

as justifying an uplift occurred before she engaged legal representation (and are therefore not relevant to incurring legal cost) or were considered by the Authority as part of its finding that she was constructively dismissed (and to increase costs on the basis of these factors would amount to double counting).

[8] NZDF says the *Calderbank* offer is of limited relevance to the determination of costs because the costs sought by YFX were excessive given the early stage of the proceedings. NZDF says the costs settlement offer was made following the Authority's determination and therefore has no bearing on any award of costs in relation to the substantive proceeding. NZDF also says it was reasonable to reject the offer because YFX sought over two and a half times tariff in the costs settlement offer.

[9] In relation to disbursements, NZDF submits it should not bear the cost of YFX's advocates' travel. There being no evidence as to other disbursements, the only cost reasonably incurred is the filing fee of \$71.55.

Analysis

[10] The Authority has clear statutory power to order such costs and expenses to be paid as the Authority thinks reasonable.³ Costs are awarded at the Authority's discretion.⁴ The principle that costs follow the event is well-recognised by the Authority and courts.⁵

[11] The Authority has adopted a daily tariff approach as the starting point for considering costs, which is well known. The current daily tariff is \$4,500.00 for the first day of hearing, and \$3,500.00 for subsequent hearing days.⁶ The parties can expect the Authority to adhere to the approach of applying the daily tariff, unless there is good reason to depart from it. In this case, the parties agree the starting point for assessing costs in this matter is the tariff for a four day hearing, which is \$15,000.00 and I proceed on this basis.

[12] 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)*

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

⁴ *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

⁵ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

⁶ Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi (February 2024) at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>

*v Da Cruz*⁷ as confirmed in *Fagotti v Acme and Co Limited*⁸. It is a principle set out in *Da Cruz* that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. The financial situation of the party paying costs can be a relevant factor to take into account. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction. A robust approach is to be adopted in relation to *Calderbank* offers. The Employment Court has noted that such an approach is "consistent with the public interest in encouraging the acceptance of reasonable settlement offers and avoiding unnecessary litigation".⁹

[13] As the successful party, YFX is entitled to a contribution to her costs actually and reasonably incurred. Based on a four day hearing, I agree with the parties the appropriate starting point for assessing costs is \$15,000.00.

[14] It is a well-settled principle that costs are not intended to punish or express disapproval at an unsuccessful party's conduct. Where an unsuccessful party has acted unreasonably, thereby also unnecessarily increasing costs, an uplift can be considered. However, the factors YFX asks me to take into account were matters outlined in the substantive determination which led to the conclusion that the breaches were made out, and that YFX had been constructively dismissed.¹⁰ NZDF's conduct was also found to have contributed to the harm YFX felt and the eventual outcome.¹¹ I am not persuaded it is appropriate to take these factors into account to uplift the tariff, as there would be an element of double-counting. For the sake of completeness, I do not accept NZDF's submission that YFX's "mixed success" justifies a modest reduction to the tariff either.

[15] I have seen the *Calderbank* offer and the costs settlement offer YFX gave NZDF. I am satisfied the *Calderbank* offer was a reasonable offer made in sufficient time before the investigation meeting to provide a reasonable time for response. Although NZDF says the costs claimed were excessive given the early stage of the investigation, the compensation YFX sought in the *Calderbank* was less than the amount the Authority ultimately awarded. Acceptance of the offer would have put NZDF in a significantly better position. An uplift to the tariff is appropriate to recognise

⁷ [2005] 1 ERNZ 808.

⁸ [2015] NZEmpC 135 at 114.

⁹ *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4.

¹⁰ *YFX v Chief of the New Zealand Defence Force* [2024] NZERA 86 at [86].

¹¹ Above n10 at [95] and [96].

the unexplained rejection of a reasonable *Calderbank* offer and I consider an uplift of 10 percent (\$1,500) to be a moderate and appropriate amount.

[16] The costs settlement offer presented after the investigation meeting was not a *Calderbank*, because it was not made to avoid the litigation. The same principles do not apply to costs settlement. Parties are expected to enter into post-investigation negotiations to resolve costs and I do not accept that unexplained rejection of a costs settlement offer justifies an uplift.

[17] In relation to disbursements, YFX specifically claims the Authority's filing fee, courier fees and fees for summoning a witness. The "expenses claim" YFX submitted is supported by an excel spreadsheet which contains line items relating to YFX's advocates' travel costs. YFX's disbursement claims are not substantiated with invoices or supporting documentation other than the excel spreadsheet. It is therefore unclear what she is seeking to claim. To the extent YFX claims her advocates' travel costs, I would decline to grant them. YFX chose to be represented by advocates based out of Wellington, and I do not consider it is reasonable for NZDF to bear the cost of their travel expenses. In relation to the other disbursements, based on the information provided to the Authority, I consider it is reasonable to reimburse YFX for her application fee to the Authority.

[18] Stepping back to look at matters overall and considering parity with other cases, an award of \$16,500.00 as a contribution to costs, which includes an uplift to the tariff based on a reasonable *Calderbank* offer, represents a modest and appropriate costs award in the circumstances. YFX is also to be reimbursed the Authority's application fee.

Orders

[19] For the reasons set out above, I order the Chief of the New Zealand Defence Force to pay YFX within 28 days of the date of this determination:

- (a) The sum of \$16,500.00 as a contribution to her costs.
- (b) The sum of \$71.55 as a disbursement, being the Authority's filing fee.

Natasha Szeto
Member of the Employment Relations Authority