

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 422  
3251559

BETWEEN	JACOB MAARSCHALK Applicant
AND	WEST AUCKLAND TRUST SERVICES LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Lawrence Anderson, advocate for the Applicant Aishleen Sluiters and Susannah Hodson, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and information received:	21 June and 10 July 2024, from the Applicant 10 July 2024, from the Respondent
Determination:	12 July 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] The Authority issued a determination on 7 June 2024 which found Mr Maarschalk had established personal grievances for unjustified disadvantage and awarded compensatory remedies in his favour.<sup>1</sup> Costs were reserved and a timetable set if the parties were unable to resolve this issue themselves which they advise has not been possible.

[2] Mr Maarschalk seeks by way of memorandum filed and served within the timetable a contribution to costs from the Trusts. The Trusts filed a memorandum in reply, to which Mr Maarschalk's representative filed a further memorandum which was

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<sup>1</sup> *Jacob Maarschalk v West Auckland Trust Services Limited* [2024] NZERA 333.

not timetabled. Correspondence between the representatives has also been copied to the Authority.

### **Costs principles**

[3] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

### **Mr Maarschalk's claim for costs**

[4] Mr Maarschalk seeks an award of \$8,250, as a contribution to total costs of representation incurred of \$8,625. A supporting invoice has been provided. He submits the award sought is warranted given:

- he was the successful party and costs should follow the event;
- the investigation meeting required one full hearing day and filing of written submissions to address policy documents filed after the investigation meeting at the direction of the Authority warrants an uplift of half a second day notional tariff; and
- the Trusts unreasonably refused offers of informal resolution made by Mr Maarschalk on 28 June and 4 September 2023.

### **The Trusts' position on costs**

[5] The Trusts submits there are several factors that warrant a reduction from the notional daily tariff and costs should lie where they fall:

- matters unrelated to these proceedings were raised by Mr Maarschalk’s representative which were later withdrawn causing the Trusts to incur costs of \$4,000 unnecessarily;
- at most, an uplift of \$600 given the submitted invoice shows actual costs incurred for the additional submissions was \$600 plus GST;
- after the determination was issued Mr Maarschalk’s representative sent an email containing an apparently AI generated image to previous counsel for the Trusts with subject line “This is coming to the internet”. The Trusts incurred further costs in seeking advice on this matter; and
- no valid *Calderbank* offer was made which would warrant an uplift because the proposals made would not have led to a beneficial outcome than was achieved by the party against whom costs are sought.

### **Costs analysis**

[6] Mr Maarschalk was the successful party and it is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party’s costs.

[7] The notional daily tariff is a starting point. The applicable daily tariff is \$4,500 with each subsequent day at \$3,500. This matter involved one full day investigation meeting so the starting point is \$4,500.

[8] No uplift is warranted for two reasons. Firstly, the matters for which additional information and submissions was sought after the investigation meeting was reasonably within the purview of the parties throughout this employment relationship problem. Secondly, while the proposals made on behalf of Mr Maarschalk to resolve this matter sooner rather than later were sensible given his employment is ongoing, the terms of the proposals cannot be said to have been more beneficial to the Trusts than the Authority awards because Mr Maarschalk was not found to have a contractual right to full time hours of work.

[9] Should there be a decrease in the daily tariff or should costs lie where they fall? On the information before the Authority the subject conduct is not Mr Maarschalk’s and it is not conduct for which he is responsible.

[10] A fair and reasonable costs award, given all the relevant circumstances is in Mr Maarschalk's favour at the daily tariff of \$4,500 plus reimbursement of the filing fee.

**Outcome**

[11] West Auckland Trust Services Limited is ordered to pay Jacob Maarschalk \$4,500.00 as a contribution to costs incurred and \$71.55 to reimburse the filing fee.

Marija Urlich  
Member of the Employment Relations Authority