

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 510
3204059

BETWEEN

DANIEL WILLIAMS
Applicant

AND

TE WHATU ORA – HEALTH
NEW ZEALAND
Respondent

Member of Authority: Sarah Blick

Representatives: David Feist, advocate for the applicant
Rebecca Rendle and Alana Harrison, counsel for the
respondent

Investigation meeting: On the papers

Submissions received: 25 June 2024 from the applicant
19 July 2024 from the respondent

Determination: 26 August 2024

DETERMINATION OF THE AUTHORITY

[1] By determination dated 29 May 2024, I dismissed Mr Williams' claim of unjustified dismissal against Te Whatu Ora – Health New Zealand who, having successfully defended the matter, is entitled to an award of costs.¹ The parties have not been able to reach agreement concerning costs and, consequently, a determination is required.

Costs principles

[2] The Authority has the power under Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act) to award costs. However, the discretion to order a party to pay costs to another party must be exercised in accordance with principle. Those principles are well settled and are outlined in the Authority's practice note which is

¹ *Williams v Te Whatu Ora – Health New Zealand* [2024] NZERA 319.

publicly available.² Informing the Authority's approach on costs is relevant case law such as *PBO Limited (formerly Rush Security Limited) 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:³

- Costs generally follow the event (i.e. the unsuccessful party will normally be required to contribute to the costs of the successful party).
- That awards will be modest.
- Conduct which increased costs unnecessarily can be taken into account in increasing or reducing an award.
- Costs are frequently judged against a notional daily rate or tariff.

[3] The starting point for an award of costs is based on a notional daily tariff of \$4,500 for the first day of an investigation meeting.

Submissions

[4] Te Whatu Ora says it has incurred actual legal costs significantly in excess of \$4,500 in opposing the claim, and submits the claim was entirely without merit and put it to unnecessary cost. It applies for an order that Mr Williams pay a contribution of at least \$6,750 towards its legal costs, being an uplift to the tariff taking into account that it was successful in defending all of Mr Williams' claims. It further submits it incurred unnecessary costs due to a late claim for reinstatement raised for the first time at the investigation meeting in September 2023, which had to be adjourned. Finally, it incurred additional costs preparing further evidence and submissions on the issue of reinstatement and attending the rescheduled investigation meeting in February 2024.

[5] Mr Williams says the proposal for increased costs is excessive and there is no reason to vary from the daily tariff amount. Mr Williams acknowledges the adjournment of this matter due to reinstatement being raised, but says this does not justify the increase sought. It was submitted the first investigation meeting lasted only 30 minutes and there was no requirement to adjourn it to add reinstatement as a remedy. Further, Mr Williams' representative says the Authority has ignored the Act's focus and made the practice of employment law more legalistic and expensive for the average

² www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf.

³ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

New Zealander than previously. It was submitted that requiring an adjournment simply for the purposes of adding the (primary remedy) of reinstatement is “unlawful”, particularly as very little evidential preparation was required to cover the issue.

Assessment

[6] It is correct that Mr Williams, through his advocate for the first time raised the issue of reinstatement at the commencement of the investigation meeting in September 2023. After hearing from the parties, an adjournment was granted.

[7] While I agree the Authority is statutorily designed to be an investigative, non-technical, low level and readily accessible forum, it is also required, in carrying out its role, to comply with the principles of natural justice. Granting an adjournment at Te Whatu Ora’s request in the circumstances, allowing it to consider its position and provide additional evidence relevant to the issue of reinstatement, was in alignment with the principles of natural justice. Te Whatu Ora did in fact lodge supplementary witness statements, as well as helpful submissions, on that issue. Mr Williams’ representative could have avoided the potential for an adjournment through more careful briefing during the case management process, prior to the investigation meeting. I accept Te Whatu Ora’s costs unnecessarily increased as a result of this, with the late raising of reinstatement as a remedy.

[8] Cost awards in the Authority are modest for good reason because if substantial cost awards were made against unsuccessful litigants, this can have a chilling effect on applicants approaching the Authority for redress. However, it is both reasonable and consistent with the Authority’s approach to costs that Mr Williams contribute towards the increased costs as a result of the adjournment, but at a level less than that sought.

Outcome

[9] For the reasons given above, the Authority orders Daniel Williams to pay Te Whatu Ora – Health New Zealand \$5,500 as a contribution towards its actual costs within 21 days of the date of this determination.

Sarah Blick
Member of the Employment Relations Authority