

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 558  
3085314

BETWEEN

DUANE FARRELL  
First Applicant

CORRECTIONS  
ASSOCIATION OF NEW  
ZEALAND INCORPORATED  
Second Applicant

AND

CHIEF EXECUTIVE OF THE  
DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority: Marija Urlich

Representatives: Jim Roberts and Kirby Kleingeld, counsel for the Applicants  
John Rooney, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 19 July 2024, from the Applicant  
2 August 2024, from the Respondent

Determination: 18 September 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Authority issued a determination in Mr Farrell's favour on 7 June 2024.<sup>1</sup> Costs were reserved and a timetable set if the parties were unable to resolve costs

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<sup>1</sup> *Duane Farrell & Anor v Department of Corrections* [2024] NZERA 331.

between them. The parties have filed costs memoranda in accordance with a modified timetable having attempted unsuccessfully to resolve this issue themselves. A preliminary determination has also been issued in respect of this employment relationship problem for which costs were reserved.<sup>2</sup>

### **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; and
- frequently costs are judged against a notional daily tariff.

### **Mr Farrell and CANZ's claim for costs**

[4] Mr Farrell and CANZ seek a costs award of \$42,500, as a contribution to total costs of representation incurred. Invoices have been provided. They submit the award sought is warranted given:

- the preliminary matter, though determined on the papers required time for preparation and submissions equivalent to a one-day hearing for which the applicable tariff is \$4,500;
- the substantive investigation meeting took six days which, calculated on the tariff basis is \$22,000; and
- an uplift of \$16,000 is warranted due to the costs of reviewing and responding to supplementary evidence.

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<sup>2</sup> *Duane Farrell & Anor v Department of Corrections* [2021] NZERA 336.

## **Correction's position on costs**

[5] Corrections submits the following factors are relevant to the determination of costs:

- the applicants achieved partial success in the preliminary matter for which costs should lie where they fall;
- the investigation meeting lasted 4.75 days in total and this should be the starting point for calculating notional daily tariff which is \$17,625;
- there are no factors which warrant an uplift in costs including an unreasonably rejected *Calderbank* offer or conduct which has unreasonable uncured costs and the uplift sought in respect of the last investigation meeting which lasted a quarter day are unreasonable; and
- the applicants' actions in respect of the supplementary material increased costs and caused delay.

## **Costs analysis**

[6] The applicants' claims were successful, 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. The applicants were substantially successful in the preliminary matter, and it is accepted though determined on the papers considerable time for preparation and submissions was required equivalent to one hearing day. The investigation meeting for the substantive claims required four investigation meeting days and then part day attendance for submissions presented by audio-visual link and a further part day investigation meeting to deal with material subsequently lodged at the direction of the Authority. Given the preliminary matter and the non-sequential nature of the investigation meeting including two part-day attendances the total investigation meeting time is fairly assessed as six days. Applying the daily tariff the starting point for assessing costs is \$22,000.

[8] There are none of the usual factors present in this matter which would warrant an increase or decrease in the assessed starting point. The Authority was assisted by the material filed and the parties' analysis of such which, is reflected in the appropriate application of the daily tariff.

### **Outcome**

[9] Corrections is ordered to pay Mr Farrell and CANZ \$22,000 as a contribution to costs incurred.

Marija Urlich  
Member of the Employment Relations Authority