

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 577
3204839

BETWEEN CALEB DAVIES
Applicant

AND KELVIN NEWPORT &
LORRAINE NEWPORT
Respondents

Member of Authority: Shane Kinley

Representatives: Philip Ross, counsel for the Applicant
Lorraine Newport for the Respondents

Investigation Meeting: On the papers

Submissions received: 9 August 2024 from the Applicant
17 August 2024 from the Respondents

Determination: 1 October 2024

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] On 12 July 2024 I issued a determination which found Caleb Davies was due unpaid annual holiday pay, unpaid time and a half pay for worked public holidays and unpaid alternatives holidays from Kelvin Newport and Lorraine Newport (the Newports).¹ I declined to impose a penalty for the Newports failure to provide Mr Davies with an employment agreement.²

[2] I ordered the Newports pay Mr Davies a combined amount of \$15,644.26 gross.³

¹ *Davies v Newport and Newport* [2024] NZERA 423 at [38] to [42].

² *Ibid* at [48].

³ *Ibid* at [49].

[3] Costs were reserved and the parties were encouraged to resolve this matter between themselves.⁴

[4] Unfortunately the parties have been unable to reach agreement and Mr Ross has filed submissions on behalf of Mr Davies in support of a contribution to costs.

[5] The discretion to award costs, whilst broad, is to be exercised in a principled way. The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*.⁵

[6] The primary principle is that costs ‘follow the event’. The Authority has power to award any party to pay to any other party such costs and expenses as the Authority thinks reasonable.⁶ Costs are awarded in the Authority generally starting from the daily tariff, currently \$4,500 for the first day and \$3,500 for each subsequent day, with upward and downward adjustments made if appropriate to the circumstances of the case.⁷

[7] The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it. Costs awards are generally modest and are not to be used as a punishment or expression of disapproval of the unsuccessful party’s conduct.

[8] In this case the investigation meeting took one full day, with written submissions and further information provided on behalf of Mr Davies.

The parties’ submissions

[9] Submissions for Mr Davies said he was substantially successful in his application to the Authority. No reasons were said to exist to depart from the daily tariff, with a claim the Authority should therefore award costs of \$4,500 in Mr Davies’ favour.

[10] The response from Mrs Newport both challenged the Authority’s findings and raised issues of ability to pay, due to the Newports’ circumstances as pensioners, and proposed they only be required to pay a maximum of \$1,000.

⁴ Ibid at [50].

⁵ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁶ Employment Relations Act 2000, schedule 2, clause 15.

⁷ For further information about the factors considered in assessing costs, see: <https://www.era.govt.nz/determinations/awarding-costs-remedies/>

Analysis

[11] Mr Davies was the successful party in this case and costs usually follow the event. I consider a reasonable starting point for costs is \$4,500, being the daily tariff for one day.

[12] 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.

[13] The Newports have raised ability to pay as a reason for me to make a modest award of costs only, although the only evidence provided was the statements they are retired and living on a pension. No supporting financial information was provided such as recent bank statements.

[14] I accept it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However, I also note the observation of the Court:⁸

... the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account. ...

[15] I accept the Newports may struggle to pay costs awarded given evidence at the investigation meeting, which was consistent with Mrs Newports' response referring to their position as pensioners. Similar circumstances have been taken into account by the Authority in at least one other case.⁹

[16] I do not consider, however, in the absence of specific information about the Newports' financial circumstances, it would be appropriate for me in the exercise of my discretion to make the limited award proposed.

[17] I consider in the exercise of my discretion a fair award would be achieved by reducing the starting point for costs by one third to \$3,000.

[18] Given the Newports' asserted financial position, they may wish to explore instalment payment options with Mr Davies. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

⁸ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [22].

⁹ *WTW v John Road Investments Limited and Blair* [2022] NZERA 601 at [9] and [20].

Order

[19] I order Kelvin Newport and Lorraine Newport pay Caleb Davies within 28 days of the date of this determination \$3,000 as a contribution towards his costs.

Shane Kinley
Member of the Employment Relations Authority