

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 656
3241021

BETWEEN FERETI FUIMAONO
 Applicant

AND RITCHIES MURPHY
 TRANSPORT SOLUTIONS
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Epenesa Sooula, counsel for the Applicant
 Anthony Drake and Rosie Judd, counsel for the
 Respondent

Submissions: From the Respondent on 30 September 2024 and from
 the Applicant on 4 November 2024

Determination: 5 November 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination issued on 20 September 2024 the Authority found Ritchies Murphy Transport Solutions Limited (the company) acted justifiably in dismissing Fereti Fuimaono for serious misconduct. Mr Fuimaono's personal grievance application was declined.¹

[2] The parties were encouraged to agree any issue of costs between themselves. They were not able to do so. The company lodged and served a memorandum seeking an order for costs of \$10,000. This comprised the Authority's usual tariff for a two-day investigation meeting and an uplift of a further \$2,000. The company sought this because Mr Fuimaono had declined a settlement offer that would have left him better off than the eventual outcome of the Authority investigation.

¹ *Fuimaono v Ritchies Murphy Transport Solutions Limited* [2024] NZERA 563.

[3] Mr Fuimaono did not initially lodge a reply memorandum on costs. Instead counsel for Mr Fuimaono advised the Authority that a challenge to the determination had been filed in the Employment Court along with an application for stay of proceedings on costs in the Authority. Inquiry to the court and to the parties' representatives established a challenge had been filed in the court, but no stay application.

[4] In subsequent correspondence to the representatives the Authority advised that it usually completed the setting of costs for the Authority proceedings, even though a challenge to the substantive determination had been filed. This correspondence referred to the court's practice guidelines which set out details of how a challenge to a costs determination may also then be added to the substantive application.

[5] Counsel for Mr Fuimaono sought and was granted an extension of time to reply to the company's costs application.

[6] Mr Fuimaono sought an order for costs to lie where they fell. He submitted he had pursued the matter in the Authority with a genuine belief that he had not acted wrongly or intended any harm in the events that led to his dismissal for serious misconduct. He also submitted that he was not obliged to consider the company's settlement offer when, in his view, he was seeking justice. He also referred to ongoing poor health, due to serious heart problems, and limited income as an Uber driver.

Factors

[7] In determining costs the Authority applies well-established tenets to the particular circumstances of the case.² Those tenets recognise that a successful party should receive a contribution to its reasonably incurred costs and expenses; costs should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional 'daily rate' as a starting point to assess costs.

[8] Undue rigidity in applying the daily rates is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may take account of settlement offers made by either party, the financial means of a liable party to pay costs,

² Employment Relations Act 2000, Schedule 2 clause 15(1) and www.era.govt.nz/determinations/awarding-costs-remedies.

the preparation required in particularly complex matters and whether conduct of any party unnecessarily increased the costs they incurred.

Assessment

[9] In this case the company was entitled to an assessment of costs as the successful party.

[10] The investigation meeting spread over three days but the time actually spent in the meeting totalled around two days' time. This gave a starting point of \$8,000 for assessing costs. This comprised the Authority's usual daily tariff of \$4,500 for the first day and \$3,500 for a subsequent day.

[11] Two factors in this case required particular consideration as to whether that starting point should be adjusted upwards or downwards: firstly, Mr Fuimaono not accepting the company's settlement offer and, secondly Mr Fuimaono's health and financial circumstances.

Uplift for declining settlement offer

[12] The company submitted Mr Fuimaono should pay a further \$2,000 in costs for not accepting its offer made on 5 June 2024.

[13] At the time the company made that offer the Authority was due to resume its investigation meeting. The meeting had begun on 1 February and then adjourned. A further two days was scheduled for 20 and 21 June.

[14] The company's settlement proposal was made 'without prejudice save as to costs' through Mr Fuimaono's counsel. It was stated to be open for acceptance until 14 June, which was adequate time to consider it.

[15] The proposal said both parties would benefit from not having to prepare for and attend the next two days of the investigation meeting.

[16] It referred to clear video evidence of the events said to involve serious misconduct by Mr Fuimaono while driving a bus in his job with the company. This included failing to stop and ascertain whether a person had been injured after falling under the bus he was driving; failing to render assistance to the person; and then failing to disclose those details when he made an incident report at the depot.

[17] While Mr Fuimaono held a strong view that he was unfairly treated in how the company dealt with its concerns over those events, an objective assessment was required of the situation at the time he was given the opportunity to accept the company's 'walk away' settlement proposal and had been put on notice of the potential costs consequences of not doing so.

[18] During the Authority investigation meeting on 1 February Mr Fuimaono was shown the audio-visual recordings from the bus cameras. He had answered questions put to him about the compelling evidence of what could be seen and heard on those recordings of what he had done during the events depicted.

[19] Objectively assessed, and at a time during which he was professionally advised, Mr Fuimaono could not realistically have expected to succeed in his argument that the company acted unreasonably in concluding that his actions had been serious misconduct.

[20] In that light, his failure to accept the settlement offer had to be given significant weight in assessing costs. The uplift of \$2,000 sought by the company was an appropriate and relatively modest amount for that purpose.

Health and financial circumstances

[21] After his dismissal Mr Fuimaono had worked as a truck driver, on a casual basis, and as an Uber driver. His submissions said his earnings now were from Uber driving only. His earning capacity was affected by health problems, including a recent hospital admission for aortic repair. There was no information indicating he would not be returning to work at some stage when sufficiently recovered.

[22] While Mr Fuimaono may have a limited financial capacity to immediately pay an order for costs, this does not exempt him incurring an obligation he was notified he would likely face in turning down the settlement offer. There was no information about any assets or ability he might have to call upon family, friends or a financial institution to meet the costs order.

[23] Such an order is not intended to punish a party for pursuing their case, even when highly unlikely to succeed. The order made in this case, rather, reflects the

standard award with a modest uplift required where a reasonable settlement offer, made with adequate time given to consider it, was declined.

Order

[24] Mr Fuimaono must pay costs of \$10,000 to Ritchies Murphy Transport Solutions Limited within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority