

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 664
3211960

BETWEEN THINZIYELO THEBE
Applicant

AND HEALTH NEW ZEALAND
TE WHATU ORA
Respondent

Member of Authority: Alex Leulu

Representatives: Liz Lambert and Erika Whittome, advocates for the
Applicant
Jack Rainbow, counsel for the Respondent

Submissions: 13 September 2024 from the Applicant
23 and 27 August 2024 from the Respondent

Determination: 8 November 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] On 30 July 2024 the Authority dismissed Thinziyelo Thebe's grievance claims against Health New Zealand - Te Whatu Ora (HNZ) for unjustified disadvantage and unjustified dismissal.¹

[2] As part of its determination, the Authority reserved its decision on costs. A timetable was also set for memoranda to be filed if the parties were unable to resolve the issue of costs themselves.

[3] On 26 August 2024 HNZ filed and served a memorandum asking the Authority to make a further determination for an award of costs against Mr Thebe. Mr Thebe filed and served his costs memorandum in response to HNZ on 13 September 2024

¹ *Thebe v Health New Zealand - Te Whatu Ora* [2024] NZERA 464.

Costs principles

[4] Clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) gives the Authority discretion to order any party to a matter to pay to another party such costs and expenses as the Authority thinks reasonable.

[5] The unsuccessful party will usually have to contribute to the costs of the successful party, as well as meeting their own costs. A daily tariff applied by the Authority sets a starting point from which relevant factors and principles may guide an upward or downward adjustment of the amount of costs awarded.² The current tariff for costs is \$4,500 for the first day of any matter and \$3,500 for any proceeding days.

[6] Relevant principles governing costs in the Authority include consideration of whether the conduct of the parties increased costs unnecessarily, warranting an adjustment up or down, without compromising the Authority's otherwise modest approach to costs.³

[7] Costs should not be used to punish a party or express disapproval of an unsuccessful party's conduct.

Should costs be awarded?

[8] As referred to in the Authority's determination, the Authority's investigation was initially to be dealt with on the papers. However after evidence and submissions were made from both parties, Mr Thebe then asked for the matter to proceed to an investigation meeting. Mr Thebe's request was granted and an investigation meeting for this matter proceeded for a day before further written closing submissions were made by both parties.

[9] In accordance with the daily tariff, HNZ said a starting point for assessing costs should be \$4,500. HNZ sought the uplift from the starting point because it said Mr Thebe's conduct throughout the Authority's investigation had unnecessarily increased its legal costs.

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

³ See www.era.govt.nz/determinations/awarding-costs-remedies.

[10] HNZ referred to several allegations against Mr Thebe and his representatives conduct throughout the Authority's investigation including allegations against Mr Thebe of:

- (a) Continuously changing his position in both how he wanted the authority to investigate his complaint and changing the nature of his substantive claims. This included Mr Thebe withdrawing his initial claim for interim reinstatement.
- (b) Continuously missing timetable deadlines for lodging submissions, evidence, and affidavits.
- (c) Failing to properly engage a prospective witness within a reasonable timeframe which resulted in a further adjournment of the investigation meeting.
- (d) Refusing to engage with HNZ in an attempt to resolve costs between the parties leading to HNZ incurring fees to prepare and file its memorandum on costs.

[11] As a result of these allegations, HNZ sought an uplift from the starting point seeking a total award of costs of \$10,000. In support of its costs application, HNZ provided invoices of its legal costs which show it had incurred actual legal costs significantly in excess of its claimed amount.

[12] Mr Thebe opposed HNZ's application and has asked the authority not to award any costs to HNZ. Although Mr Thebe acknowledged the changes and the delays relating to his claims, he said these hindrances were unavoidable and were due to his representative being unwell.

[13] Mr Thebe also acknowledged the changes to his claims including the withdrawal of his application for interim reinstatement. His representative said his decision to no longer pursue interim reinstatement was due to Mr Thebe eventually gaining alternative employment. As a result, it said it would have been dishonest to continue to pursue his claim for interim reinstatement.

[14] Mr Thebe also said it had engaged with HNZ on resolving the issue of costs. He referred to an offer by HNZ's to settle the issue of costs and said by receiving the offer and letting it lapse, he had in effect 'engaged' with HNZ on the issue of costs.

Outcome

[15] HNZ was the successful party and costs should follow the event. It is entitled to a contribution to its costs. There are no compelling reasons to start the assessment of costs outside the notional daily tariff. In applying the tariff for a one-day investigation meeting, the starting point is \$4,500.

[16] It is a well-established principle that costs are not intended to punish or express disapproval at an unsuccessful party's conduct. However, where an unsuccessful party has acted unreasonably, thereby also unnecessarily increasing costs, an uplift can be considered.

[17] The changes to Mr Thebe's claims and various changes to how he wanted his claims to be investigated contributed to unnecessary delays to the Authority's investigation. This was compounded further by various failures by Mr Thebe to meet timetabled deadlines for lodging documents with the Authority (and service documents on HNZ). Although health issues associated with Mr Thebe's representative are acknowledged, they did not account for all the delays to the Authority's investigation. I accept these delays led to an unnecessary increase in costs for HNZ. For these reasons, an uplift to the tariff of \$1000 is warranted in this case.

[18] Accordingly, Ms Thebe is ordered to pay \$5,500 in costs to HNZ within 28 days of the date of this determination.

Alex Leulu
Member of the Employment Relations Authority