

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 7
3189739

BETWEEN	PETER HYNES Applicant
AND	ONE PURE INTERNATIONAL GROUP LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Chris Eggleston, counsel for the Applicant Rob Towner, counsel for the Respondent
Submissions received:	8 November 2023 from Applicant 22 November 2023 from Respondent
Determination:	10 January 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] On 16 October 2023, the Authority issued a determination in this matter upholding the applicant’s claim of unjustifiable dismissal, and awarding him amounts for lost remuneration and compensation for humiliation, loss of dignity, and injury to feelings¹.

[2] In that determination, the parties were encouraged to resolve any issue of costs between them, and the Authority made reference to its usual practice of applying the daily tariff to determine costs.

[3] The parties have not been able to resolve costs between themselves, and have filed memoranda accordingly.

¹ 2003 NZERA 599

Applicant's Submissions

[4] It is submitted on behalf of the applicant that there was a three day investigation meeting, which using the normal daily tariff would lead to a starting point of \$11,500. However, the applicant seeks a significant further uplift being a doubling of the daily tariff to \$23,000, on account of the four following factors:

- a. The applicant made a Calderbank offer on 9 June 2022, meaning that if accepted, the respondent would have achieved a better outcome and all subsequent costs associated with the investigation meeting would have been avoided;
- b. There were two sets of proceedings, the second being the respondent's counterclaim, which put the applicant at significant risk and required significant preparation, but was then withdrawn after the investigation meeting leading to wasted time and expense;
- c. There was a need for several interlocutory applications including an application for discovery by the applicant;
- d. Despite this, the respondent provided documents late, and "drip fed" documents, including documents relevant to the respondent's own counterclaim which were only disclosed in the days leading up to the investigation meeting.

[5] Overall, the applicant says that he was put to significant additional legal costs by virtue not just of the respondent's counter-claim which was described as the making of allegations which should never have been made,² but also because of the respondent's failure to disclose relevant documents in a timely way, and its decision to disclose them in instalments. On this basis, the applicant suggests in the alternative that costs on an indemnity basis could be considered.

² At paragraph 2.17 of the applicant's costs submissions.

[6] In addition, the applicant seeks a total of \$3,842.19 in disbursements, including the filing fee, airfares for counsel and two witnesses, accommodation for counsel, and a significant amount for the preparation of a bundle of documents.

Respondent's Submissions

[7] It is submitted for the respondent that costs should be based on the usual daily tariff, with the respondent responsibly accepting that there should be a small uplift from this on the basis of the "without prejudice" settlement offer made.

[8] The respondent rejects the suggestion that the costs award should be increased because of the counterclaim and states that if there had not been a counterclaim, the investigation meeting would have been shorter, thus reducing the applicable daily tariff. The respondent says it was entitled to bring a counterclaim, and should not be penalised for doing so.

[9] In respect of document disclosure, the respondent says it is not unusual for documents to be periodically disclosed, and what was important is that relevant documents were disclosed.

[10] The respondent rejects that indemnity costs are appropriate, and also rejects that the full disbursement costs claimed for out of town counsel are appropriate.

Analysis

[11] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days³.

[12] The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it.

[13] The investigation meeting in this matter was for three days, and was held in person. This means that the starting point for a contribution to costs with reference to the daily tariff is \$11,500.

³ For further information about the factors considered in assessing costs, see: <https://www.era.govt.nz/determinations/awarding-costs-remedies/>

[14] I do not consider it appropriate to award indemnity costs in this matter. This was not a case that was so exceptional or out of the ordinary that conduct which contributed to prolonging matters and increasing costs cannot properly be dealt with by way of a proportional uplift to the daily tariff.

[15] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*⁴ as confirmed in *Fagotti v Acme and Co Limited*⁵. The principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment or expression of disapproval of the unsuccessful parties conduct.

[16] The principles relevant to this matter in particular are that a costs award is to be a contribution to costs reasonably incurred, and is to be modest. Accordingly, the daily tariff at the rate of \$11,500 is the appropriate starting point, and I will now consider if an uplift to this is appropriate.

[17] My view is that it is appropriate to order an uplift to the daily tariff for some of the matters raised by the applicant. First, I accept that the respondent's raising of a counter-claim with potentially serious implications for the applicant if successful added to the legal costs incurred by the applicant in preparing to defend himself at the investigation meeting. In the end, there was no evidence to support the respondent's counterclaim, and the respondent withdrew its claim after hearing. In addition, failure to disclose relevant documents in a timely way added to the applicant's legal costs.

[18] My view is that it is appropriate to award the equivalent of a day's tariff, eg a further \$4,500, as a contribution to the additional costs that the applicant was put to in preparing for and defending his position at hearing, which was ultimately wasted effort. This is a fair contribution, using the first day's tariff as a guide, to the applicant's additional preparation costs.

[19] This amounts to a total of \$16,000.00. Orders are made accordingly.

⁴ [2005] 1 ERNZ 808.

⁵ [2015] NZEmpC 135 at 114.

Disbursements

[20] The applicant is seeking the following disbursements:

- a. Filing fee of \$71.56;
- b. Airfares for counsel of \$220.60;
- c. Airfares for witness Mr Verry of \$653.60;
- d. Airfares for witness Mr Bolmatis of \$617.60;
- e. Accommodation for counsel for 3 nights of \$569.56;
- f. Bundle of documents of \$1,442.61;
- g. Hearing fee (if required).

[21] The applicant has supported his claim for disbursements by way of invoices.

[22] As the applicant was successful in his claim, he is entitled to the reimbursement of the filing fee. As I understand that no hearing fee applies, I make no orders in respect of this.

[23] I conclude that it is not appropriate to order reimbursement for the airfares of the two witnesses called by the applicant, that is, Mr Verry and Mr Bolmatis.

[24] I decline to order reimbursement of airfares or accommodation for counsel, as the choice of out-of-town counsel was with the applicant.

[25] I also decline to order reimbursement of the costs of the document bundle, as preparing documents is an expected part of any proceedings.

Orders

[26] For the reasons set out above, I order One Pure International Group Limited to pay to Peter Hynes within 28 days of the date of this determination:

- a. The sum of \$16,000.00 as a contribution to legal costs; and
- b. The filing fee being \$71.56.

Claire English
Member of the Employment Relations Authority