

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2024] NZERA 73  
3210879

BETWEEN                      UELE LINO  
   Applicant

AND                              RESTAURANT BRANDS  
   LIMITED  
   Respondent

Member of Authority:            Eleanor Robinson

Representatives:                Kalesita Lino, representing the Applicant  
   Laura Briffett, counsel for the Respondent

Costs Submissions                7 February 2024 from the Applicant  
   24 January 2024 from the Respondent

Determination:                    9 February 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In a determination dated 10 January 2024 ([2024] NZERA 6), the Authority found that the Applicant, Mr Uele Lino, had not been unjustifiably disadvantaged in his employment with the Respondent, Restaurant Brands Limited (RBL).

[2]     In the determination, I indicated that this might be a case in which costs should lie where they fell, or that submissions should be made if costs were sought.

[3]     Ms Briffett, on behalf of RBL, submits that it is not an appropriate case for letting costs lie where they fall on the basis that Mr Lino was either self-representing or was represented by a family member, and thus incurred no costs.

[4]     RBL also submits that it has attempted to settle the issue of costs with Mr Lino, but agreement was not reached.

[5]     RBL is seeking costs at the rate of the notional daily tariff in the Authority despite its actual costs having significantly exceeded the daily tariff amount.

[6] Accordingly RBL is seeking a contribution to costs in the amount of \$7,125.00 in respect of a day and three quarters of an investigation meeting.

[7] Ms Kalesita Lino, on behalf of Mr Lino submits that he is unable to pay any costs award on the basis that he is a full-time university student and it will cause him extreme financial hardship and stress.

[8] Ms Lino submits that the second day was required only because one of the Respondent witnesses was unwell on the first day so that his evidence was taken on the second day which lengthened the investigation.

#### *The Calderbank Offer*

[9] RBL submits that it made a Calderbank<sup>1</sup> offer, that is a “without prejudice save as to costs” offer to settle that matter to Mr Lino on 23 November 2023. The Offer was not accepted by Mr Lino.

[10] A Calderbank offer can be taken into consideration by the Authority as providing a consideration for an uplift in the daily tariff. However in this case, RBL is not seeking to rely upon it.

#### *Principles*

[11] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

##### **15 Power to award costs**

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[12] Costs are at the discretion of the Authority<sup>2</sup>. 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)*<sup>3</sup>.

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

<sup>2</sup> *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

<sup>3</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

[13] The principles include that costs normally follow the event, and they are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

### **Costs Award**

[14] RBL was the successful party in determination [2024] NZERA 6.

[15] This was a one and three quarter days investigation so the starting point for costs is \$7,125.00 which is the sum RBL is seeking as a contribution to costs.

[16] It is submitted that a costs award against Mr Lino will be adverse considering his limited economic means. I accept that it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings.

[17] However I also note the observation of Chief Judge Inglis that:

... 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.<sup>4</sup>

[18] RBL was the successful party and is entitled to an award of costs. In considering if this is a case in which it is appropriate for the Authority to use its discretion by making an award below the level indicated by RBL as appropriate despite the actual costs it occurred in defending this matter, I recognise the merits of the submission regarding Mr Lino's ability to pay.

[19] I also recognise however that RBL, which made an unsuccessful attempt to settle the matter in advance of the Investigation Meeting, incurred significant costs in respect of the time and resources taken by it in defending the disadvantage claim brought by Mr Lino.

[20] I also note that whilst the Respondent witness was unwell and excused from giving his evidence until the second day of the hearing, this did not extend the length of the investigation since all the witness evidence was heard in a timely manner. The length of the investigation meeting was correctly stated by the Respondent as one and three quarters of a day.

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<sup>4</sup> *Tomo v Chekmate Precision Cutting Tools Ltd* [2015] EmpC 2 at [22]

[21] In balancing all of these considerations I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take slightly in excess of a 1 day hearing time as the appropriate measure for costs.

[22] Accordingly Mr Lino is ordered to pay RBL the sum of \$5,000.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

[23] It may be that RBL is willing for Mr Lino to make payment by instalments. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

[24] RBL is not seeking costs in respect of its costs application.

[25] **I order Mr Lino to pay to RBL the sum of \$5,000.00 as a contribution to its actual costs pursuant to clause 15 of Schedule 2 of the Act.**

Eleanor Robinson  
Member of the Employment Relations Authority