

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 220
3176667

BETWEEN GARY OWEN BURGESS
 Applicant

AND TUTTON SIENKO AND HILL
 PARTNERSHIP
 Respondent

Member of Authority: Philip Cheyne

Representatives: Gary Owen Burgess, the Applicant
 Amy Keir, counsel for the Respondent

Submissions and
Information Received: 23 January 2025 and 21 March 2025 from the Applicant
 6 December 2024 and 8 March 2025 from the
 Respondent

Date of Determination: 17 April 2025

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In an earlier determination, I dismissed claims by Mr Burgess and reserved costs, with a timetable for each party to lodge and serve submissions.¹

[2] The respondent lodged and served its costs application out of time, together with an application to extend time. Mr Burgess opposed the application to extend time and the application for costs if time was extended. For reasons set out in directions to the parties, the respondent was granted an opportunity to provide supporting information, which it did on 8 March 2025. Mr Burgess then had an opportunity to respond.

¹ *Burgess v Tutton Sienko and Hill Partnership* [2024] NZERA 641.

[3] This determination resolves the leave and costs issues.

Leave to apply out of time is appropriate

[4] The substantive determination was issued on 29 October 2024. The Partnership was given until 26 November 2024 to lodge and serve a memorandum in support of a claim for costs. Mr Burgess was given a further 14 days to lodge and serve a reply.

[5] The Partnership lodged its memorandum seeking leave and costs on 6 December 2024, 10 days late.

[6] Mr Burgess in response on 12 December 2024 proposed that the Authority should defer determining both applications (leave and costs), pending the outcome of his challenge in the Employment Court to the Authority's determination.

[7] On my instruction, Mr Burgess was advised on 16 December 2024 that the Authority's standard practice is to determine costs (if reserved), even if there is a challenge. He then requested and was granted additional time to lodge a memorandum in response to the applications.

[8] Counsel had submitted that the Partnership's delay in lodging its memorandum arose from communication delays between them, given the death of one of the partners on 1 October 2024 and the serious illness affecting a second partner. Mr Burgess drew attention to the absence of evidence on these two points. There is now evidence that Mr Hill died on 1 October 2024 and about the effects of Ms Tutton's serious illness. Mr Hill and Ms Tutton were responsible for the day-to-day operation of the business.

[9] The delay is not minor, but there is now evidence in support of the reasons outlined by counsel.

[10] Mr Burgess appears to have anticipated that evidence of what he described as "incapacity" might be available. He had also submitted that the remaining two partners could have acted, but nonetheless let the opportunity to apply for costs expire.

[11] It is apparent from the affidavit now provided that they both live in London, the Partnership interest of one of them was transferred to the other and that the remaining partner's main responsibility in the business has been distribution and marketing

internationally. It is a reasonable and obvious inference that their proper attention to business responsibilities not normally within their portfolio was affected by the serious illness and death of family members.

[12] Mr Burgess observes that counsel could have alerted the Authority and himself, prior to the date set for an application. However, the observation is a minor factor and does not make the 10-day delay more significant. Mr Burgess' challenge meant that the determination did not bring finality to the substantive problem. He says that the present applications are "redolent of retaliatory tactics, if not a manoeuvre ... to block [his] access to the Employment Court". But there is no evidence to support that. The timing pointed to by Mr Burgess resulted from the respective deadlines. His submission about "tactics" is speculative and unpersuasive.

[13] Mr Burgess pointed out that the Partnership's website continued to operate, that someone was running the Partnership during that time but there was no explanation offered about why that person had not issued instructions to apply for costs. No doubt, the business continued to trade through its website and that likely included some human attention. But it does not follow that the person "was running the Partnership during this time", in the sense of having responsibility for the management of the business.

[14] Mr Burgess referred me to a number of judgments and the New Zealand Bill of Rights Act 1990. It is not necessary to set out the judgments or that provision. The point for present purposes is that the Authority's power to extend time should be exercised in accordance with principle, not arbitrarily, and be based on evidence.

[15] The Partnership has provided evidence in support of the application for leave. It reasonably explains the delay.

[16] Mr Burgess did not point to any specific prejudice or hardship he has suffered by the Partnership's delay.

[17] Mr Burgess made additional submissions against leave, when given the opportunity to reply to the Partnership's evidence. They were critical of counsel and characterised Ms Tutton's affidavit as "scandalous". It is not necessary to set out or comment on the submissions, other than to say they lack merit.

[18] It is appropriate to grant leave.

The Partnership is entitled to costs

[19] Mr Burgess submits that he succeeded in the more important of his two main objectives. He refers me to the finding at [162] of the determination that the Partnership did not comply with the requirements of Part 6AA of the Employment Relations Act 2000.² He says that a privative clause was invoked to preclude any remedy. Mr Burgess also refers to incomplete wage and time records and the withholding of time records and his personal information. He characterises the Partnership's statement in reply as "dishonest pleadings", which caused wasted time. These points lead him to submit that both parties had a degree of success.

[20] On an objective and reasonable assessment, the Partnership was completely successful in defending itself against the large number of claims made by Mr Burgess, some of which were out of time. Part 6AA of the Employment Relations Act 2000 might have been a minor part of resolving the return-to-work problem Mr Burgess faced at the time.³ I assumed without making a finding that there was a breach of Privacy Act obligations.⁴ Mr Burgess was not denied a remedy by a privative provision. He sought a statutory remedy that was not available under the statute. Whether the Partnership's time and wage record were properly kept or released to Mr Burgess was not material to the issues for the Authority. Any finding or assumption of breach of statutory duty could not be regarded as a measure of success, given the substantive problems raised by Mr Burgess.

[21] I note that Mr Burgess in his 21 March 2025 submissions sought costs in his favour jointly against the Partnership and counsel. There is no information to establish that Mr Burgess incurred legal costs. In any event, the submission is unmeritorious, on any reasonable view.

[22] The ordinary principle is that the successful party is entitled to costs. The Partnership was successful and is entitled to costs.

² *Burgess v Tutton Sienko and Hill Partnership* [2024] NZERA 641.

³ At [161].

⁴ At [171].

[23] There was also a preliminary determination in which I declined an application by Mr Burgess to remove part of the matter to the Employment Court.⁵ The Partnership had opposed the removal application. Costs were reserved.

[24] As the successful party, the Partnership is entitled to costs on the preliminary matter too.

The Partnership is entitled to an uplift from the tariff

[25] The application for costs referred to invoices as attached, but they were not. Counsel remedied the oversight when it was drawn to her attention. Mr Burgess says that time and costs records, not just invoices, must be supplied. However, the narrations in counsel's invoices satisfy me that the work was necessary for the conduct of the Partnership's defence to the claims against it.

[26] Regarding the preliminary matter, a day previously set for the substantive investigation was reassigned to consider the removal application. Counsel appeared but Mr Burgess did not, having mistaken the date. I then decided to consider the application on the papers. Mr Burgess lodged submissions. I did not require more from the Partnership.

[27] For the preliminary matter, counsel was involved in a case management conference, considered and formally opposed the removal application, prepared for and attended (briefly) the Investigation Meeting and reviewed but was not required to respond to submissions. An invoice dated 30 August 2023 includes these steps. Costs cannot be assessed by reference to the daily tariff, but nonetheless the Partnership is entitled to a modest contribution. I fix that amount at \$1,000.00.

[28] The substantive Investigation Meeting was spread across three days, the first two of which each occupied a little less than the full day. The third day occupied approximately two hours. Counsel has treated it as one full day and two half days, to reach the same total. Assessed on a daily tariff basis, costs would be \$8,000.00 for that meeting. Adding that to the contribution just mentioned brings the total to \$9,000.00.

⁵ *Burgess v Tutton Sienko and Hill Partnership* [2023] NZERA 552.

[29] Counsel also refers to other aspects of how Mr Burgess conducted the matter as having caused increased costs. Mr Burgess took a litigious approach overall but did not always comply with directions. However, it would be difficult to accurately assess the quantum of increased costs. I take this matter no further.

[30] An uplift is sought, based on a Calderbank offer made to Mr Burgess on 13 September 2022. The application for costs referred to the Calderbank offer as attached, but it was not. A copy of the email to Mr Burgess with the Calderbank offer was provided later with the invoices. It meets the requirements to be considered as a Calderbank offer.

[31] Before the Calderbank offer was copied to the Authority, Mr Burgess described it as “the alleged and mythical Calderbank offer”. He went on to say a Calderbank offer “has been claimed”, but was not attached and must be ignored. He denied ever receiving a Calderbank offer to settle matters between the parties in the “Employment jurisdiction” (my emphasis).

[32] Mr Burgess had an opportunity to reply after the Calderbank offer was copied to the Authority. Mr Burgess did not repeat the earlier description and denial. Instead, he said it must be disregarded as it required a settlement in all jurisdictions (my emphasis).

[33] It should not be disregarded. It offered settlement of all claims and issues “arising out of the employment relationship and/or its termination”. It is a reasonably standard form of words used for Calderbank offers to settle claims between those who had been in an employment relationship.

[34] The offer was made at a very early stage, after the statement in reply but before the first case management conference. It is appropriate to take account of it not being accepted by Mr Burgess as part of assessing costs to be awarded. It has long been understood that the Authority may consider Calderbank offers when setting costs.⁶

[35] Having regard to the principle that costs in the Authority should be modest, I assess an uplift of 50% as appropriate to recognise the Calderbank offer.

⁶ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

Conclusion

[36] The Partnership is entitled to costs as the successful party. Costs assessed in accordance with the daily tariff and adjusted to cover the preliminary matter should be increased by 50% to recognise the Calderbank offer.

[37] Gary Owen Burgess is to pay the Tutton, Sienko and Hill Partnership costs of \$13,450.00 by 15 May 2025.

Philip Cheyne
Member of the Employment Relations Authority