

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 347
3259739

BETWEEN NOY PAULL
Applicant

AND WAIKANAE HOLDINGS
(GISBORNE) LIMITED
Respondent

Member of Authority: Natasha Szeto

Representatives: Ali Bendall, counsel for the Applicant
David McLeod, advocate for the Respondent

Submissions received: 18 March 2025 from the Applicant and
24 March 2025 from the Respondent

Date: 17 June 2025

COSTS DETERMINATION OF THE AUTHORITY

[1] On 19 February 2025, I issued a determination¹ in which I found that Noy Paull was unjustifiably dismissed from his employment with Waikanae Holdings (Gisborne) Limited (WHL).

[2] Costs were reserved. The parties were referred to the Authority's usual practice of applying the daily tariff to determine costs and encouraged to resolve any issue of costs between them. They have been unable to do so, and this determination accordingly resolves the issue of costs.

¹ *Noy Paull v Waikanae Holdings (Gisborne) Limited* [2025] NZERA 94.

Parties' submissions

[3] Mr Paull asks for his actual and reasonable costs of \$18,392.70 (\$15,993.66 plus GST) to be ordered, plus disbursements of \$250.95. He says that the Authority's tariff does not fairly or reasonably reflect the level of costs associated with or required for hearing his matter. Mr Paull says an uplift is justified because WHL's conduct increased his costs.

[4] In particular Mr Paull says:

- (a) He incurred costs to file and serve a statement of problem on WHL because it would not receive or respond to his personal grievance;
- (b) He was required to incur costs relating to mediation;
- (c) The costs of preparation for the investigation meeting exceeded the time and appearances at the meeting itself;
- (d) WHL pursued lines of argument for strategic reasons which were not sustainable including that Mr Paull's witness should be named.

[5] WHL says the starting point for assessing costs is the tariff rate of \$8,000.00 for a two-day hearing. WHL says that none of the factors raised by Mr Paull justify an uplift to the tariff. It says the initial lack of response was due to the decision-maker being overseas, and the matter was progressed without delay on his return. WHL also says there is no justification to uplift the tariff on the basis of attempts to resolve the matter using mediation services, refining the claims, or raising an objection to non-publication which are anticipated aspects of litigation and covered by the tariff. WHL says it made a genuine *Calderbank* offer to Mr Paull on 18 April 2024 which was not responded to. WHL asks the Authority to consider any award of costs is distributed over a time payment basis given the significant financial pressure on the business.

Analysis

[6] The Authority has clear statutory power to order such costs and expenses to be paid as the Authority thinks reasonable.² Costs are awarded at the Authority's

² Schedule 2, clause 15 of the Employment Relations Act 2000.

discretion.³ The principle that costs follow the event is well-recognised by the Authority and courts.⁴

[7] The Authority has adopted a daily tariff approach as the starting point for considering costs, which is well known. The current daily tariff is \$4,500.00 for the first day of hearing.⁵ The parties can expect the Authority to adhere to the approach of applying the daily tariff, unless there is good reason to depart from it. In this case, the investigation meeting ran for two days, and I proceed on the basis that the appropriate starting point for considering costs is \$8,000.00.

[8] 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*⁶ as confirmed in *Fagotti v Acme and Co Limited*⁷.

[9] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. The financial situation of the party paying costs can be a relevant factor to take into account. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction. A robust approach is to be adopted in relation to *Calderbank* offers. The Employment Court has noted that such an approach is "consistent with the public interest in encouraging the acceptance of reasonable settlement offers and avoiding unnecessary litigation".⁸ There is no blanket rule about whether costs of attending mediation are properly claimable, because costs are inherently discretionary and each case needs to be decided on its facts.⁹

Analysis

[10] It is rare for indemnity costs to be justified in the Authority. Having reviewed the invoices provided by Mr Paull, I am not persuaded that the matters raised by him demonstrate conduct by WHL that unnecessarily increased his costs. In saying this, I note that although mediation was directed by the Authority, this was on the basis that

³ *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

⁴ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

⁵ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

⁶ [2005] 1 ERNZ 808.

⁷ [2015] NZEmpC 135 at 114.

⁸ *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4.

⁹ *RHB Chartered Accountants Limited v Rawcliffe* [2012] NZEmpC 31 at [27].

both parties consented to attending. I accept that WHL's objection to non-publication was a genuine issue and to the extent it may have extended the investigation meeting time, this is addressed by applying the tariff. In summary, the matters that Mr Paull points to as being unnecessary conduct, I find were entirely orthodox parts of the Authority's investigation process.

[11] I also find that the *Calderbank* offer was ineffective because the compensation WHL offered was significantly less than the amount the Authority ultimately awarded. Therefore the *Calderbank* does not provide any justification for reducing the starting point for a costs award in Mr Paull's favour.

[12] Based on the reasoning above, there are no factors in this matter that justify displacing the starting point for tariff costs of \$8,000.00. I consider an award of \$8,000.00 is both modest and appropriate.

[13] The claim for disbursements relates to printing and copying expenses, a witness fee and costs associated with filing in the Authority. It is reasonable for WHL to reimburse Mr Paull for these disbursements, totalling \$250.95.

[14] WHL asks that costs be paid in instalments. It has not provided any details about a proposed plan, or any information to support that ordering payment by instalments would be justified. I am therefore not satisfied on the basis of the information before the Authority that WHL's financial position requires the payment of costs by instalment.

Orders

[15] For the reasons set out above, I order Waikanae Holdings (Gisborne) Limited to pay Noy Paull within 28 days of the date of this determination:

- (a) The sum of \$8,000.00 as a contribution to his costs.
- (b) The sum of \$250.95 for disbursements.

Natasha Szeto
Member of the Employment Relations Authority