IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 588
3109492

	BETWEEN	JOHN MCDERMOTT Applicant
	AND	PENINSULA GROUP NZ LIMITED (FORMERLY EMPLOYSURE LIMITED) Respondent
Member of Authority:	Peter Fuiava	
Representatives:	Allan Halse, advocate for the Applicant Jessie Lapthorne and Megan Blackwood, counsel for the Respondent	
Submissions received:	29 April and 3 June 2025 from the Applicant 17 April and 23 June 2025 from the Respondent	
Determination:	23 September 2025	

SECOND DETERMINATION OF THE AUTHORITY

---

[1] This determination deals with two applications the first being an application for a stay of costs brought by John McDermott and the second, an application by Employsure Limited (Employsure) for costs. Employsure now trades as Peninsula Group NZ Limited but not at the time of Mr McDermott's employment. The costs application is made on the basis that Employsure successfully defended a number of claims brought against it by Mr McDermott of unjustified disadvantage, discrimination, breach of the employment agreement, and unjustified dismissal (the determination).[1]

[2] The parties oppose each other's applications. To save costs for them both, I have determined these matters 'on the papers' having regard to their representatives' written submissions lodged with the Authority.

---

[1] *John McDermott v Employsure Limited* [2025] NZERA 187.

[3] I deal first with the application for a stay of costs.

Whether to grant a stay from awarding costs?

[4] Mr McDermott's stay application is made on the basis that he has filed a *de novo* challenge of the determination with the Employment Court and that in the circumstances costs should not be determined until the outcome of that process is known.

[5] It is not uncommon for a challenge of a determination to be lodged with the Court before costs have been resolved in the Authority. In *Taia v Ake Innovation Limited* [2024] NZERA 561, the Authority held:

> [7] This is a situation where a challenge to the Authority's determination was lodged in the Employment Court before costs were resolved in the Authority. This is not unusual in this jurisdiction. Section 180 of the [Employment Relations] Act provides that electing to challenge an Authority determination does not act as a stay but the Authority (or the Court) can order a stay of proceedings.
>
> [8] Neither party is prejudiced by the Authority proceeding to determine costs while there is a challenge in the Employment Court. Once an Authority costs determination is issued, the party challenging the substantive determination can amend their statement of claim in the Court to include a challenge to the costs determination if they wish or either party can file a separate challenge to the determination.

[6] Additionally, this is not a situation where declining a stay would render Mr McDermott's challenge in the Employment Court ineffectual and where there is a challenge of a determination, the Authority's usual practice is to determine costs so that the Court has the costs determination before it.[2] There is no prejudice for Mr McDermott if costs are determined now particularly as doing so would be tidier in the sense that all matters in the Authority would then be concluded. I note that Mr McDermott's application for a stay of costs repeats much of what he has said in his statement of claim to the Employment Court. It would be improper of me to weigh in on those matters which can be dealt with sufficiently in that forum. This includes an assertion by Mr McDermott that the determination is invalid which the determination has addressed.[3]

---

[2] *Clark v Pals Investment (2023) Limited & anor* [2025] NZERA 538 at [12].
[3] *McDermott v Employsure*, n 1, at [4].

[7] For all the above reasons, the application for a stay of proceedings for costs is unsuccessful and is declined.

Costs determination

Costs submissions

[8] On 1 April 2025, the determination was issued to the parties. It dismissed Mr McDermott's claims and reserved the question of costs.

[9] On 28 April 2025, Mr McDermott lodged a *de novo* challenge of the determination in the Employment Court.

[10] On 17 April 2025, Employsure's counsel, Ms Lapthorne, filed her costs memorandum in which she seeks a $7,500 uplift from the notional tariff for a three-day investigation meeting from $11,500 to $19,000. Counsel relies on three rejected *Calderbank* letters that were made to Mr McDermott and his improper use of without prejudice communications that resulted in Employsure incurring further unnecessary costs in order to respond.

[11] In addition, because Mr McDermott failed to respond to counsel's written proposal concerning an agreement as to costs, on behalf of her client, Ms Lapthorne seeks additional costs for filing a memorandum on this issue.

[12] On 3 June 2025, Mr McDermott lodged submissions opposing costs. He reiterates that the determination is invalid which renders any entitlement to costs equally invalid. While I disagree, the matter is now before the Court who will determine the outcome of Mr McDermott's challenge in due course.

[13] Mr McDermott explains that the first two settlement offers that were made to him occurred 11 months apart (13 October 2021 and 13 September 2022) and were identical. The third offer (made 11 July 2023) was substantially higher moving from $29,500 to $77,000 and included $17,500 for three months' lost wages. It was submitted that this was a clear acknowledgment that his termination was unjustified. It was further submitted that the settlement offers were conditional on criteria that were important to Mr McDermott – confidentiality and non-disparagement – which do not

apply to determinations. As such his rejection of all three settlement offers was not unreasonable in the circumstances.

[14] As to the use of without prejudice communication, Mr McDermott submits that the number of memoranda filed by Employsure and the interactions with the Authority demonstrate that the issue was not "clear cut" and warranted careful consideration. Finally, it was submitted that a party is not entitled to claim for "costs on costs" which falls outside the notion of costs being considered on a daily tariff basis. For all these reasons, it was submitted that costs should lie where they fall.

Costs principles

[15] The Authority has the power under sch 2 cl 15 of the Act to award costs. However, the discretion to order a party to pay costs to another must be exercised on a principled basis. Those principles are well settled and are outlined in the Authority's Practice Note,[4] and Practice Direction,[5] both of which are publicly available online.

[16] Informing the Authority's approach to costs is the leading decision of *PBO v Da Cruz* in which the Employment Court established key principles for the Authority to consider when determining costs. For this determination, those key principles relevantly comprise:[6]

- There is a discretion as to whether costs are awarded and in what amount.
- The discretion is to be exercised in accordance with principle and not arbitrarily.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- That costs generally follow the event.
- That awards will be modest.
- That frequently costs are judged against a notional daily rate.
- That without prejudice offers can be taken into account.

---

[4] www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.
[5] www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf.
[6] *PBO Ltd (formerly Rush Security Ltd v Da Cruz* [2005] 1 ERNZ 808 at [44].

Costs analysis

[17] The starting point is that Employsure was the successful party in the determination and being the successful party, it is entitled to an award of costs from the other party.

[18] Consideration must then be given to the length of the investigation meeting that took place on 21-22 May and 2 August 2024. The first two days of the investigation meeting were full meeting days and in accord with the notional tariff, a starting point of $8,000 applies being $4,500 for the first day of an investigation meeting and $3,500 for the second day. However, unlike the first two days of the investigation meeting, the third day started at 9.30 am and concluded by 11.23 am. While this is slightly less than half a day of meeting time, I nevertheless adopt half of the notional tariff or $1,750 for the third and subsequent day. I therefore adopt $9,750 ($4,500+$3,500+$1,750) as my starting point for this investigation meeting.

[19] Ms Lapthorne has provided me with a schedule of costs totalling $123,988.78 (excluding GST) which Employsure has incurred from June 2020 to August 2024 in its defence of Mr McDermott's claims in the Authority. While Mr McDermott says that he did not accept the settlement offers that were made to him because he did not want to be bound by a confidentiality and non-disparagement clause, such clauses are common in settlement agreements and the ones made to Mr McDermott were made on a no admission of liability basis.

[20] Further, the settlement offers were made well before the investigation meeting took place. In particular, the third and final offer was made on 11 July 2023 and gave Mr McDermott 14 days to consider it. Had this been accepted, both he and Employsure, would have been considerably better off than they are today. Having rejected three reasonable settlement offers, with the third being particularly generous, I find that an uplift in costs is warranted.

[21] Conduct that unnecessarily increases costs for the other party is a sufficient reason for an upwards adjustment in costs. Here, despite a direction not to refer to without prejudice information, Mr McDermott did so in his written witness statement to the Authority which unnecessarily added to Employsure's legal costs as it was forced

to respond. Even so, costs in the Authority are modest and are not intended to be punitive.

[22] I agree with Mr McDermott that he should not be liable for the filing of costs memoranda which is a normal step in the Authority similar to the filing of written closing submissions.

[23] Weighing all of the above, and noting also that there have been previously preliminary matters in which both sides have equally won and lost, I consider that a 35 percent uplift from the starting point of $9,750 for the rejection of three reasonable *Calderbank* offers and conduct increasing Employsure's costs is warranted in all the circumstances.

Costs Order

[24] For the reasons given above, the Authority orders John McDermott to pay Peninsula Group NZ Limited (formerly Employsure Limited) $13,162.50 as a contribution towards its actual and reasonable costs. Payment is to be made no later than 28 days following the date of this determination.

Peter Fuiava
Member of the Employment Relations Authority