



(d) the sum of \$6,053.60 in respect of special damages.

[3] The Authority reserved costs and encouraged the parties to resolve the issue of costs between them.

[4] The parties were unable to do so, and Boxster has now brought a costs application before the Authority for determination.

### **Legal principles**

[5] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The principles and approach adopted by the Authority in exercising this power are set out in the Authority's Practice Direction and the legal principles which underpin it.<sup>2</sup> These principles follow:

- (a) An award of costs is discretionary.
- (b) Costs will generally follow the event.
- (c) The starting point for assessing costs is the notional daily tariff.
- (d) The Authority then considers whether there are any relevant factors which might lead to increasing or decreasing the daily tariff. Factors include:<sup>3</sup>
  - (i) costs awards in the Authority will be modest;
  - (ii) it is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
  - (iii) costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be considered in increasing the daily tariff; and
  - (iv) the complexity of a matter may justify an increase in the daily tariff.

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<sup>2</sup> *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [114].

<sup>3</sup> *JCE v The Chief Executive of the Department of Corrections* [2018] NZERA 175 at [4].

## **Application**

### *Notional daily tariff*

[6] The investigation meeting was one day in length. The starting point for assessing costs based on the daily tariff is \$4,500.

### *Adjusting the tariff*

[7] Boxster seeks an uplift on the daily tariff rate because it attended mediation on several occasions, it had strong evidence in support of its claims, and additional case management was required because Mr Song did not engage with the Authority's process.

[8] Costs associated with preparation for and attendance at mediation, whether by agreement of the parties or at the direction of the Authority, are not typically included in costs awards.<sup>4</sup> There is no reason to depart from this principle in this case.

[9] Although Boxster provided evidence to the Authority in support of its claims, Boxster did not succeed with all of the claims it advanced. This is because the period of 18 months, which applied to all of the restraint clauses in the IEA, was unreasonable.<sup>5</sup>

[10] Although additional case management was required, Mr Song engaged with the Authority's process.

[11] There is no reason to adjust the daily tariff rate. The Authority has its own unique approach to costs, which is focused on access to justice and modest costs awards.<sup>6</sup> The daily tariff has been put in place to give parties an idea of what the costs consequences of pursuing a claim, or losing a claim, are likely to be.<sup>7</sup>

## **Outcome**

[12] Within 28 days of the date of this determination, Mr Song is ordered to pay Boxster \$4,500 as a contribution towards legal costs incurred.

Simon Greening  
Member of the Employment Relations Authority

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<sup>4</sup> Practice Direction of the Employment Relations Authority 2024, cl 11.

<sup>5</sup> Above n 1 at [54].

<sup>6</sup> *Key Industries v Perrin* [2023] NZERA 172 at [114].

<sup>7</sup> Above n 6 at [114].