

PRACTICE NOTE 2

COSTS IN THE EMPLOYMENT RELATIONS AUTHORITY

1. The power for the Authority to order any party to pay a contribution to the costs of any other party is set out in clause 15 of the Second Schedule to the Employment Relations Act 2000. The power conferred by that provision is a wide one but the Authority has traditionally used a notional daily tariff approach as the starting point for considering a costs award.
2. That daily tariff approach and the principles that ought to apply to its exercise have been considered judicially by two leading decisions of the Employment Court and those decisions guide the Authority's practice in this area¹.
3. From time to time, the Authority adjusts the daily tariff having regard to movements in the cost of legal and other advocacy services and a review of the position has just been completed by the Authority.
4. As a consequence, for matters lodged in the Authority from 1 August 2016, the daily tariff will be \$4,500 for the first day of any matter and \$3,500 for any subsequent day of the same matter.
5. Typically the Authority will not deal with costs until the substantive determination has been made and thereafter costs will fall for disposition either by negotiation between the parties or by determination of the Authority.
6. Parties will always be encouraged to try to resolve costs on their own terms but in the result that costs are not able to be determined by agreement between the parties, the Authority will fix costs on the basis of a timetable that it may set.
7. Most commonly, the Authority Member will require the successful party to file its claim for costs in the Authority, providing a copy of that document to the other party, and then the other party will have a right of reply on a timetable which the Authority will set.
8. Parties to proceedings in the Authority ought always to remember in evaluating their proceedings that if they are unsuccessful, they will almost always face the prospect of having to make a contribution to the costs of the successful party, as well as meeting their own costs.
9. The daily tariff that the Authority applies gives no more than a guide to the starting point that the Authority will use in calculating the entitlement of the successful party to costs; there may be factors in the particular case which require the Authority to either increase the daily tariff figure or reduce it.
10. For instance, if the behaviour of the successful party created cost that was unnecessarily incurred, then the Authority may reduce the daily tariff amount.

¹ *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135 at [106]-[108]

Conversely, if the unsuccessful party turned down an operative *Calderbank* offer² then that may encourage the Authority Member to increase the daily tariff proportionately.

11. Where it is necessary for the Authority to make a decision about costs (that is where the parties are unable to agree costs on their own terms), parties should make clear in their submissions what claim if any they make and the reasons for that position. If they are seeking an award of costs then it is important that that is supported by material such as copies of invoices showing fees and other expenses that have been incurred, the time taken by the practitioner or advocate and the relevant hourly rate.
12. 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 of the Authority (unless some particular or unusual circumstance of the case makes it appropriate to do so).
13. If parties wish to obtain further information about the costs regime in the Authority, they should ask the presiding Member, during the case management conference, to provide them with further information.
14. Generally, the presiding Member will discuss the costs regime at the case management conference if the issue appears to warrant such discussion, and Members will be ready to explain to parties, if requested, the principles that are used to apportion costs at the conclusion of an Authority investigation.
15. Costs fixing in the Authority, as in all courts and tribunals, is often the source of controversy. The goal is to leave the successful party with a contribution to the costs that that party has reasonably incurred. Typically, successful parties want the award of costs to be as high as possible while unsuccessful parties want the converse.
16. There needs to be a level of predictability concerning the fixing of costs and the exercise typically involves balancing the right of the successful party to have a contribution to its costs so as to ensure that it gets, as far as possible, the benefit of its win, against the need of the unsuccessful party not to have such a great impost on its financial resources as to preclude it contemplating litigation in the first place.

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² An operative *Calderbank* offer is an offer made by one party to the other party in litigation the effect of which is that the offering party agrees to accept a particular sum of money in settlement of the claim in circumstances where, if that offer is not accepted by the other party and the Authority then makes a finding which leaves the offering party less well off than they would have been if the offer in the *Calderbank* were accepted, the terms of the *Calderbank* offer can be put before the Authority when costs are being fixed as evidence for the view that the offering party reasonably tried to resolve the matter by agreement but was unsuccessful.

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