

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 190
3022755

BETWEEN

SUSAN HARROD
Applicant

AND

HOKITIKA RIMU TREE TOP
WALK LIMITED
PARTNERSHIP trading as West
Coast Treetop Walk
Respondent

Member of Authority: Christine Hickey

Representatives: Paul Brown, advocate for the Applicant
Shane Abel for the Respondent

Costs submissions received: From the Applicant at the investigation meeting
From the Respondent on 8 November 2018

Determination: 14 December 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] On 24 September 2018 I issued a determination ordering the respondent to pay Ms Harrod lost wages and compensation.¹ I reserved the issue of costs.

[2] Paul Brown represented Ms Harrod at the investigation meeting. He applied for costs of \$4,500, the Authority's usual tariff for a one-day investigation meeting.

[3] I gave Hokitika Rimu Tree Top Walk Limited Partnership (TTW) 14 days after the date of the determination to respond to the application for costs.

[4] It did not do so. I instructed the Authority officer to contact , Shane Abel and Neil Wade, who are the directors of Fly West Pty Limited, a partner in TTW again and ask for their comments. He did so on 25 October 2018:

Further to the determination dated 24 September 2018, the respondent had 14 days to respond to Mr Brown's application for costs. This would have made

¹ [2018] NZERA Christchurch 139.

comment due by 8 October 2018, but I do not appear to have received anything to date.

I am unsure as to whether a challenge has been lodged for this matter but, even if it has, a challenge does not, in and of itself, act as a stay, nor does it prevent the Authority from determining costs.

If the respondent has any comment on Mr Brown's application for costs, please provide this to the Authority by 8 November 2018.

[5] On 8 November 2018, Mr Abel and Mr Wade responded by email that:

- they have challenged the determination in the Employment Court. TTW will engage a barrister to conduct the case;
- they feel they were disadvantaged by being Australian residents and therefore not understanding New Zealand employment legislation so that they could not present a well-reasoned and legally framed response;
- TTW has not yet returned a profit despite running for five years. Therefore, it was not possible to engage the services of a lawyer for the Authority's proceedings;
- The hearing by phone from Australia in the absence of legal representation severely disadvantaged TTW in presenting its argument adequately. They now recognise that not being legally represented was unwise;
- Since the Authority's proceedings more evidence has come to light about the site manager's abuse of trust and minimal on-site management;
- They consider that Ms Harrod was in breach of her conditions of employment and acted dishonestly and fraudulently.
- They did not instigate the legal process and were forced to defend the case at their cost.
- Given the challenge they believe no costs should be ordered against TTW until the outcome of the challenge is known.

[6] In the light of that email, I instructed the Authority officer to send the following email on 13 November 2018:

I interpret Mr Wade's email as asking me to stay the consideration of costs because of the challenge. Challenging an Authority determination does not automatically act to stay the orders made in the substantive determination or the Authority dealing with costs. I need to give Mr Brown an opportunity to respond to the application for a stay of the costs determination.

I also note that Mr Wade refers to the poor financial position of the business. In order for me to take into account the business's apparently poor financial position I need to have up-to-date financial year end accounts for the business for the tax year ended 31 March 2018 in New Zealand. I direct Mr Wade and

Mr Abel to send those to me and to Mr Brown by 4pm on Friday, 23 November 2018 – NZ time.

Mr Brown will then have until 4pm on Friday, 7 December 2018 to provide brief submissions on whether the costs determination should be stayed and how the business's financial position should be taken into account by the Authority both in relation to the stay application and, if the stay is not granted, the amount of costs to be awarded.

[7] On 28 November 2018, Mr Brown notified the Authority that he was no longer acting for Ms Harrod and asked the Authority to communicate directly with her. This determination will be sent directly to Ms Harrod.

[8] On 29 November 2018, the Authority officer sent a further email to the respondent noting that the Authority had not received anything further from it in response to my request for further information. He notified the respondent that I would proceed to determine the costs application.

The applicable law

[9] The Authority's jurisdiction to award costs arises from clause 15 of Schedule 2 of the Employment Relations Act 2000.

[10] The principles the Authority applies are well-settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.² In *Fagotti v Acme & Co Limited*,³ the Employment Court re-affirmed these principles.

[11] Costs principles the Authority considers include:

- a. Whether to award costs and, if so, what amount.
- b. The discretion must be exercised in accordance with principle and not arbitrarily.
- c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d. Equity and good conscience must be considered on a case-by-case basis.
- e. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct

² [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

³ [2015] NZEmpC 135.

which increased costs unnecessarily can be taken into account in inflating or reducing an award.

- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. 'Without prejudice' offers can be taken into account.
- h. Awards of costs will be modest and must be reasonable.
- i. Frequently costs are judged against a notional daily rate, which is currently \$4,500 for the first day of an investigation meeting, and \$3,500 for subsequent days. This is usually the starting point for considering the amount of costs.
- j. Costs generally follow the event; that is, the unsuccessful party is likely to be ordered to pay a reasonable contribution to the successful party's costs.
- k. The nature of the case can also influence costs. That means that the Authority may order that costs lie where they fall in certain circumstances.

Issues

[12] I will consider the following issues in exercising my discretion on costs:

- (i) Should I order TTW to pay Ms Harrod's costs in the Authority proceedings or should I grant a stay?
- (ii) Is the daily tariff the appropriate starting point, or should I order any uplift or downward adjustment in the daily tariff?

Should I stay the costs determination and allow the Court to fix the Authority's costs?

[13] Section 180 of the Employment Relations Act 2000 states that electing to challenge a determination of the Authority does not act as a stay of proceedings on the determination of the Authority, unless the Court or the Authority orders a stay.

[14] I am not aware that the respondent has applied for a stay of the Authority proceedings in the court. Therefore, I need to determine the reserved issue of Ms Harrod's costs.

[15] As I notified the respondent in the email of 13 November 2018 a challenge does not operate as a stay of the Authority's proceedings. Despite the respondent's pleading of the business being in a poor financial position, it has indicated by way of initiating a challenge that it has the financial ability to challenge and pay a barrister to conduct those proceedings. That is its right. However, at this stage Ms Harrod has been successful in her case in the Authority and has incurred the cost of representation.

[16] It is not the Authority's practice to stay its ability to make a determination on reserved costs while a challenge proceeds. I do not consider there are any grounds to do so in this case.

Is the daily tariff the appropriate starting point, or should I order any uplift or downward adjustment in the daily tariff?

[17] The investigation meeting took most of one day, including submissions. The correct starting point for my consideration of costs is the daily tariff of \$4,500.

[18] TTW had an opportunity to present me with financial information that I could have taken into account to consider whether it should pay decreased costs, and/or I could make an order for time payment. However, it has foregone that opportunity. I cannot exercise my discretion to make a lower order for costs, or for time payments, in the absence of any evidence.

[19] There are no factors justifying an uplift. Nor do I consider there are any factors meaning that I should decrease the daily tariff. Ms Harrod was successful in her application and I have already reduced the remedies she would otherwise have obtained by 20% due to her contribution.

Order

[20] **Hokitika Rimu Tree Top Walk Limited Partnership must pay Susan Harrod \$4,500 as a contribution towards the cost of her representation to be paid within 28 days of the date of this determination.**

Christine Hickey
Member of the Employment Relations Authority