

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 164
3079975

BETWEEN	CAROL SUSANNE BAKER Applicant
AND	HAURAKI RAIL TRAIL LIMITED First Respondent
AND	PETER FOSTER MAYNARD Second Respondent

Member of Authority: Jenni-Maree Trotman

Investigation meeting: On the papers

Submissions and further Information Received: Applicant's submissions 23 March 2020
No Submissions from respondents

Date of Determination: 24 April 2020

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination addresses the issue of costs arising out of a determination dated 22 August 2018 (the 2018 determination) and a determination dated 27 November 2019 (the 2019 determination).

[2] Costs were reserved by the Authority in both determinations. In the 2019 determination the parties were encouraged to resolve the issue of costs themselves but, in the event that they could not, a timetable was set for the filing of submissions. That timetable was subsequently extended at Ms Baker's request.

[3] Ms Baker filed detailed cost submissions. No reply to Ms Baker's costs application was received from the Respondents.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Application for costs

[5] Ms Baker filed detailed cost submissions. These submissions claimed costs and disbursements dating back to 2012 and totalling \$140,537.35. Her claim included not only costs and disbursements associated with her re-opening application, but losses she said she endured as a consequence of events that took place leading to a protection order being granted by the Family Court in 2012. It also included a claim for costs and disbursements relating to her original claim before the Authority in 2015 and her attempts at enforcement of that determination through the District Court and the Employment Court.

The Authority's Approach to Costs

[6] The Authority may order any party to a matter to pay to any other party such costs and expenses as the Authority considers reasonable.¹

[7] In *PBO Ltd v Da Cruz*, a full Court set out the principles that are appropriate for the Authority to apply when considering an application for costs.² These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.³ The principles include:

- a) There is discretion as to whether costs would be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

¹ Employment Relations Act 2000, Schedule 2 clause 15.

² *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

³ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases 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) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[8] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500.00 for the first day of an investigation meeting.⁴ The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[9] Although costs generally follow the event, that is not always the case. There are cases where the parties have mixed success and "in such instances it is not necessarily easy to determine who won" the case so as to be entitled presumptively to costs."⁵

The starting point for costs

[10] Both parties had a measure of success in the 2018 and 2019 determinations.

[11] Ms Baker was successful in the 2018 determination in having the investigation reopened to consider the level of compensation that the Authority ordered the First Respondent to pay to her in its determination dated 26 August 2015 (the 2015

⁴ Practice Note 2, Costs in the Employment Relations Authority.

⁵ *Health Waikato Ltd v Elmsley*, [2004] 1 ERNZ 172 (CA) at [35]. *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156 at [37] – [43].

determination). However, she was unsuccessful in the 2019 determination in having her claim for compensation increased.

[12] Ms Baker was unsuccessful in the 2018 determination in having Maurice Barnett and Peter Maynard, both of whom were directors of HRT during her employment, joined to the proceedings. However, the evidence that she adduced to the Authority, and later to the Court, led to the Authority exercising its discretion to investigate whether Mr Maynard had obstructed and delayed the Authority's 2015 investigation. The Authority found that Mr Maynard's obstructions impeded the Authority's ability to conduct a just and fair investigation and led to significant delay. Mr Maynard was ordered to pay \$5,000 by way of penalty for his breach of s 134A of the Act.

[13] Standing back and looking at matters "in the round", and taking into account the equal measure of success achieved by each party, I am satisfied that no legal costs or disbursements should be ordered payable by the Respondents to Ms Baker.

[14] For Ms Baker's benefit, I record that the Authority does not have jurisdiction to award costs and disbursements that were incurred in the course of Ms Baker bringing claims before the Family Court, the District Court or the Employment Court. In terms of the Employment Court claim, I note that the Court has already decided, due to Ms Baker being unsuccessful, that she was not entitled to costs.⁶ In addition, the Authority has already made a finding in her favour in terms of the costs associated with its 2015 determination.⁷

Outcome

[15] Carol Baker's claim for costs is dismissed.

Jenni-Maree Trotman
Member of the Employment Relations Authority

⁶ *Baker v Hauraki Rail Trail* [2019] NZEmpC 147.

⁷ *Baker v Hauraki Rail Trail* [2015] NZERA Auckland 259.