IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 342
3051312 and 3051372

BETWEEN	ANGELA NEIL Applicant in 3051312
AND	TINA WEST Applicant in 3051372
AND	NEW ZEALAND NURSES ORGANISATION Respondent

Member of Authority:	Robin Arthur
Representatives:	Allan Halse, advocate for the Applicants Susan Hornsby-Geluk, counsel for the Respondent
Submissions:	From the respondents on 7 July 2020 and from the applicants on 13 July 2020
Determination:	26 August 2020

DETERMINATION OF THE AUTHORITY

A. Angela Neil and Tina West must each pay $14,107 in costs and expenses to the New Zealand Nurses Organisation within 28 days of the date of this determination.

[1] The New Zealand Nurses Organisation (NZNO) sought an order requiring Angela Neil and Tina West to contribute to costs of representation it incurred in successfully responding to their personal grievance applications.

[2] The Authority issued three determinations during the proceedings about those applications. NZNO succeeded in all three. Firstly, NZNO sought an order requiring the advocate for Ms Neil and Ms West, Allan Halse and his advocacy business Culturesafe NZ Limited, to comply with an earlier Authority order prohibiting publication of the names and other details of three witnesses until the Authority had

investigated and determined the grievances.[1] Mr Halse breached the order by repeatedly publishing information about one of those witnesses in particular. Secondly, NZNO opposed an application to have the matter removed to the Court without any investigation and determination by the Authority.[2] Thirdly, the determination issued after the Authority's investigation found NZNO had not acted unjustifiably in dismissing Ms Neil and Ms West, in how it investigated complaints they had made or in declining their requests to be paid special leave for an extended period of absence from work.[3] The determination also rejected claims from Ms Neil and Ms West that NZNO had breached the statutory code of good faith for the public health sector (set out in Schedule 1B of the Employment Relations Acts 2000 (the Act)) and a provision in s 69AAE of the Act about flexible working.

[3] For costs incurred in successfully applying for the compliance order NZNO sought indemnity costs, that is its full legal costs.

[4] For successfully opposing the removal application NZNO sought a contribution of $1,500 towards its costs.

[5] For preparation and attendance at the Authority's investigation meeting, held over four days, NZNO asked for an order of $45,000 towards its legal costs. This aspect of its claim sought what was, in effect, a tripling of costs that the Authority would typically award for a meeting of that length. NZNO said such an increase was warranted because the applicants had unnecessarily increased costs by the way they conducted their case and because Ms Neil and Ms West had rejected an earlier settlement offer that would have left them considerably better off than the outcome achieved through the Authority's eventual determination.

[6] NZNO also sought reimbursement of the expenses of its counsel travelling from Wellington to the investigation meeting in Tauranga and for the expense of preparing the common bundle of documents provided for the investigation.

[7] A reply memorandum lodged on behalf of Ms Neil and Ms West said they rejected NZNO's claim for costs, criticised NZNO as seeking to use a costs order to

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[1] *Neil & West v New Zealand Nurses Organisation* [2019] NZERA 98 (25 February 2019).
[2] *Neil & West v New Zealand Nurses Organisation* [2019] NZERA 160 (20 March 2019).
[3] *Neil & West v New Zealand Nurses Organisation* [2020] NZERA 219 (20 June 2020).

penalise their advocate and appealed to the Authority to "consider the substantive proceedings and keep the order of costs relevant to the case".

Assessing costs – relevant principles

[8] The Act authorises the Authority to "order any party to a matter to pay to any other party such costs and expenses … as the Authority thinks reasonable".[4] It also permits the Authority to "apportion any such costs and expenses between the parties or any of them as it thinks fit".[5]

[9] Exercise of those discretionary powers to award costs is guided by well-established "basic tenets" applied to the particular circumstances of each case.[6] Those tenets include exercising the discretion in a principled and not arbitrary way, considering equity and good conscience on a case-by-case basis, increasing or reducing an award to take account of party conduct that unnecessarily added to costs, considering whether any of the costs sought by the successful party were unnecessary or unreasonable, taking account of without prejudice offers to settle that (if accepted) would have spared costs for both parties and the general rule that costs follow the event. Each case must be considered on its own merits.

[10] Assessment of costs is typically made on a notional daily tariff set according to the length of the investigation meeting. The current tariff is $4,500 for the first day of an investigation meeting and $3,500 a day for any subsequent days.

[11] Undue rigidity in application of the tariff is avoided by principled adjustments of the tariff rate, upwards or downwards, to account for the guiding tenets noted above and particular characteristics or factors present in each case. Those characteristics or factors may include a liable party's means to pay costs, preparation required in particularly complex matters and the conduct of the parties.

[12] While costs are not to be used to punish or express disapproval of an unsuccessful party's conduct, costs may be awarded on a full or "indemnity" basis in the rare cases of "exceptionally bad behaviour" during the course of proceedings.[7]

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[4] Employment Relations Act 2000, Schedule 2 clause 15(1).
[5] Employment Relations Act 2000, Schedule 2 clause 15(2).
[6] *PBO Limited v Da Cruz* [2005] ERNZ 808 at [44]-[46].
[7] *Bradbury v Westpac Banking Corp* [2009] NZCA 234 at [28] and [29].

Compliance application

[13] Early in the proceedings NZNO sought an order prohibiting publication of details identifying three employees who were the subject of allegations made by Ms Neil and Ms West in their personal grievance applications against NZNO. The order, issued on 14 February 2019, prohibited publication of those details from that date until the issue of the Authority's substantive determination or until the Authority otherwise ordered. An exemption included in the order allowed for the applicants or any representative they appointed to communicate with relevant regulatory authorities, such as WorkSafe or the Labour Inspectorate, about concerns about work-related matters.

[14] The order was directed at what were described as strident and untested allegations Mr Halse had made in social media postings about a particular NZNO employee who Ms Neil and Ms West had identified as the primary cause of their workplace problems and at the likelihood that Mr Halse would publish similarly vitriolic comments about two other employees.[8] As noted in the Authority's eventual substantive determination, the prohibition order was made as a matter of fairness to those three individual employees and to protect the integrity of the Authority investigation process until those allegations about them could be properly tested through questioning at the investigation meeting by the Authority Member and both parties' representatives.[9] At the end of the Authority investigation no application was made for any further or continued non-publication orders so, as provided in the terms on which it was first issued, the existing order then lapsed on issue of the Authority's substantive determination.

[15] Before the order was even made Mr Halse had indicated he considered any such non-publication order was "illegal" and he would ignore it. Soon after the order was issued Mr Halse made postings on the Facebook pages of his Culturesafe business and of another group which continued to identify one of the employees. As it was entitled to do, NZNO applied for and was granted an order requiring compliance with that earlier non-publication order.

[16] The Authority determination granting the compliance order described the breaches as deliberately made in defiance of the non-publication orders. And it was

[8] Minute of the Authority, 14 February 2019 at [15]-[25].
[9] *Neil,* above n 3, at [48].

the "intentional and unrepentant nature" of those breaches that NZNO submitted warranted indemnity costs for the compliance order it had felt forced to seek.

[17] As that application was determined 'on the papers', an assessment of costs would typically start from one third of the Authority's current notional daily rate, that is $1,500.

[18] In this case there were two means by which an increase on that amount could be considered. Firstly, a principled adjustment of the tariff could be made if conduct of a party had unnecessarily increased the costs incurred by the other party. Secondly, indemnity costs could be imposed for very bad or unreasonable behaviour during the course of the proceedings.

[19] Case law confirms one category of such bad behaviour as being where a party has engaged in flagrant misconduct in wilful disregard of clearly established law.[10] The conduct of Mr Halse, acting on behalf of Ms Neil and Ms West and in breaching the prohibition order in the way he did, was plainly within that category of wilful disregard of clearly established law. As noted in the determination granting the compliance order, his postings exhibited an idiosyncratic and incorrect view of the law, the interrelationship of various statutes and long-standing principles intended to protect parties and witnesses in the proceedings of tribunals like the Authority.[11] In communications to the Authority, attempting to justify his actions, Mr Halse asserted the orders prohibiting publication of some information were "illegally raised" or could be overridden by his personal interpretation of the Health and Safety at Work Act 2015 and the New Zealand Bill of Rights Act 1990 provisions about freedom of expression. However those statutes did not authorise an individual, such as Mr Halse while acting as the representative of Ms Neil and Ms West, to deliberately flout the power Parliament expressly gave the Authority under the Employment Relations Act to prohibit publication of some information during its proceedings. If such orders are wrongly made, the proper means of having them set aside is through a challenge in the Employment Court. Mr Halse was advised of those rights of challenge but the applicants did not exercise them.[12]

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[10] *Bradbury*, above n 7, at [29].
[11] *Neil,* above n 1, at [16].
[12] *Neil*, above n 1, at [36].

[20] There was nothing inadvertent or accidental in how Mr Halse had acted on behalf of Ms Neil and Ms West in breaching the orders. His deliberate actions in wilfully disregarding clear, established law amounted to one of those rare circumstances where indemnity costs could properly be awarded for exceptionally bad behaviour.

[21] No weight could reasonably be given to the submission made in the memorandum Mr Halse lodged on behalf of Ms Neil and Ms West opposing costs, that they should not be liable for additional legal costs resulting from their representative's conduct. During the Authority investigation neither Ms Neil nor Ms West sought to distance or dissociate themselves in any way from those breaches or indicated Mr Halse had acted contrary to any instructions from them. What Mr Halse did in breaching the order, and leading to NZNO incurring costs in seeking the compliance order, was clearly done in his role as their representative. Ms Neil and Ms West are fixed with any consequences in costs resulting from what was done on their behalf. Whatever remedy or arrangement they may have with their representative about who meets that cost is between them and not a concern in respect of the amount they must pay to NZNO.

[22] NZNO sought as $3,735 as indemnity costs for its application for a compliance order. This is the amount Ms West and Ms Neil must pay to NZNO as costs on that account.

Removal to Court

[23] The removal application was determined on the papers. NZNO sought $1,500 costs based on one third of the notional daily tariff. This is an appropriate amount to award as costs for that part of the proceedings.

Preparing for and attending the investigation meeting

[24] If calculated solely on a tariff basis, costs for preparing for and attending the investigation meeting would total $15,000 – that is $4,500 for the first day and $3,500 for each of the subsequent three days.

[25] Two factors favoured an upward adjustment of that tariff in the particular circumstances of this case – firstly, the effect of a settlement offer made to but not

accepted by Ms Neil and Ms West and, secondly, aspects of how their case was conducted that had unnecessarily increased costs NZNO incurred.

Uplift for failure to accept reasonable settlement offer

[26] NZNO's submissions on costs disclosed that it had offered to settle the grievances rather than continue with the proceedings. Its proposal, made on a 'without prejudice save as to costs' basis, offered to pay Ms Neil and Ms West three months' lost wages and $15,000 in distress compensation each, as well as to contribute $10,000 to their costs of representation. The offer, which was not accepted, proved superior to the outcome of the Authority determination in which no remedies were awarded.

[27] NZNO submitted its settlement offer was reasonably made with adequate time and opportunity to consider it. The submissions of Ms West and Ms Neil made no reference to the offer or its effects on any costs order that should be made. In that light NZNO's submission that the offer was reasonably made has been accepted.

[28] Case law indicates the Authority should take a "steely" approach to setting costs where a party had turned down a reasonably made offer to settle the matter on terms better than that party ultimately achieved by carrying on with the proceedings.[13] This fortitude in assessing costs does not mean the party which made the offer can expect any eventual award of costs will reimburse all legal fees incurred after such an offer was rejected.[14] Rather, the uplift should make a difference sufficient to support the broader public interest in parties being encouraged to resolve matters themselves, where they reasonably can, rather than going on to use the limited resources deployed by the state for dispute resolution in the Authority and the courts beyond it.

[29] Review of a sample of Authority costs determinations shows the uplift made to give weight to settlement offers ranges between one quarter and one half of the tariff, with the final outcome also subject to other potential adjustments for factors such as party conduct, unnecessarily incurred costs and the financial means of the party ordered to pay costs.[15]

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[13] *Bluestar Print Group (NZ) Limited v Mitchell* [2010] NZCA 385 at [20] and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [109].

[14] *Stevens v Hapag-Lloyd (NZ) Limited* [2015] NZEmpC 28 at [97].

[15] See, for example, *McKeown v Universal Communications Group NZ Limited* [2018] NZERA Auckland 80 (uplift of $4,000 on tariff for a two day investigation meeting, after applying a downward adjustment for financial circumstances); *Pender v Lyttleton Port Company Limited* [2018] NZERA

[30] In this case a 40 per cent upward adjustment of the tariff rate for the four-day meeting was appropriate, that is from $15,000 to $21,000, to give weight to the failure to accept a reasonably made settlement offer.

Conduct unnecessarily increasing costs

[31] NZNO submitted there were a number of ways in which the case of Ms Neil and Ms West was conducted that unnecessarily increased its costs and which warranted an increase in the tariff. The following are accepted as ways in which that conduct did unnecessarily increase NZNO's costs:

(i) Inclusion in written evidence submitted of references which breached mediation confidentiality and thereby required additional legal work to have those references redacted;

(ii) Persisting with claims in relation to the public health sector code of good faith and statutory flexible working provisions that were plainly misconceived but, despite guidance from the Authority, were left in an amended statement of problem and had to be addressed in NZNO's submissions, thereby causing an unnecessary increase in its costs; and

(iii) Seeking to add an additional claim for enhanced early retirement payments during the course of the investigation which, while not properly raised, had to be addressed by NZNO's legal representative, thereby increasing costs.

[32] The submissions made on behalf of Ms Neil and Ms West did not satisfactorily respond to or negate those concerns. In essence they argued their claims were correct and necessary, despite the outcome, and they were "entitled to defend their claim any way they chose within Authority guidelines". Even if that were a correct description of what they could do, it was not an approach without consequences when it increased the costs of the ultimately successful party.

Christchurch 161 (uplift of $3,500 on tariff for one day investigation meeting); *Maheta v Airbus Express Limited* [2020] NZERA 52 (uplift of $3,250 on tariff for one-and-a-half day investigation meeting); *Mokaraka v Department of Corrections* [2019] NZERA 636 (uplift of $3,000 on tariff for two-and-a-half day investigation meeting); *Cuttriss v Pact Group* [2019] NZERA 706 (uplift of $2,000 on tariff for one day investigation meeting) and *Dunn v Air New Zealand* [2020] NZERA 265 (uplift of $1,500 for one day investigation meeting).

[33] A ten per cent upward adjustment of the tariff for the four days of investigation meeting was appropriate to recognise aspects of that conduct that unnecessarily increased cost incurred by NZNO.

Total costs award for the investigation meetings

[34] Tallying that 10 per cent adjustment of $1,500 with the 40 per cent adjustment already made in respect of the settlement offer, $22,500 is awarded as costs for preparation and attendance at the four days of investigation meeting.

[35] There was no submission on behalf of Ms West and Ms Neil that any adjustment to costs should be made to take account of their personal financial situations or ability to pay costs awarded at that level. They proffered no evidence for the costs assessment regarding their respective income, expenditure, assets and liabilities that would be necessary to make any adjustment on that account.

Expenses

[36] NZNO's claim for travel and accommodation expenses for counsel is declined. While there is a well-recognised right for a party to engage a representative of their choosing, engaging out-of-town counsel was not a cost to be reasonably visited on an unsuccessful party in this case.

[37] Printing, binding and courier fees of $479 incurred for preparing and providing documentation for the investigation meeting was an expense for which reimbursement should be ordered.

Order for costs and expenses

[38] The contribution towards costs and expenses of NZNO that Ms Neil and Ms West must pay totals $28,214. It comprises $3,735 costs incurred in relation to the compliance order; $1,500 incurred in relation to the removal application; $22,500 as a contribution to costs for the investigation meeting; and document expenses of $479.

[39] The applications by Ms Neil and Ms West were jointly investigated due to the substantial overlap in the relevant evidence and witnesses who needed to be heard. There was no significant difference in the scope or nature of the grievances and other claims they pursued together in the Authority. It was appropriate therefore that they each, individually, be responsible for contributing half of the costs found due to

NZNO in this determination. Accordingly, Ms Neil and Ms West must each, separately, pay the sum of $14,107 to NZNO within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority