

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2022] NZERA 132
3133736

BETWEEN	REGENT REALTY LIMITED (T/A HARCOURTS HAWKES BAY) Applicant
AND	MARY FERGUSON Respondent

Member of Authority: Sarah Kennedy

Representatives: Jol Bates for the Applicant
Justin Cameron for the Respondent

Submissions received: 15 February 2022 from Applicant
7 March 2022 from Respondent

Determination: 7 April 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] Regent Realty Limited filed an application for an order for payment of costs that the company incurred in successfully seeking penalties against Mary Ferguson. In my determination dated 18 January 2022, two breaches of the parties' record of settlement¹ were identified and Ms Ferguson was ordered to pay a penalty.²

[2] The Authority's jurisdiction to order a party to pay reasonable costs and expenses is exercised by applying some well-established principles to the particular circumstances of the case.³ Those principles recognise that a successful party should

¹ Employment Relations Act 2000, s 149.

² *Regent Realty Limited v Ferguson* [2022] NZERA 8.

³ Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

receive a contribution to costs reasonably incurred in reaching that result; costs are discretionary and should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional ‘daily rate’ or ‘tariff’ as a starting point to assess costs.

[3] Undue rigidity in applying that tariff is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may account for a liable party’s means to pay costs, the preparation required in particularly complex matters and where conduct of parties has unnecessarily increased costs.⁴

[4] The Authority’s current tariff for a one day investigation meeting is \$4,500.00. This amount is taken as an appropriate starting point for assessing a reasonable contribution to the costs incurred by a party in preparing for and taking part in an investigation meeting.

[5] Regent Realty seeks costs on an indemnity basis. It says indemnity costs are just in the circumstances of this case because the applicant was put to unnecessary expense through both an unmeritorious defence of the allegations of breach, that was then abandoned at the hearing.

[6] Ms Ferguson, in reply, said the costs incurred by both parties were as a result of Regent Realty’s actions when it was aware that it did not suffer a loss but continued to pursue compliance after the restraint period had ended and penalties. She also says the breaches were not blatant and did not justify the maximum penalty. On that basis it was submitted on her behalf that costs should lie where they fell because the determination was a partial success for both parties and Regent Realty did not suffer a loss.

Assessment

[7] Weighing the relevant principles referred to above, neither party’s proposal for a costs order was appropriate for the particular circumstances of this case. The matter

⁴ Above n2.

was heard over one day and having been successful, Regent Realty is entitled a contribution towards its costs.

[8] On the other hand, costs are not to be used as a punishment and an award of indemnity costs requires “exceptionally bad behaviour” during litigation which is a high threshold to cross and is unlikely to be met in circumstances of this case.⁵ Ms Ferguson was entitled to defend the claim against her and have her responses heard. Indemnity costs are not appropriate in the circumstances of this case.

[9] I consider that costs based upon one day’s hearing time is the appropriate starting point and from there a small uplift in costs based on the conduct of the case by Ms Ferguson is appropriate.

[10] The inclusion of material to defend the claim that was largely irrelevant because it was inadmissible resulted in the Respondent and the Authority having to consider material that was not able to be taken into account in reaching a determination. This resulted in increased costs being incurred by Regent Realty in bringing its claim.

Order

[11] Ms Ferguson is ordered to pay Regent Realty the sum of \$5,500.00 as costs within 28 days of this determination.

Sarah Kennedy
Member of the Employment Relations Authority

⁵ *Bradbury v Westbank Banking Corp* [2009] NZCA 232 at [28].