

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 550
3088412

BETWEEN	MICHELLE ANN SMITH Applicant
AND	FITZHERBERT REGENCY MOTOR LODGE (2018) LIMITED Respondent

Member of Authority: Michael Loftus

Representatives: Phil Payton, counsel for the Applicant
Gordon Paine, counsel for the Respondent

Submissions Received: 6 October 2022 from the Applicant
6 October and 27 October 2022 from the Respondent

Date of Determination: 27 October 2022

DETERMINATION OF THE AUTHORITY

[1] On 22 September 2022 I issued a determination in which I concluded Ms Smith had a personal grievance having been unjustifiably dismissed.¹

[2] Costs were reserved and as the successful party Ms Smith now seeks a contribution toward those she incurred pursuing her claims.

¹ *Smith v Fitzherbert Regency Motor Lodge Limited* [2022] NZERA 481

[3] The Authority's jurisdiction to order a contribution toward a party's costs is exercised by applying well-established principles.² Those principles recognise that:

- (a) a successful party should receive a contribution toward reasonably incurred costs and expenses;
- (b) costs should generally be modest and may not be used to punish the substantive conduct of the unsuccessful party;
- (c) the nature of a case may allow for an order that costs lie where they fall; and
- (d) the Authority may use a notional daily tariff as its starting point. From there adjustment may occur either up or down depending on the circumstances of the case. Such adjustment may be to take account of settlement offers, particularly "calderbanks," the financial means of the liable party and whether or not a party unnecessarily increased the costs incurred by the other.

[4] The tariff is currently \$4,500 for the first day and \$3,500 for each day thereafter.

[5] Ms Smith seeks \$8,000 and submits this is "fair in light of the two day investigation and subsequent submissions". She supports the claim with an invoice from her then representative, Kathy Jarrett.

[6] In its initial reply the Respondent, FRML, suggests "it would be inappropriate for the Authority to continue dealing with this file" pending the outcome of a de-novo challenge of the substantive determination it intended filing in the Employment Court. It also asserted "The costs claimed are quite frankly exorbitant and there is no evidence that they have been paid. In fact the respondent believes they have not been paid."

[7] FRML was advised the fact of a challenge meant that contrary to its assertion costs not be dealt with the opposite should apply as case law strongly suggests, and usual practice sees, the Authority conclude all outstanding matters, including costs, pending an appeal or challenge. Indeed, it is what the "... Court expects will happen on appeals from the Employment Tribunal

² *Employment Relations Act 2000, Schedule 2, clause 15, Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 and www.era.govt.nz/assets/Uploads/practice-note-2.pdf

to the Employment Court”³ and while Swales refers to the Employment Tribunal that has remained the practice of the Authority as its replacement.⁴

[8] FRML’s second submission reiterated the view the invoice was never paid and suggests the figure contained therein “... seems to have been deliberately claimed to bring it within the Authority’s tariff”. It is also suggested that last assertion is supported by the fact the invoice was prepared before the determination was issued.

[9] The submission also argues Ms Jarrett’s “...style meant the matter took longer than it should have with the advocate conducting a lengthy cross examination of most witnesses that advanced matter not at all”.

[10] Given these matters it is submitted costs should lie where they fall.

[11] That is not a submission I can accept. It is well accepted costs follow the event which, in this instance, was Ms Smith’s successful claim.

[12] The investigation meeting itself did not take two full days, being completed early afternoon on the second, but that said submissions were subsequently prepared and filed. Had they been presented orally the investigation would have continued for the bulk of the second day so, on the face of it, two days is appropriate though that raises the submission Ms Jarrett’s approach extended the hearing time. It is not my recollection and hearing seven witnesses in a day and half is not, in my experience, particularly tardy in a matter of this nature. This is especially so when it is noted the evidence of Ms Smith, who in making a claim of constructive dismissal must establish the fact of that dismissal, took just over a third of the hearing time and there it was Mr Paine cross examining - not Ms Jarrett.

[13] With respect to \$8,000 for two days I note Ms Jarrett is a professional service provider who undoubtedly has a commensurate hourly rate. Given that and tariff’s established acceptance I see nothing inordinate about the amount invoiced.

[14] I also disregard the argument the invoice is a manufactured device designed to reflect the tariff and has not been paid. That is because there is no evidence to support the assertion the invoice has not been paid and in any event that is probably irrelevant. It has been tendered

³ *Swales v AFFCO New Zealand Limited* [2001] NZEmpC 38 at [3]

⁴ For example *Sandilands v Chief Executive of the Department of Corrections* [2009] NZERA 616 (10 September)

and payment or otherwise then becomes matter between Ms Smith and Ms Jarrett. I also note it was not forwarded to the Authority by Ms Smith but counsel who has a duty not to mislead and I have no cause to think he has done so.

[15] I now comment on the submission the invoice was prepared before the determination was issued. That is also irrelevant as by then the service had been provided and the submissions lodged but it does raise another point and that is to award the amount sought and invoiced would also be an award of indemnity costs.

[16] It is well established an award of costs are a contribution and indemnity costs should only be considered in exceptional circumstances that have not been suggested here.⁵ In such circumstances I consider an appropriate award to be 66% of actual costs as traditionally applied as the starting point prior to the tariff.⁶

Conclusion and Orders

[17] For the above reasons I order the respondent, Fitzherbert Regency Motor Lodge (2018) Limited, pay Michelle Smith the sum of \$5,280.00 (five thousand, two hundred and eighty dollars) as a contribution toward the costs she incurred in successfully pursuing her claims.

Michael Loftus
Member of the Employment Relations Authority

⁵ See *Bradbury v Westpac Banking Corporation* [2009] 3 NZCA 234

⁶ *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 at [14]