

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 147  
3178599

BETWEEN

MERE BROUGHTON  
Applicant

AND

THE WHANAU ORA  
COMMUNITY CLINIC  
LIMITED  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Lawrence Anderson, advocate for the Applicant  
William Tumai, counsel for the Respondent

Costs submissions received: 7 and 14 February 2023

Determination: 24 March 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] The Authority investigated and determined an employment relationship problem brought to it by Mere Broughton, the applicant. She had been employed as an Administrator by The Whanau Ora Community Clinic Ltd (WOCC), the respondent.

[2] The Authority gave a written determination on 2 February 2023, finding that Ms Broughton had been unjustifiably dismissed. WOCC was ordered to pay compensation of \$20,000 and reimburse lost wages of \$12,725.86 to her.

[3] The Authority also found that WOCC had failed to pay Ms Broughton wages in lieu of notice of \$3,907.20 and annual holiday pay of \$1,007.92. Interest was ordered to be paid on the lost wages, wages in lieu of notice and annual holiday pay.

[4] The Authority reserved the question of costs for application to be made and replied to in writing. An application has been made on behalf of Ms Broughton for an award of \$4,500 costs, the Authority's tariff for a one-day investigation meeting, and for the \$71.56 lodgement fee as an expense.

[5] WOCC in its response does not oppose an award but submits that \$3,200 is a fair and reasonable amount.

[6] As noted in the costs application, hearing time was closer to ½ day (\$2,250) than a full day. From there an uplift of ¼ day (\$1,125) is sought for the written submissions provided to the Authority, and the same amount for trying to obtain records, the need to lodge amended statements of problem and for time spent quantifying losses.

[7] The law to be applied by the Authority in determining costs has been reviewed by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>1</sup>.

[8] Principles formulated by the Court include that costs are not to be awarded as punishment or to express disapproval of a party's conduct. Awards are to compensate a party who or which has incurred expense in applying to the Authority for it to investigate and determine claims or has incurred expense in responding to such claims. The amount of costs will usually be modest, and they will normally be awarded to the party who or which is successful in the outcome of the Authority's investigation.

[9] The Authority has a discretion to award costs based on a daily tariff, which it fixes from time to time and publicises. Currently the tariff is \$4,500 for the first full day and \$3,500 for each subsequent day of an investigation meeting.

[10] The principles formulated also include that conduct which increased costs unnecessarily can be considered in increasing or reducing an award. There was such conduct on the part of WOCC, which did not respond to the substantive application until the investigation meeting was about to take place. Even then it did not fully engage.

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<sup>1</sup> [2005] ERNZ 808.

[11] The Authority must be satisfied that costs sought do not exceed actual costs. Whether fees are reasonable or have reasonably been incurred, is also a long-established factor in assessing costs in the employment law jurisdiction; *Order of St John v Greig*<sup>2</sup>.

[12] In support of the present application copies of invoices and terms of engagement were provided. These show that Ms Broughton engaged as her representative No Win No Fee Kiwi Ltd ('0800 Win Kiwi'), to provide advocacy services in accordance with the engagement agreement.

[13] For those services Ms Broughton was invoiced an ERA filing fee of \$345.00. She seems to have been overcharged, as the ERA fee is only \$71.56, but as she must have paid that, she is entitled to recover \$71.56 as an expense.

[14] Ms Broughton was also invoiced \$14,534.83 including GST. The invoice states that sum is 1/3 plus GST of the total awarded by the Authority in its determination, \$37,916.34. The invoiced amount has been calculated by simple arithmetical application of a percentage or fraction to the Authority's determination monetarily.

[15] The fees charged are therefore directly linked to the level of distress Ms Broughton and the level of her deprivation of minimum entitlements, including minimum wages and holiday pay. There is nothing to admire about this arrangement, which gives no indication that charging was based on actual costs or time or effort.

[16] The terms of engagement show that Ms Broughton committed herself to this commission type of fee arrangement when she signed the terms on 5 July 2022, a date only six days after she was dismissed. A grievance letter written the same day appears to be the first work performed for her, although after that more advocacy work was done for the investigation meeting.

[17] As an indication of the level of difficulty Ms Broughton's case presented, it may be noted that through counsel WOCC quickly accepted liability under the determination and indicated it will pay Ms Broughton the \$37,916.00 determined as owing to her.

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<sup>2</sup> [2004] 2 ERNZ 137.

[18] The respondent suggests reasonable time should have been 10.6 hours, yielding \$3,200 if charged out at \$300 per hour.

[19] In the absence of better information from the applicant to show whether the advocacy charges were reasonably incurred, the Authority will accept the respondent's evaluation of \$3,200 as being a fair and reasonable award.

[20] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000, WOCC is ordered to pay costs of \$3,200 and expenses of \$71.56. Those amounts are to be paid directly to Ms Broughton within 14 days of the date of this determination.

Alastair Dumbleton  
Member of the Employment Relations Authority