

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 151  
3154743  
3145901

BETWEEN

DENISE HENIGAN  
Applicant

AND

WAKA KOTAHI NEW  
ZEALAND TRANSPORT  
AGENCY  
Respondent

Member of Authority: Sarah Blick

Representatives: Denise Henigan, in person  
Ruvín Pattiaratchi, counsel for the respondent

Investigation Meeting: On the papers

Information received: 18 and 30 January 2023, 20 February 2023

Determination: 27 March 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] The Authority issued a determination on 20 December 2022 finding the applicant Denise Henigan was unjustifiably disadvantaged and awarded her \$10,000 in compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).<sup>1</sup> The issue of costs was reserved. The parties have been unable to resolve costs between themselves and Ms Henigan now applies for costs.

**What principles apply to costs?**

[2] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act. The power is discretionary with its use governed by principles.<sup>2</sup> These include

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<sup>1</sup> *Henigan v Waka Kotahi New Zealand Transport Agency* [2022] NZERA 684.

<sup>2</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

that costs will usually follow the event; costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award; it is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable; the discretion is exercised in accordance with principle and not arbitrarily, considering equity and good conscience. When considering costs, the starting point is the Authority's daily tariff, which is \$4,500 for a one-day investigation meeting.

### **What do the parties say about costs?**

[3] Ms Hengian says she has spent around \$20,900 in legal fees stemming from Waka Kotahi New Zealand Transport Agency's (WK) failure to address a wrong in 2019. She is seeking full recovery of those costs and has provided seven fee invoices in support. The invoices are as follows:

- a. 'Invoice 1' is dated 2 March 2020 and is in the sum of \$12,428.63 including GST. The invoice largely relates to drafting a personal grievance letter, requesting mediation, and advising on WK's investigation into a complaint made by Ms Henigan.
- b. 'Invoice 2' is dated 30 November 2020 and is in the sum of \$575.00 including GST. This work also relates to Ms Henigan's personal grievance, liaising with mediation services, and communications with WK.
- c. 'Invoice 3' is dated 26 February 2021 and is in the sum of \$1,219.00 including GST. The invoice relates to correspondence with Ms Henigan and writing a letter to WK.
- d. 'Invoice 4' is dated 30 April 2021 and is in the sum of \$799.25 including GST. This invoice largely relates to discussions between Ms Henigan and WK's representatives.
- e. 'Invoice 5' is dated 29 November 2021 and is in the sum of \$580.75 including GST. The invoice relates to advice to Ms Henigan about whether she should file proceedings in the Authority.
- f. 'Invoice 6' is dated 31 July 2022 and is in the sum of \$1,259.25 including GST. This invoice relates to reviewing and amending Ms Henigan's witness statement.

- g. 'Invoice 7' is dated 24 August 2022 and is in the sum of \$3,507.50 including GST. This invoice relates to reviewing Ms Henigan's witness statement and preparing legal submissions for the Authority's investigation meeting.

[4] Ms Henigan says she first sought legal assistance in February 2020 while still working under a manager whose behaviours and actions she experienced as bullying. The cost for that assistance was \$12,428.63 including GST (Invoice 1).

[5] Ms Henigan notes that in October 2020, WK Group Manager Mr Brett Gliddon accepted the findings of an investigation into her complaint. Ms Henigan says his expression of regret and desire to "draw a line in the sand" did not address her sense of grievance. She says despite reeling from her first legal bill, she needed to inform herself via legal advice again (Invoice 2).

[6] Ms Henigan says she then attempted to personally work with WK's human resources team and was given an offer that required her resignation even though by December 2020 she had a permanent placement in another team.

[7] As noted in my earlier determination, in February 2021 WK's Group Manager of People responded to an email from Ms Henigan as follows:

...As a state sector organisation Waka Kotahi does not make payments to employees on a compensatory, compassionate or goodwill basis. We are accountable for public funds and need to justify any money that changes hands. The arrangement you refer to would be in a full and final settlement with an exit and that is a pragmatic arrangement that would be reached to permanently close out a risk or future cost to the organisation. That cannot apply to an ongoing employment relationship.

[8] Between February and April 2021 Ms Henigan says she sought advice from a new (cheaper) lawyer who wrote a letter appealing to the Group Manager of People (resulting in Invoices 3 and 4). Ms Henigan has provided a "without prejudice save as to costs" letter from her counsel dated 6 April 2021. In that letter counsel proposed WK pay what has ultimately been proven an unrealistic amount in compensation, being double that awarded by the Authority and pay Ms Henigan's full legal costs, which by then amounted to \$14,500. WK has provided its response and counter proposal saying it invested considerable time and effort in investigating Ms Henigan's complaints and concerns and including its investigation report. It also stated WK felt the situation did

not warrant payment of compensation, still less the amounts proposed. WK's response was to offer Ms Henigan an exit package.

[9] Ms Henigan did not wish to leave WK, and later Ms Henigan personally lodged her application in the Authority in July 2021. She says, however, her counsel reviewed the application (resulting in Invoice 5).

[10] The investigation meeting was held in September 2022, and Ms Henigan ably represented herself at the investigation meeting. She says she chose to represent herself due to the likely significant additional costs of legal representation. However, her counsel reviewed her witness statement and prepared her closing submissions which were handed up in writing at the investigation meeting (resulting in Invoices 6 and 7).

[11] Ms Henigan says the above shows WK missed many opportunities to resolve their dispute in an informal way. Ms Henigan says she seeks full legal fees because first and foremost she had to spend that money to get some sense of resolution for the unjustified actions of her employer and cites the following additional reasons:

- a. WK's practice regarding payment of compensations, described at [7] above, was "covert" and she was not aware of it until late 2020 (six months after she paid her first legal bill in March 2020).
- b. Rather than make the practice transparent, WK attempted to "remove" the email from the General Manager of People identifying the practice as if it were part of without prejudice discussions. She believes concealing this practice was a breach of good faith on WK's part.
- c. The existence of the practice made a mockery of mediation as an authentic process for resolution because the boundaries for redress were fixed, and in this instance, Mr Gliddon had already determined in October 2019 the actions of Ms Henigan's Manager were unjustified.
- d. She requested very modest compensation but did so with the expectation or desire that all legal costs would be reimbursed.
- e. The sum spent on legal fees represents opportunities lost to her and her family for enjoyment and security and did not need to be spent.

[12] Ms Henigan says the existence of the practice at [7] above and actions of WK directly contributed to the need for her to seek legal advice multiple times. She says her need for legal advice directly stemmed from WK's failure to address a wrong in 2019. If it had done so in 2019, a great deal of money and angst could have been avoided.

[13] Ms Henigan refers to the finding in my earlier determination that WK's practice of refusing to pay compensation to existing employees prevented it from taking a step that could have resolved Ms Henigan's grievance – a grievance which was caused by WK's failure to follow its performance processes and expectations within its Code of Conduct. I found the practice was a significant factor in Ms Henigan's personal grievance and recommended WK review it against the standard under s 103A of the Act and in light of its duty of good faith towards its employees, including keeping an open mind as to available options for resolution.<sup>3</sup>

[14] Ms Henigan also asks for the reimbursement of two filing fees paid in relation to lodging two separate statements of claim.

#### *Waka Kotahi's position*

[15] WK says Ms Henigan should receive a costs award of no more than the daily tariff of \$4,500 for a one-day investigation meeting. It says no increase to the daily tariff should be given because it did not use arguments that had no prospect of success nor did its conduct unnecessarily increase Ms Henigan's costs. It submits in accordance with well-established principles that any costs award to Ms Henigan should be modest.

[16] WK further submits the components of Ms Henigan's personal grievance were uncomplicated – it was a straightforward unjustified disadvantage claim. It says this further supports a modest award of costs of no more than the daily tariff.

[17] WK also submits costs incurred by Ms Henigan in trying to resolve the employment relationship problem prior to intervention by the Authority are not recoverable. It says the only invoices directly connected to the Authority's investigation (post-lodgement) are Invoices 6 and 7 and the total fee for these two invoices is \$4,766.75 including GST. It is submitted the remainder of the costs incurred are 'pre-

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<sup>3</sup> Above n 1, at [83].

application costs' and cannot be recovered. While Invoice 5 covers advice as to whether Ms Henigan should file proceedings in the Authority, WK submits this advice relates to 'pre-application costs' prior to the Authority's intervention, and therefore cannot be recovered.

### **Costs assessment**

[18] Ms Henigan was the successful party and is entitled to a contribution to her costs. However, this is not a case where an order for indemnity costs should be made, as WK's actions fall short of the kind of outstandingly bad behaviour needed to warrant such an order.

[19] The investigation meeting took one day and would have attracted the starting point of the daily tariff of \$4,500 had Ms Henigan been represented by counsel during it. Taking into account that Ms Henigan was not represented at the investigation meeting, I consider an appropriate starting point for costs to be \$3,500.

[20] However, this matter was indeed complicated so, for the following reasons, an increase on the starting point is warranted.

[21] While mediation costs are not usually awarded in the Authority, that does not necessarily exclude all "pre-application" costs incurred, as WK argues. As such I do not accept WK's submission that only Invoices 6 and 7 and the fee of \$4,766.75 for them is relevant to the Authority's assessment of costs.

[22] WK's practice of refusing to pay compensation to existing employees prevented it from taking a step that could have resolved the grievance and was a significant factor in Ms Henigan's personal grievance. I find WK's conduct, in declining to move on its practice during inter party negotiations and after the matter was lodged in the Authority, unnecessarily increased Ms Henigan's costs over time. I accept Ms Henigan's statement that she was not aware of the practice and the barrier it posed to resolution until some months after she raised her personal grievance. Ms Henigan's strong wish to remain employed meant the parties were at an impasse on the grievance, and remained so until the Authority issued its determination. The only way to resolve her grievance was before the Authority.

[23] While the amount of fees incurred in Invoice 1 appear unreasonably high, I am otherwise satisfied Ms Henigan's costs were reasonable. Ms Henigan has since done well to contain costs.

[24] I note the Authority made an assessment of the appropriate level of compensation on its merits and found the amount sought by Ms Henigan appropriate. That she may have had an expectation of being reimbursed full legal costs cannot factor into or alter the compensation assessment, nor should it impact on an appropriate costs award.

[25] In all the circumstances an increased costs award is warranted. Taking the above matters into account, Ms Henigan should be awarded \$8,000 in costs. While Ms Henigan may be disappointed at this outcome, the amount set is also guided by the principle that costs in the Authority are to be modest.

[26] Ms Henigan lodged two statements of problem, one in July 2021 and another in October 2021. It appears the second statement of problem ought to have been lodged as an amended statement of problem, which would not have attracted an additional filing fee. It was lodged by Ms Henigan personally and clarified her arguments and the remedies sought. In the circumstances WK should reimburse Ms Henigan both filing fees.

### **Outcome**

[27] Waka Kotahi New Zealand Transport Agency is ordered to pay \$8,000 in costs and \$143.12 (being two Authority filing fees) to Denise Henigan within 21 days of the date of this determination.

Sarah Blick  
Member of the Employment Relations Authority