

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 27
3135160

BETWEEN TONI MAHENO
 Applicant

AND CARRINGTON RESORT JADE
 LP
 Respondent

Member of Authority: Rachel Larmer

Representatives: Dave Cain, advocate for the Applicant
 William Tan, for the Respondent

Investigation Meeting: On the papers

Submissions and Other 8 and 12 December 2022 from the Applicant
Information Received: 20 and 22 December 2022 from the Applicant
 No response from Respondent

Date of Determination: 20 January 2023

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Toni Maheno, succeeded with her personal grievance claims for unjustified disadvantage and unjustified dismissal against her former employer, Carrington Resort Jade LP (“*the Respondent*”).

[2] Ms Maheno’s matter was investigated by the Authority during an in person investigation meeting that was held in Kerikeri on 2 August 2023. The Authority’s substantive determination was issued on 30 November 2022.¹

¹ *Maheno v Carrington Resort Jade LP* [2022] NZERA 635.

[3] Ms Maheno, as the successful party, is entitled to a contribution towards her actual legal costs. The Authority encouraged the parties to resolve costs by agreement, but a timetable was also set in case that did not occur.²

[4] No agreement was reached, so Ms Maheno applied to the Authority for a costs award in her favour.

The Authority's investigation

[5] The costs application was dealt with on the papers. Ms Maheno filed costs submissions and information but the Respondent did not file anything.

[6] Ms Maheno's costs application that was filed on 8 December 2022 was served on the respondent that same day.

[7] On 12 December 2022 the Authority asked the Applicant to provide invoices in support of her disbursements claim. The Applicant responded by asking if a breakdown of total disbursements was sufficient. The Authority replied on 13 December 2022 that itemised disbursements plus a copy of supporting invoices was required.

[8] On 20 December 2022 the Applicant provided a screen shot outlining the disbursements she had incurred. The Authority responded that same day by advising the Applicant that she had to file GST receipts/invoices for any disbursements she was claiming (apart from her filing fee).

[9] On 22 December 2022 the Applicant filed receipts in support of her disbursements claim. These were copied to the Respondent that same day.

[10] On 5 January 2023 the Authority emailed the Respondent to advise that it had until 19 January 2023 to file its response to the Applicant's costs claim. Mr William Tan replied on behalf of the Respondent by an email that said "*The Respondent will file submission for costs by 19 Jan.*" However, it did not do so, nor did the Respondent request an extension of time to file its costs submissions.

² Above n1, at [241]-[244].

[11] The Authority contacted the Respondent by telephone today but was told Mr Tan was busy and could not take the call. The Authority Officer left a message asking Mr Tan to call her. He called back when the Authority Officer was not available.

[12] The Authority considered it was important to bring closure to the parties of these proceedings, so the costs application was determined today based on the available information.

[13] The Authority had previously informed the parties in paragraph [242] of the substantive determination that no costs submissions would be accepted outside the timetable that had been set, without the prior leave of the Authority. The Respondent was therefore put on notice of the likely consequences of failing to comply with the Authority's costs' timetable directions.

Legal position

[14] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Although costs are discretionary, the discretion must be exercised on a principled basis.

[15] Costs may not be used to punish a party but conduct that has unreasonably increased the other party's costs may be reflected in the amount of costs awarded.

[16] The Authority usually adopts a 'notional daily tariff' based approach to costs. The current tariff is \$4,500 for the first day of an investigation meeting and the \$3,500 for each subsequent day. The notional starting tariff is then adjusted to reflect the particular circumstances of each case.

[17] When assessing costs in this matter the Authority has had regard to the 'costs assessment' principles identified by the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v De Cruz* and *Fagotti v Acme & Co Ltd*.³

Issues

[18] The following issues are to be determined:

- (a) Should the Applicant be awarded costs?
- (b) What costs and disbursements has the Applicant claimed?

³ [2005] ERNZ 808 and [2015] NZEmpC 135.

- (c) What is the notional starting tariff for assessing costs?
- (d) What (if any) adjustments should be made to the notional starting tariff?
- (e) What costs and disbursements should the Applicant be awarded?

Should the Applicant be awarded costs?

[19] There is no reason to depart from the usual principle that a successful party is entitled to a contribution towards their actual legal costs.

What costs and disbursements has the Applicant claimed?

[20] The Applicant said her actual legal costs were \$12,420 and that she had incurred \$746.52 disbursements. She sought an award of \$10,000 costs plus reimbursement of all of her disbursements.

What is the notional starting tariff for assessing costs?

[21] This matter involved a one day investigation meeting. The notional starting tariff for assessing costs was therefore \$4,500.

Should the notional starting tariff be adjusted?

Decrease to notional starting tariff?

[22] The Authority is not aware of any factors that should result in the notional starting tariff being reduced and the parties have not identified any. Accordingly, there are no factors that warrant a reduction being made to the notional starting tariff.

Applicant's submissions

[23] The Applicant submitted the notional starting tariff should be increased to reflect the following factors;

- (a) The Respondent's repeated timetable breaches "*greatly inflated*" the Applicant's actual legal costs;
- (b) The Respondent "*appeared to hinder the Authority's investigation with every engagement*". Examples included (but were not limited to) failures to provide relevant documents or attend the case management conference call and the very

late application for remote attendance by witnesses, and contemptuous and obstructive conduct by Mr Tan during the investigation meeting;

- (c) The Respondent unreasonably rejected a *Calderbank offer* to settle that had been made nearly a year prior to the investigation meeting.

Increase to notional starting tariff?

[24] The Authority's Notice of Direction dated 22 February 2022 at paragraph [27] expressly noted that conduct by a party that unreasonably increased the other party's costs or the unreasonable rejection of a Calderbank offer were factors that could result in adjustments being made to the notional daily tariff;

[25] The Respondent was therefore on notice from the outset of the factors that could potentially impact on an award of costs. Knowing that, the Respondent still elected to proceed in the manner in which it did.

[26] The Authority was satisfied that the factors identified by the Applicant should result in an increase being made to the notional starting tariff.

[27] The *Calderbank* offer was dated 18 August 2021. This was after the Statement of Problem had been filed (on 31 March 2021) but before the first Case Management Conference had been held (on 18 February 2022). It was also made almost a year prior to the investigation meeting that was held on 3 August 2022.

[28] The Applicant proposed to settle her claims for \$8,000 plus a contribution of \$2,500 plus GST towards her legal costs. The offer expressly stated it was a Calderbank offer, so if was not accepted it would be relied on by the Applicant to support an uplift being made to the Authority's notional daily costs tariff if she succeeded with her claims.

[29] Had the Respondent accepted this offer, then the Applicant would not have incurred any legal costs apart from those associated with filing her Statement of Problem. It was therefore appropriate to increase her costs award to reflect that.

[30] The Authority agreed with the Applicant that the Respondent's actions unreasonably increased her actual legal costs.⁴ That conduct also needed to be reflected by an increase being made to the notional starting tariff.

Increase made to notional starting tariff

[31] The Authority has determined it necessary and appropriate to increase the notional starting tariff to \$10,000 to reflect that the Respondent's conduct unreasonably and unnecessarily increased Ms Maheno's actual legal costs.

What if any costs and disbursements should be awarded?

Costs awarded

[32] The Respondent is ordered to pay Ms Maheno \$10,000 plus GST towards her actual legal costs.

Disbursements awarded

[33] Ms Maheno's claim for reimbursements totalling \$746.52 did not succeed. She was entitled to recover \$71.56 from the respondent to reimburse her filing fee.

[34] However, the Authority concluded that her disbursements incurred in connection with the travel of her advocate from Auckland to Kerikeri, overnight accommodation and airport transfers were not recoverable.

[35] Ms Maheno chose to engage an out of town representative, so she should cover those costs herself. It was not appropriate to require the Respondent to reimburse her for her choice of an out of town representative.

[36] The other disbursements claimed that related to "*printing, binding, stationary, general*" involved the normal costs of running a business. These were generalised expenses that Ms Maheno's representative charged her, as opposed to actual disbursements that were incurred with an external third party (such as external printing fee or courier charges). The Respondent should not be required to reimburse generalised office expenses.

⁴ Above n1, at [26] to [83].

Order

[37] Within 28 days of the date of this costs determination the Respondent, Carrington Resort Jade LP, is ordered to pay Ms Maheno \$10,071.56 towards her actual costs and disbursements (consisting of \$10,000 contribution to her legal costs plus \$71.56 to reimburse her filing fee).

Rachel Larmer
Member of the Employment Relations Authority