

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 401  
3104176

BETWEEN	BARBARA-LEE (BARLEE) VAN NIEKERK Applicant
AND	HONEYBUNCH PURE NATURALS NZ LIMITED (IN LIQ) First Respondent
AND	LISA JOLLY Second Respondent

Member of Authority: Nicola Craig

Representatives: Jeremy Lynch, counsel for the applicant  
Lisa Jolly in person and previously as agent for the first  
respondent

Submissions [and further Information] Received: At and associated with the earlier investigation meeting  
and 10 November 2021 and 31 May, 16 September and  
20 December 2022 for the applicant  
At and associated with the earlier investigation meeting  
and 16 September, 16 and 18 December 2022 and 1 and  
11 May and 10 July 2023 for the respondents

Date of Determination: 27 July 2023

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**THIRD DETERMINATION OF THE AUTHORITY**

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**The Authority's process**

[1] Barbara Lee (Barlee) van Niekerk worked for Honeybunch Pure Naturals NZ Limited (now in liquidation) (Honeybunch or the company). Honeybunch's sole director is Lisa Jolly.

[2] A preliminary determination was issued on a question about parties to the proceeding.<sup>1</sup> The Authority then determined that Ms van Niekerk was unjustifiably constructively dismissed by Honeybunch and remedies were awarded.<sup>2</sup> Honeybunch was also ordered to pay Ms van Niekerk arrears of wages for an unlawful deduction. Honeybunch and Ms Jolly did not establish their claims against Ms van Niekerk.

[3] Questions about whether Ms Jolly had obstructed and/or delayed the Authority's investigation and costs were reserved. A timetable was set for the filing of memoranda on costs if the parties were not able to reach agreement.

[4] Ms van Niekerk applied for costs.

[5] Honeybunch and Ms Jolly attempted to file a challenge to the Authority's determination in the Employment Court. This included seeking a stay of the Authority's proceedings. The Authority indicated that the remaining questions would not be progressed until the stay application was concluded. Ms van Niekerk applied to have the statement of claim in the Court struck out.

[6] The company's difficulties with meeting the requirements for a challenge are set out in the Court's interlocutory decision in *Honeybunch Pure Naturals NZ Limited and Lisa Jolly v Barbara-Lee van Niekerk*.<sup>3</sup> The Court gave Ms Jolly a final opportunity to file an amended statement of claim and stated that unless that document was filed and various monetary orders were complied with, Honeybunch's claim would be struck out without further application.

[7] It is not disputed that there was a failure to comply and thus Honeybunch's claim was struck out. The Authority was therefore free to proceed with the remaining questions. The parties were asked to provide any final submissions on the costs and obstruction/delay issues. For Ms van Niekerk, reliance was placed on memoranda and submissions previously filed in the Authority along with a letter containing a costs proposal. Ms Jolly

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<sup>1</sup> *Barbara-Lee (Barlee) van Niekerk v Honeybunch Pure NZ Limited, Honeybunch Pure Naturals NZ Limited and Lisa Jolly* [2020] NZERA 503.

<sup>2</sup> *Barbara-Lee (Barlee) van Niekerk v Honeybunch Pure Naturals NZ Limited and Lisa Jolly* [2021] NZERA 474.

<sup>3</sup> *Honeybunch Pure Naturals NZ Limited and Lisa Jolly v Barbara-Lee van Niekerk* [2022] NZEmpC 81.

then raised a wish to pursue a defamation claim. As previously indicated to her, the Authority does not have jurisdiction over such claims.

[8] Honeybunch was then put into liquidation by order of the High Court. This prevented the Authority continuing any part of the proceeding regarding the company, in the absence of the liquidators' consent or order of the High Court.<sup>4</sup> The Authority indicated it would be pragmatic to deal with the costs question, which potentially concerned Honeybunch and Ms Jolly, after the liquidators' view was obtained.

[9] The liquidators advised that they did not wish to partake in any dispute but were prepared to consent to the claim against the company in liquidation continuing if any party wished that.

[10] In the process of obtaining a copy of the Authority's file, Ms Jolly indicated that she was obtaining representation, naming a representative. Given the prospect of further submissions being sought to be made, the Authority made contact with the identified representative. The firm involved responded that it did not have instructions to represent Ms Jolly personally.

[11] I have considered all the material provided by the parties. However, as permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

### **The issues**

[12] The issues remaining to be determined are:

- (a) Should a penalty be imposed on Ms Jolly for obstructing and/or delaying the Authority's investigation?
- (b) Should a party be required to make a contribution to another party's costs?

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<sup>4</sup> Companies Act 1993, s 248(1)(c).

## **Obstruction and delay**

[13] Under s 134A of the Act a penalty may be imposed on a person who, without sufficient cause, obstructs or delays an Authority investigation. Obstructing an investigation has been defined as including impeding the investigation or making it more difficult.<sup>5</sup>

[14] Ms Jolly denies that she obstructed or delayed the Authority's investigation.

[15] The elements of concern are focused on Ms Jolly making unwarranted and derogatory comments about those involved in the proceeding and indicating that complaints would be raised with other bodies regarding them.

[16] Overall Ms Jolly appeared to be become irritated on occasions, make such comments but then not follow through on them. She occasionally showed insight, for example on one occasion accepting subsequently that she had "overreached" with such a comment.

[17] The Authority deals with a wide range of representatives. Directors of companies are free to represent their company in Authority proceedings. Some representatives have little understanding of the appropriate way to behave in this context.

[18] Ms Jolly is not a professional representative. She was very opposed to the claims being made against her company and at times became outraged that Honeybunch and herself were being pursued. There were elements of her conduct which were inconsiderate and unhelpful. She did not always understand the limits of what is acceptable conduct in the Authority nor the role and obligations of a professional representative.

[19] In addition Ms Jolly identified herself as having had a brain injury some years ago which she reports causes her to have no filter in times of conflict.

[20] There are a relatively small number of Authority findings imposing a penalty under s 134A of the Act. The standard for a finding of obstructive and delaying behaviour warranting a penalty is high. I accept there were elements of Ms Jolly's conduct which

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<sup>5</sup> *Ahuja v Labour Inspector, Ministry of Business, Innovation and Employment* [2018] NZEmpC 31.

made the investigation more difficult. Her behaviour at times approached the level required. However, taking into account all of the above factors, I am ultimately not satisfied that Ms Jolly's imprudent behaviour should be found to warrant the imposition of a penalty. The impact of unreasonable conduct can appropriately be taken into account in the costs assessment below.

[21] Ms Jolly would be wise to seek representation for any further proceedings she or her companies are involved in, rather than face such allegations again. She may find a less lenient approach is taken in future.

### **Costs principles**

[22] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act. There is a wide discretion to award costs, on a principled basis.

[23] The principles guiding the Authority's approach to costs include:

- (a) the statutory jurisdiction to award costs is consistent with the equity and good faith jurisdiction of the Authority;
- (b) equity and good conscience are to be considered on a case by case basis;
- (c) costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased the costs unnecessarily can be taken into account in inflating or reducing an award;
- (d) costs generally follow the event; and
- (e) awards will be modest.<sup>6</sup>

### **Costs submissions**

[24] Ms van Niekerk seeks her full solicitor-client costs of \$14,700 (plus GST, totalling \$16,695). This is on the basis of unreasonable conduct by Honeybunch and Ms Jolly increasing costs unnecessarily, an unmeritorious counterclaim and having to deal with a raft of unsubstantiated allegations from Ms Jolly as representative.

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<sup>6</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

The liquidators for Honeybunch have chosen not to participate in the dispute. I take it from Ms Jolly's comments at various points that she would be strongly opposed to any costs being awarded against the company or her.

### **Costs assessment**

[25] Ms van Niekerk was largely successful in her claims. She did not establish her claim regarding mobile phone provision.<sup>7</sup> An attempt at the investigation meeting to make penalty claims and to draw in Ms Jolly as a person involved in breach of employment standards under s 142W of the Act were assessed as being raised too late in the process but did not generate substantial additional material nor take significant additional time.<sup>8</sup>

[26] Ms van Niekerk was also successful in defending all of Honeybunch and Ms Jolly's claims.<sup>9</sup> These included a mixture of claims which were more in the nature of costs claims, claims for payments for which there was no contractual basis or liability and claims outside the Authority's jurisdiction. Elements of these difficulties were pointed out to Ms Jolly but she chose to proceed.

[27] The starting point is the Authority's notional daily tariff of \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day of hearing. On the basis of full three days this totals \$11,500. Not all days were full days. However, the investigation meeting was heard over three non-consecutive days. The circumstances of this are set out in the previous determination. I accept the point made for Ms van Niekerk that that was not her fault and required additional preparation for her counsel. I therefore proceed from \$11,500.

[28] A basis for a full solicitor-client costs award is not established.<sup>10</sup>

[29] I accept an uplift should be allowed for conduct which unnecessarily increased the costs Ms van Niekerk incurred. There are a number of examples of such conduct.

[30] Ms Jolly, as Honeybunch's representative chose not to attend the final day in person. Rather than seeking the Authority's agreement she simply advised that she was

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<sup>7</sup> Above at n 2, at [ 83] and [84].

<sup>8</sup> Above at n 2, at [13].

<sup>9</sup> Above at n 2, at [92] – [105].

<sup>10</sup> *Bradbury v Commissioner of Inland Revenue* [2015] NZSC 80.

not going attend in person. I accept that her non-attendance in person added some additional time to the meeting as the process was more protracted.

[31] The counterclaim was advanced. Ms Jolly for Honeybunch ought to have known it had little or no prospect of success. Considerable time during the investigation meeting was spent exploring the issues in the counterclaim.

[32] A large number of unsubstantiated allegations were made against others involved in the proceeding. Ms van Niekerk's actual costs reflect the need to respond to or otherwise deal with such allegations.

[33] After an uplift for these factors I consider \$15,000 to be a fair assessment of costs. As there have been no orders made against Ms Jolly personally, the costs award should be made solely against Honeybunch.

[34] I order Honeybunch Pure Naturals NZ Limited (in liq) to pay the following to Barlee van Niekerk within 28 days of the date of this determination:

- (a) \$15,000 as a contribution towards her costs; and
- (b) \$71.56 for the Authority's filing fee.

Nicola Craig  
Member of the Employment Relations Authority