

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 51  
3171422

BETWEEN                      STACEY ROY  
   Applicant  
  
AND                                CARRINGTON RESORT JADE  
   LP  
   Respondent

Member of Authority:        Rachel Larmer  
  
Representatives:              Lawrence Anderson, advocate for the Applicant  
   William Tan, for the respondent  
  
Investigation Meeting:        On the papers  
  
Submissions Received:        16 January 2023 from the Applicant  
   31 January 2023 from the Respondent  
   1 February 2023 from the Applicant  
   1 February 2023 from the Respondent  
  
Date of Determination:        2 February 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Ms Stacey Roy, succeeded with all of her claims (unjustified disadvantage, unjustified dismissal, failure to keep or produce employment records, and wage arrears) against her former employer, Carrington Resort Jade LP (“*the Respondent*”).

[2]     Ms Roy’s matter was investigated by the Authority during an in person investigation meeting that was held in Kerikeri on 5 October 2022. The Authority’s substantive determination was issued on 9 January 2023.<sup>1</sup>

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<sup>1</sup>     *Roy v Carrington Resort Jade LP* [2023] NZERA 4.

[3] Ms Roy, as the successful party, was entitled to a contribution towards her actual legal costs. The Authority encouraged the parties to resolve costs by agreement, with a timetable for the parties to file costs submissions being set, in case agreement was not reached.<sup>2</sup>

[4] Costs were not agreed, so Ms Roy applied to the Authority for a costs order.

### **The Authority's investigation**

[5] The costs application was dealt with 'on the papers'.

[6] Ms Roy filed costs submissions and other information to support her costs claim. The Respondent also filed submissions and sent emails to the Authority in response to information provided by the Applicant.

[7] Both parties responded via an exchange of emails to the Authority's query to Ms Roy on 1 February 2023 regarding clarification of the amount of costs she had actually incurred.

### **The legal position**

[8] 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.

[9] 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.

[10] 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.

[11] 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*.<sup>3</sup>

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<sup>2</sup> Above n1, at [180] to [183] and [185](i).

<sup>3</sup> *PBO Ltd v De Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

**Issues**

[12] The following issues were to be determined:

- (a) Should Ms Roy be awarded costs?
- (b) What costs and disbursements has Ms Roy claimed?
- (c) What was 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 Ms Roy be awarded?

**Should Ms Roy be awarded costs?**

[13] 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 Ms Roy claimed?**

[14] The Applicant produced two invoices to the Authority. The first invoice dated 2 May 2022 was for \$345 GST inclusive. The second invoice dated 9 January 2023 was for costs and disbursements that totalled \$15,106.05 GST inclusive.

[15] In her submissions the Applicant said her total disbursements were \$558.41. The Authority noted that amount had not included GST or the \$71.56 filing fee Ms Roy had paid to lodge her Statement of Problem.

[16] Ms Roy sought an award of \$7,000 plus GST towards her actual costs along with reimbursement of \$558.41 of the disbursements she had been invoiced on 9 January 2023.

**What was the notional starting tariff for assessing costs?**

[17] This matter involved a two and a half hour investigation meeting, because the Respondent and its witnesses did not turn up. As advised in the substantive determination, on a pro rata basis, the notional starting tariff for assessing costs was therefore \$1,875.

**Should the notional starting tariff be adjusted?***Decrease to notional starting tariff?*

[18] The Respondent submitted that Ms Roy should not be awarded any costs because she had already been awarded money in the substantive determination. That submission was not accepted, Costs normally follow the event, which is what should occur in this matter.

[19] The Respondent also claimed Ms Roy had not actually incurred any costs or alternatively if she had, then not the amount she had recorded in her submissions. That submission was not accepted.

[20] Specific inquiries were made with Ms Roy's advocate who confirmed that she had actually incurred the legal costs and disbursements she had been invoiced for and that she was required to pay costs to her advocate in accordance with those invoices.

[21] Ms Roy's advocate also informed the Authority that although he had been engaged under a 'no win no fee' arrangement that provided for Ms Roy to pay costs equal to one third plus GST of the money she had recovered, her actual invoices had been slightly reduced to bring them more in line with the extent of the work that had been undertaken. The Authority finds there was no issue with that having occurred.

[22] The Authority was satisfied Ms Roy had incurred costs and disbursements, so was entitled to receive a contribution from the Respondent towards those actual costs.

[23] There were no factors that should result in the notional starting tariff being reduced.

*Ms Roy's submissions*

[24] Ms Roy submitted the notional starting tariff should be increased due to the following factors which had all increased her actual costs;

- (a) The start of the substantive investigation meeting was delayed while attempts were made to contact Mr Tan;
- (b) The Respondent's failure to provide any employment records (an updated employment agreement, wage and time records, or holiday and leave records) resulted in more time being required to quantify her claims, including her wage

arrears claim, in calculating the unlawful deductions made from her wages and the outstanding annual holiday pay she was owed;

- (c) The Respondent's breaches of the Authority's directions resulted in Ms Roy having to file an Amended Statement of Problem, after she had finally received some (very limited) payroll information, that had enabled her to better calculate what she believed she was owed;
- (d) Ms Roy's representative wasted time preparing to question seven of the Respondent's witnesses who had provided witness statements, when none of them turned up to the substantive investigation meeting;
- (e) The Respondent failed to provide documents that supported the claims made against Ms Roy in the witness statements it filed. Ms Roy spent considerable time with her advocate responding to all of the allegations that had been made against her, the details of which had not previously been disclosed to her;
- (f) Ms Roy incurred the time and travel costs and overnight accommodation associated with her advocate travelling from Auckland to attend the investigation meeting in Kerikeri in person. This was originally scheduled to be a two day investigation meeting, on the basis there would be eight witnesses attending in person to be questioned about their evidence. Ms Roy said that if they had known that none of the Respondent's witness would be attending, then she would have asked for the meeting to be conducted remotely in order to save costs, which would be disproportionate to the time that would be involved in an investigation meeting that only one party participated in;
- (g) Ms Roy said she had to file submissions after the investigation meeting to give her time to properly quantify the remedies and other amounts she had sought. She sought the additional costs associated with filing submissions in such circumstances, given the lack of employment documents disclosed to her.

#### *The Respondent's submissions*

[25] The Respondent's submissions did not address the claim that its actions had unnecessarily and unreasonably increased Ms Roy's actual costs.

[26] The Respondent's submissions to the effect that because Ms Roy was going to pay her advocate out of the money she had been awarded by the Authority she should not be awarded

costs did not succeed. How and when Ms Roy pays her costs is a matter between her and her advocate. What was important for the purposes of assessing costs was for the Authority to be satisfied that Ms Roy had not claimed costs in excess of the costs she had actually incurred.

*Increase to notional starting tariff?*

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

[28] The Respondent's failure to comply with the Authority's directions or to engage with the Authority's repeated and ongoing attempts to contact it increased Ms Roy's actual costs. All of these additional attempts to engage the Respondent were copied, or reported, to Ms Roy's advocate, thereby increasing the time spent on this matter and accordingly her actual legal costs.

[29] The Authority finds that the manner in which the Respondent elected to conduct itself unreasonably and unnecessarily increased Ms Roy's actual legal costs.<sup>4</sup> It was therefore appropriate for such conduct to be reflected in an increase being made to the notional starting tariff.

[30] The Authority determined it necessary and appropriate to increase the notional starting tariff from \$1,875 to \$7,000 to reflect that the Respondent's conduct unreasonably and unnecessarily increased Ms Roy's actual legal costs.

**What if any costs and disbursements should be awarded?**

*Costs awarded*

[31] The Respondent is ordered to pay Ms Roy \$7,000 plus GST of \$1,050 towards her actual legal costs.

*Disbursements*

[32] Ms Roy's claim for disbursements totalling \$558.41 did not entirely succeed. The disbursements (excluding GST) claimed had included:

- (a) \$76.07 printing costs;

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<sup>4</sup> Above n1, at [26] to [83].

- (b) \$133.04 one night accommodation for her advocate;
- (c) \$349.30 travel costs based on the IRD rate for a return trip of 484 km.

[33] The Authority's view was that the disbursements Ms Roy incurred in connection with her advocate's travel to and from Auckland to Kerikeri, along with the costs of his overnight accommodation, were not recoverable.

[34] Ms Roy 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.

[35] The Authority noted that, although not specifically claimed in Ms Roy's submissions, there was an invoice attached to her submissions dated 2 May 2022. This invoice was for \$345 GST inclusive, and was stated to be for Non-refundable "*ERA filing fee*".

[36] However, that amount of \$345 GST inclusive was not awarded as a separate disbursement, because the Authority's filing fee was \$71.56.

[37] It was therefore unclear what the balance of that \$345 invoice related to, but it must have included some other legal work that her advocate had done for her. If so, then that legal work would have been covered by the costs Ms Roy has been awarded.

[38] Ms Roy was entitled to be reimbursed \$71.56 for her filing fee.

[39] Ms Roy was also entitled to recover \$76.07 plus GST of \$11.41 for her actual printing costs, as these had been incurred with an external third party (and separately invoiced to her), so were not simply her advocate's normal 'office charges' or normal 'business expenses'.

[40] Ms Roy was therefore awarded reimbursement of disbursements totalling \$159.04.

## **Order**

[41] Carrington Resort Jade LP is ordered to pay Ms Roy a total of \$8,209.04 towards her actual costs and disbursements (consisting of \$7,000 towards her actual legal costs plus \$1,050 GST on those recoverable legal costs, plus \$71.56 to reimburse her filing fee plus \$87.48 GST inclusive to reimburse her externally incurred printing costs).

[42] The Respondent is ordered to pay Ms Roy the \$8,209.04 she has been awarded towards her actual costs and disbursements within 28 days of the date of this costs determination.

[43] In accordance with the Authority's power under clause 11 of Schedule 2 to the Employment Relations Act 2000, any part of the \$8,209.04 that the Respondent has not paid to Ms Roy within 28 days of the date of this determination will attract interest.

[44] In such circumstances, interest will run from day 29 after the date of this determination until the \$8,209.04 Ms Roy has been awarded, plus any interest that must be paid on that amount, has been paid to her in full.

[45] The amount of interest payable by the Respondent is to be calculated in accordance with the provisions of the Interest on Money Claims Act 2016, using the Civil Debt Calculator that is on the Ministry of Justice website.

**Rachel Larmer**  
**Member of the Employment Relations Authority**