

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OUTATAHI ROHE**

[2024] NZERA 146
3213619

BETWEEN

JACKIE HARTE
Applicant

AND

MIDWIFERY EMPLOYEE
REPRESENTATION AND
ADVISORY SERVICE
INCORPORATED
Respondent

Member of Authority: David G Beck

Representatives: Luke Acland, counsel for the Applicant in person
Simon Mitchell KC, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 23 February 2024 from the Applicant
26 February 2024 from the Respondent

Date of Determination: 12 March 2024

COSTS DETERMINATION OF THE AUTHORITY

The Determinations

[1] In a 7 February 2024 determination, I found that Jackie Harte had not sufficiently made out her personal grievance claims to warrant any compensatory remedies.¹ I, however,

¹ *Jackie Harte v Midwife Employee Representation and Advisory Service* [2024] NZERA 65.

did find that the Midwifery Employee Representation and Advisory Service Incorporated (the Union) breached an obligation of good faith it owed to Ms Harte by failing to remain neutral during an employer investigation but in all the circumstances, I found that a penalty was not appropriate. In addition, although not claimed by Ms Harte, I made a recommendation pursuant to s 123(1)(ca) of the Employment Relations Act 2000 (the Act) that the Union produce guidelines for the use of their staff to follow during inter-member conflict, including how to handle anonymous complaints. I also recommended the production of separate guidelines for distribution to union members detailing what can be expected of the union when they handle inter-member conflict.²

[2] I reserved costs and encouraged the parties to agree on such. No agreement was achieved.

[3] The matter was initially set down for a two-day investigation meeting on 27-28 November 2023 but counsel for the Union inadvertently failed to diary the first meeting day but was able to attend on the second day. The investigation meeting was concluded on the latter day with submissions being timetabled that were received on 8 December 2023. An AVL meeting was held on 15 December to allow counsel to expand on their submissions.

Submissions from the parties

[4] Mr Acland's submission concentrated on a claim for tariff-based costs for one and a half days. Ms Acland based a claim for an additional half day of costs associated with the abandoned first day of the investigation meeting and the AVL meeting being required. In total \$6,750 was claimed. While Mr Acland acknowledged Ms Harte failed to obtain any financial remedies, he suggested the finding of a breach of good faith and the recommendations made by the Authority was sufficient to establish "success" and that costs, on principle, should follow such. Mr Acland emphasised that although not claimed during Ms Harte's pursuit of remedies at the Authority, the recommendations mirrored what Ms Harte had sought in open correspondence with the union.

² Ibid at [60].

[5] In contrast, the Union's counsel, Mr Mitchell's submission pointed to Ms Harte's lack of success in obtaining compensatory remedies and that many of Ms Harte's claims had failed. Mr Mitchell suggested overall the union had successfully defended the application brought by Ms Harte and this was justification for either awarding costs in favour of the Union or letting costs lie where they fall. In also citing open correspondence between the parties, Mr Mitchell noted Ms Harte turned down a reasonable and timely offer from the Union made on 22 December 2022, in the sum of \$7,500 which sum included a \$2,500 contribution to legal costs.

Costs principles

[6] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Act. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ including those costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.⁴ These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.

The dilemma of 'mixed success'

[7] To assess costs where one party as is here has only very limited success can be problematic as it is arguable that Ms Harte's success was marginal as she failed to establish her predominant claims for compensatory remedies.

[8] The Employment Court in *William Coomer v JA McCallum and Son Limited* noted (omitting citations):

Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any 'realistic appraisal'. That conclusion followed because they obtained a

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁴ Section 160(2) Employment Relations Act 2000.

monetary award It was immaterial that they had not succeeded to the full extent of their claim because' ... success on more limited terms is still success.⁵

Assessment

[9] Taking all the factors identified in submissions into account and applying the Authority's discretion and guidance from the court authority cited above, I consider that costs should lie where they fall. I was not persuaded that the abandoned first day of the investigation meeting led to additional costs being actually incurred beyond what was already envisaged for a two-day investigation meeting. In the event, the submissions were by agreement, timetabled to allow the parties to reflect better on the evidence given during the investigation meeting and this was a mutually beneficial pause in proceedings.

[10] Likewise, despite the Union successfully resisting Ms Harte's compensatory claims I consider it would be inequitable in all the circumstances to award costs in their favour.

Awards

[11] I make no costs order.

David G Beck
Member of the Employment Relations Authority

⁵ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].