

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 195
3166181

BETWEEN	ROHEENI BHANA Applicant
AND	HEALTH MANAGEMENT SYSTEMS LIMITED First Respondent
AND	PETER GOOTJES Second Respondent
AND	HAMISH MACDONALD Third Respondent
AND	MATTHEW VALENTINE Fourth Respondent

Member of Authority:	Philip Cheyne
Representatives:	Simon Greening, counsel for the Applicant Diana Hudson, counsel for the Respondents
Submissions Received:	3 April 2024 from the Applicant 15 March 2024 from the Respondents
Date of Determination:	5 April 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] In an earlier determination,¹ I found that Roheeni Bhana was not an employee so the Authority had no jurisdiction to investigate and determine her claims. Costs were reserved. I

¹ *Bhana v Health Management Systems Limited & ors* [2024] NZERA 119.

now have the respondents' submissions in support of a claim for costs and a response for Ms Bhana. This determination resolves the question of costs.

Indemnity claims

[2] Ms Bhana's claimed personal grievances, arrears and penalties against Health Management Systems Limited and penalties against the other respondents. All respondents were represented by the same counsel.

[3] Tax invoices directed to the company show legal fees of \$22,920.00 were incurred in response to Ms Bhana's claims in the Authority. There is a further claim for \$1,687.98 to cover counsel's travel, parking, accommodation and meal expenses. These fees and expenses are claimed in full.

[4] Drs Gootjes & Valentine appeared in person. They claim airfares and mileage respectively, accommodation, meals and taxis. They also claim "Lost" income or annual leave. The amounts total \$4,521.17 and \$3,665.57. Mr McDonald appeared by AVL. His claim is for "Lost" earnings of \$600.00.

Indemnity costs should not be awarded

[5] The Authority may order a party to pay another party such costs and expenses (including expenses of witnesses) as is considered reasonable.² The Authority's discretion should be exercised on a principled basis.

[6] In *Johnston v Fletcher Construction Company Ltd*,³ the Employment Court said that indemnity costs generally require "exceptionally bad" behaviour. The Court there was dealing with a claim for indemnity costs following the party's success on interlocutory matters. Costs were fixed in accordance with the Court's scale as there were no grounds for indemnity costs. The hurdle to support a claim in the Authority for indemnity costs would be at least as high.

² Employment Relations Act 2000, Schedule 2 cl 15.

³ *Johnston v Fletcher Construction Company Ltd* [2018] NZEmpC 18 at [5].

[7] There is a submission that there was no legal basis for proceedings against Drs Gootjes & Valentine and Mr McDonald. I do not agree with the submission. If Ms Bhana had been an employee, penalties against them might have been available.

[8] There is a submission that delays meant that the respondents' evidence had to be "revisited" a number of times and again in preparation for the investigation meeting.

[9] Delay can be summarised as follows. At a first case management conference in August 2022 with both representatives, a preliminary investigation process was scheduled to consider whether Ms Bhana was an employee, as suggested for the respondents. Ms Bhana did not comply with initial timetable steps. In the second of two February 2023 case management conferences, I consented to the respondents' request and adjourned the March 2023 investigation meeting dates because the respondents would not have had time to prepare statements of evidence. Ms Bhana was directed to complete the preparatory steps, following which another date would be scheduled.

[10] Ms Bhana was then no longer represented but took the necessary steps. By June 2023, new dates were able to be scheduled and a timetable set. The respondents lodged statements of evidence thereafter.

[11] Ms Bhana instructed counsel to represent her in time for the investigation meeting in November 2023.

[12] I accept that Ms Bhana's non-compliance with timetabling caused an element of double-handling and extra time in the sense that counsel would have had to re-familiarise herself with the file. Counsel also had to attend additional case management conferences. However, Ms Bhana's non-compliance falls far short of "exceptionally bad" behaviour. Delay does not merit indemnity costs.

[13] In April 2023, Ms Bhana lodged a witness statement for Paul Tomlinson with attachments. Together, there was a substantial volume of material. There is a submission that this "enormous quantity" of material was "all largely irrelevant" to the claim, but still needed to be examined and responded to by the respondents. However, I agree with counsel for Ms

Bhana that the case had a background of a business merger, with Ms Bhana asserting that the nature of her relationship with the company changed after the merger. Mr Tomlinson's evidence and exhibits concerned the merger, how it played out and Ms Bhana's involvement in that. The evidence, the material and the respondents' evidence in reply in all assisted with context. The inclusion of Mr Tomlinson's evidence and attachments is not a ground for an award of indemnity costs.

[14] In the absence of grounds for an award of indemnity costs, I turn to consider costs on a standard approach.

Application of a daily tariff approach to assessing costs

[15] The respondents were successful. Ms Bhana accepts there should be an award of costs in their favour and I agree.

[16] In the ordinary course, a successful party cannot recover as costs, an additional payment from the unsuccessful party to cover their lost business opportunities or a payment to cover their use of a holiday entitlement to attend an investigation meeting. Opportunities foregone would not typically be regarded as "costs" or "expenses" under clause 15 of Schedule 2 to the Employment Relations Act 2000. I decline to make an award to cover that part of the claim for Drs Gootjes & Valentine and Mr McDonald.

[17] The application was treated by the Authority as having been lodged in the Christchurch office, but Ms Bhana's original representative lodged in the Auckland office. The Auckland office was reasonably regarded by the applicant as the closest to where events arose, given Ms Bhana typically worked from home. In any event, the investigation meeting was set for Auckland, without objection from the respondents.

[18] Two points arise from the investigation having been scheduled in Auckland. Drs Gootjes & Valentine seek to recover travel and accommodation costs, having travelled to attend the investigation meeting. However, it is not the Authority's standard practice to include in costs awards an addition sum to reimburse the party's travel and accommodation costs incurred

in attending an investigation meeting. There is no specific reason in the present case to depart from that approach.

[19] The second point is that the respondents' expenses claim to cover counsel's costs for travel, accommodation and meals. The company's registered office is in Dunedin and Dr Gootjes is based there. That may be why the respondents engaged Dunedin based counsel.

[20] The respondents are entitled to engage counsel of their choice. However, time and accommodation costs incurred by engaging out-of-town counsel are usually not recoverable in a costs award, in the absence of a special reason.⁴ There was no special reason in the present case. I decline to make an award of expenses to cover this part of counsel's invoice.

[21] There is a submission that the respondents were not able to change travel plans, even though the investigation meeting did not extend into the second scheduled day. As the travel cost is not recoverable in any event, it is not necessary to comment on the point.

[22] The investigation meeting took most of the first day. I arranged for submissions in writing to be exchanged on a timetable. If we had dealt with submissions as part of the investigation meeting, it would have continued into the second day. The work required for submissions would be reasonably recognised by treating the matter as a one-and-a-half-day investigation meeting for the purposes of assessing costs on the Authority's usual daily tariff basis.

[23] Applying the daily tariff as above, I fix \$6,000.00 the appropriate.

Conclusion

[24] Drs Gootjes & Valentine and Mr McDonald have not established the basis for a costs award in their favour. Only the company has provided invoices showing fees charged for legal representation. It is entitled to costs.

⁴ *Baker v St John Central Regional Trust Board* [2013] NZEmpC 109.

[25] Roheeni Bhana is to pay Health Management Systems Limited costs of \$6,000.00 within 28 days of the date of this determination.

Philip Cheyne
Member of the Employment Relations Authority