

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 332
3141361

BETWEEN

CHRISTINE RANKIN
Applicant

AND

TRANSFORMING JUSTICE
FOUNDATION
First Respondent

SCOTT GUTHRIE
Second Respondent

RODNEY FINCH
Third Respondent

KIRSTEN HARPER
Fourth Respondent

SUSAN KAY FREEMAN
Fifth Respondent

NICOLA O'LEARY
Sixth Respondent

Member of Authority: Marija Urlich

Representatives: Max Whitehead, advocate for the Applicant
Jenny Murphy, advocate for the First, Third – Sixth
Respondents
Scott Guthrie, in person

Information received: Up to and including 12 May 2024

Investigation Meeting: On the papers

Determination: 7 June 2024

DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 11 March 2024 which required Mrs Rankin and Transforming Justice Foundation (TJF) to seek to agree the calculation of

wage and holiday pay arrears, with leave to seek a determination of the Authority if agreement was not able to be reached. In the same determination, Mrs Rankin's claims of aiding and abetting breach of the employment agreement and leave to bring claims for personal liability against Mr Finch, Ms Freeman and Mr Guthrie were successful only against Mr Guthrie.¹ Costs were reserved and a timetable set if the parties were unable to resolve this issue themselves which they advise has not been possible. In an earlier determination the Authority found Mrs Rankin was an employee of TJF.² Costs were reserved in that matter.

[2] Mr Finch, Ms Freeman, Ms Harper and Ms O'Leary seek by way of memorandum filed and served a contribution to costs from Mrs Rankin. Mrs Rankin filed a memorandum in reply seeking an order for costs against TJF. Mr Guthrie has also filed a memorandum concerning costs.

Costs principles

[3] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- 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 costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Costs are judged against a notional daily tariff.

¹ *Christine Rankin v Transforming Justice Foundation & Ors* [2024] NZERA 145.

² *Christine Rankin v Transforming Justice Foundation & Ors* [2023] NZERA 420.

Mrs Rankin's claim for costs

[4] Mrs Rankin seeks a costs award of \$16,000 against TJF – the tariff rate for four days of investigation meeting. She has provided an invoice dated 7 May 2024 which appears to record all attendances in relation to this employment relationship problem including mediation and totals \$29,900. On 12 May 2024 a further invoice was filed with the Authority by a different advocacy service to that named on the 7 May invoice recording \$9,000 had been charged to Mrs Rankin for services provided in relation to this matter.

[5] Mrs Rankin submits in equity and good conscience that no costs order should be made against her because she was seeking unpaid wages, she was successful in her claim as to status and for wages and those wages remain unpaid. She also submits without prejudice save as to costs offers made in November 2021 are valid and relevant to the Authority's assessment of costs:

- (i) on 3 November 2021 she made a 'walk away' offer to Ms Harper and Ms Williams;
- (ii) on 11 November 2021 she made a without prejudice save as to costs settlement offer to TJF, Mr Guthrie, Mr Finch, Ms Harper, Ms Freeman and Ms Williams for a payment of \$25,000 (gross).

Mr Finch's claim for costs

[6] Mr Finch seeks an award of \$15,700, as a contribution to actual costs incurred of \$15,897.20. Invoices in support have been provided. He submits an award of \$15,700 is warranted given:

- he successfully defended the claim brought personally against him;
- the costs incurred were necessary and reasonable given he was named as a respondent party from the outset and continuously through these proceedings;
- unnecessary costs were incurred when he was required to change representative when Ms Harper, TJF's then solicitor was named as a respondent party, the broad and varied nature of the claims, matters concerning the origin of evidence and filing of relevant material outside the directed timetable;

- he made a valid without prejudice save as to costs offer on 27 October 2021 following the parties attendance at mediation on 19 October 2021 which was unreasonably rejected; and
- he made a reasonable attempt to resolve costs in March 2024 which had it been accepted would have avoided his incurring further costs of \$450.

Ms Freeman's claim for costs

[7] Ms Freeman also seeks an award of \$15,700, as a contribution to actual costs incurred of \$15,897.20. Invoices in support have been provided. Her submissions in support are similar to those of Mr Finch.

Ms Harper's claim for costs

[8] Ms Harper has incurred total costs of \$8,397.20 in respect of this matter. This sum includes costs incurred in attending mediation. She seeks an award of indemnity costs. Ms Harper's involvement with TJF was as a legal adviser from January 2021 and submits it was nonsensical and vexatious for Mrs Rankin to name her as a respondent party because she had no connection or control over the matters in dispute. For completeness the claim Mrs Rankin brought against Ms Harper was aiding and abetting a breach of her employment agreement. Further she submits a robust approach should be taken to the uplift of costs because a valid without prejudice save as to costs settlement offer was made, along with the other respondents less Mr Guthrie, on 27 October 2021, this offer was unreasonably rejected as was a reasonable offer made to Mrs Rankin to settle her costs claim for \$7,500 in March 2024.

Ms O'Leary's claim for costs

[9] Ms O'Leary also seeks an indemnity costs award of \$8,397.20. Her submissions are similar to those made by Ms Harper with the additional factual matter that she did not attend the key meeting on 17 May 2020. She submits there was no reasonable basis for a claim of aiding and abetting to be brought against her.

Mr Guthrie's comments

[10] Though no costs award was sought against or by him, Mr Guthrie sought and was granted leave to file a memorandum as to costs. He says a costs order should not be made against Mrs Rankin because she was successful in her claim to be recognised as an employee and is simply asking for her wages to be paid.

Costs analysis

[11] As referred to above, to date, two determinations have been issued in respect of this employment relationship problem. Mrs Rankin was the successful party in the first determination which found she was an employee of TJF (the preliminary determination). She was also successful in the second determination to the extent her arrears claim was upheld, subject to calculation, as were claims of aiding and abetting and leave under s 142Y against Mr Guthrie. The aiding and abetting a breach and s 142Y claims brought against Mr Finch and Ms Freeman were unsuccessful. Those claims were not the focus of the Authority's inquiry until the second investigation and subsequent determination. Mr Finch and Ms Freeman's involvement in the first investigation meeting was as witnesses as was Ms Harper and Ms O'Leary. TJF has not sought an award to reimburse for example, executive witness time. That said, it is accepted Mr Finch, Ms Freeman, Ms Harper and Ms O'Leary have incurred costs which stretch back to investigation of the preliminary issue given they were personally named as respondents at the outset (or near outset), had to file statements in reply, amended statements in reply as necessary and would have incurred costs in respect of matters concerning the first investigation and subsequent determination.

[12] Mrs Rankin withdrew her claims against Ms Harper and Ms O'Leary on 9 September 2023 approximately four days after timetabling directions were made for the second investigation meeting. They reserved their position as to costs. It is accepted they have incurred costs in defending claims brought against them personally which were later abandoned.

[13] The notional daily tariff is a starting point. The applicable daily tariff is \$4,500.00 with each subsequent day at \$3,500.00. This matter involved total investigation meeting time of 2 and a half days.³ The appropriate starting point for costs for this matter is therefore \$9,750.

[14] Mrs Rankin was successful in her claims against TJF. She is entitled to a costs award in her favour against that entity. A decrease in the starting point of a day is warranted given most of the second investigation meeting was focussed on the claims

³ The first investigation meeting was a full day and the second required a day and a half hearing time.

Mrs Rankin brought against Mr Guthrie, Mr Finch and Ms Freeman. The impecuniosity of TJJ and Mrs Rankin's knowledge of such, is not, in this matter, a factor warranting a further decrease. A costs order of \$7,000 is made against TJJ. The order is made in the knowledge of TJJ's current status.

[15] Ms Harper and Ms O'Leary are entitled to costs awards of \$3,000 each to reimburse them for the costs they have incurred in respect of the claims brought against them personally. The most significant factor weighing in respect of this is the early stage at which they were named as respondent parties, the costs they have incurred since those dates and the abandonment of the claim after a significant portion of those costs were incurred. No significant weight can be put on Mrs Rankin's without prejudice save as to costs offers made to them – the offers were 'walk away offers' and Ms Harper and Ms O'Leary continued to incur costs after the date of offer because they remained respondent parties. Costs for the attendance at mediation are not allowed – it was appropriate for all the parties to attend mediation. An award of indemnity costs is not warranted. This matter is not in a category which would warrant such an award.

[16] Mr Finch and Ms Freeman are entitled to costs awards of \$5,000 each. It is accepted they have incurred costs throughout the life of these proceedings before the Authority. The claims against them personally took about one day's investigation meeting time plus an uplift for the costs they have incurred throughout. The without prejudice save as to costs offer is not a relevant factor because it was a walk away offer from the arrears claim and Mrs Rankin has been successful in that aspect of her claim.

[17] Costs awards for costs submissions is not appropriate.

Outcome

[18] Transforming Justice Foundation is ordered to pay Christine Rankin \$7,000 as a contribution to costs incurred.

[19] Christine Rankin is ordered to pay Kirsten Harper and Nicola O'Leary \$3,000 each as a contribution to costs incurred.

[20] Christine Rankin is ordered to pay Susan Freeman and Rodney Finch \$5,000 each as a contribution to costs incurred.

Marija Urlich
Member of the Employment Relations Authority