

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 351
3248339

BETWEEN CAITLYN SMYTHE
 Applicant

AND ERNESTINA BONSU-MARO
 T/A EBM MODELS
 Respondent

Member of Authority: Rachel Larmer

Representatives: Jonothan Whyte, counsel for the Applicant
 Respondent in person

Investigation: On the papers

Submissions and Other 5 May and 17 June 2025 from the Applicant
Information Received: 16 May 2025 from the Respondent

Date of Determination: 18 June 2025

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 7 April 2025 the Authority issued a substantive determination in favour of the applicant, Ms Caitlyn Smythe against the respondent Ms Ernestina Bonsu-Marou trading as EBM Models.¹

[2] Ms Bonsu-Marou was ordered to pay Mr Smythe \$28,782.60. Penalties of \$6,000.00 were also imposed on Ms Bonsu-Marou for breaches of minimum code legislation.

¹ *Smythe v Bonsu-Marou t/a EBM Models* [2025] NZERA 197.

[3] The Authority determined that the parties were in an employment relationship, as defined by s 6 of the Employment Relations Act 2000 (the Act). Ms Bonsu-Marou was found to have breached the Act by failing to provide Ms Smythe with a copy of her signed employment agreement when Ms Smythe asked her on multiple occasions for a copy of it. Ms Bonsu-Marou also failed to keep, or produce on request, any of the legally required employment records for Ms Smythe.

[4] Ms Bonsu-Marou breached her good faith obligations to Ms Smythe, as required by s 4 of the Act. Ms Bonsu-Marou also failed to pay Ms Smythe for the work she had done on Ms Bonsu-Marou's instructions. Ms Bonsu-Marou was found to have unjustifiably dismissed Ms Smythe in response to her attempts to address the various statutory and contractual breaches that had been occurring.

[5] Ms Bonsu-Marou had penalties imposed on her for breaches of the Act, the Holidays Act 2003, the Wages Protection Act 1983 and the Minimum Wages Act 1983. Half of the total penalties imposed were to be paid to Ms Bonsu-Marou directly, with the balance to be paid to the Crown bank account.

[6] The parties were encouraged to resolve costs by agreement but, despite Ms Smythe's attempt to do so, that did not occur.

[7] Ms Smythe now seeks an award of costs "in the region of \$16,000.00 to \$20,000.00" for her substantive claim plus disbursements, along with an award of "not less than \$1500.00 up to indemnity costs" for this costs application.

The Authority's investigation

[8] Ms Smythe lodged costs submissions and she provided copies of invoices for her legal costs and the disbursements she had incurred.

[9] Ms Bonsu-Marou informed the Authority on 16 May 2025 that she would not be lodging any costs submissions.

[10] Costs were determined 'on the papers'.

Legal position

[11] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Act.

[12] Costs are discretionary, with the discretion to be exercised by the Authority on a principled basis. An unsuccessful party will normally be required to contribute towards the successful party's actual legal costs.

[13] There was no reason for this matter to depart from the usual principle that a successful party is entitled to a contribution towards their actual legal costs. Ms Smythe, as the successful party, is therefore entitled to a contribution towards her actual legal costs from Ms Bonsu-Maró.

[14] Costs must not be used to punish a party, or to express disapproval of a party's conduct, unless that conduct had increased the other party's actual legal costs unnecessarily. However, conduct by one party that has unreasonably increased the other party's actual legal costs may be reflected in the amount of costs that are awarded.²

[15] The Authority usually adopts a notional daily tariff based approach to costs. The current tariff is \$4,500.00 for the first day of an investigation meeting and \$3,500.00 for each subsequent day. The notional starting tariff is then adjusted to reflect the particular circumstances of each case. That approach has been adopted in this case.

[16] When assessing costs in this matter the Authority has had regard to the costs assessment principles identified by the Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz* and *Fagotti v Acme & Co. Limited*.³ These factors are so well known, and are accessible on the Authority's website, so there is no need to set them out again here.

Issues

[17] The following issues are to be determined:

- (a) What legal costs and disbursements did Ms Smythe actually incur?

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808.

³ *PBO Ltd* above n2, and *Fagotti v Acme & Co. Limited* [2015] NZEmpC 135.

- (b) What is the notional starting tariff for assessing costs in this matter?
- (c) Should the notional starting tariff be reduced?
- (d) Should the notional starting tariff be increased?
- (e) What legal costs should Ms Smythe be awarded?
- (f) What disbursements should Ms Smythe be awarded?
- (g) Should interest be awarded?

What costs and disbursements did Ms Smythe actually incur?

[18] As per invoices submitted to the Authority, Ms Smythe's actual legal costs for the substantive matter were \$43,876.07 including GST plus she incurred total disbursements of \$1,846.33 including GST. Ms Smythe also incurred actual legal costs of \$3,489.10 including GST for this costs application.

[19] Ms Smythe's total actual legal costs in connection with these proceedings were therefore \$49,211.50, consisting of actual legal costs of \$47,365.17 plus disbursements of \$1,846.33. These amounts represent the maximum Ms Smythe could potentially recover, as she cannot be awarded more in legal costs than she has actually incurred.

[20] However, costs in the Authority are expected to be modest. That is why parties are encouraged to undertake a realistic 'risk versus reward' assessment prior to an investigation meeting.

What is the notional starting point for assessing costs?

[21] During a case management conference held on 7 March 2024, Ms Smythe's substantive claims were set down for a two-day in-person investigation meeting (IM) on 3 and 4 October 2024.

[22] Although this matter could have been heard earlier, the Authority elected to schedule the investigation meeting in October in order to give Ms Bonsu-Maró six months after the birth of her baby to be able to take legal advice and prepare her evidence.

[23] For the reasons set out in paragraphs [14] to [23] of the substantive determination, the two day IM in October 2024 as not completed during the scheduled time.⁴

[24] That meant the IM had to be split into two periods of time that occurred ten weeks apart. The first day of the IM (that Ms Bonsu-Marou arrived late to and then abruptly departed early from) was held on 3 October 2025. Due to availability issues the second day of the IM could not be held until 12 December 2025. Ms Bonsu-Marou again unexpectedly and abruptly departed from the second day of the IM, but on that occasion she rejoined the IM by Teams that afternoon in order to complete the Authority's investigation.

[25] Accordingly, the notional starting tariff for assessing costs in this matter is \$8,000.00. This amount represents the notional starting tariff for a two-day IM, being \$4,500 for the first day plus \$3,500.00 for the second day of the IM.

Should the notional starting tariff be decreased?

[26] Neither party identified any reasons why the notional starting tariff should be decreased.

Should the notional starting tariff be increased?

[27] Ms Smythe's submissions set out a number of reasons why she said the notional starting tariff of \$8,000.00 should be increased.

[28] The following matters warrant a substantial uplift being made to the notional starting tariff, on the basis Ms Bonsu-Marou's acts and omissions unreasonably increased Ms Smythe's actual legal costs. Examples of such conduct included:

- (a) Repeated and ongoing failure to communicate with or respond to the Authority attempts to communicate with her;
- (b) Repeated breaches of timetable directions, and of extended timetables that had been varied in order to facilitate Ms Bonsu-Marou's participation in the Authority's investigation;
- (c) Ms Bonsu-Marou failed to produce relevant documents, requiring time to be spent during the investigation meeting exploring what documents did

⁴ *Smythe v Bonsu-Marou*, above n1.

and did not exist, where they were and why they had not been provided. She was also given more time after the IM to produce relevant documents which she claimed to have but had not provided, however that did not occur;

- (d) Failure to adequately address in her witness statement the specific matters being investigated. The issues to be addressed were set out in the Authority's directions, which Ms Bonsu-Marou had a copy of. Despite considerable time and effort being expended by the Authority to get Ms Bonsu-Marou to lodge a witness statement that addressed all relevant matters, that did not occur;
- (e) The witness statements Ms Bonsu-Marou lodged for her other witnesses who gave evidence on her behalf did not address the material facts, or issues to be determined, so extra time was required during the IM to obtain, when it should have been provided in their witness statements;
- (f) Ms Bonsu-Marou drip-fed information to the Authority instead of following the directions that were made regarding the lodging of evidence. That has made it more resource intensive and time consuming to establish what her position was on material issues and conflicts in the evidence;
- (g) The time required for the investigation meeting was lengthened by Ms Bonsu-Marou's reluctance to answer the questions she had been asked, instead 'bad mouthing' Ms Smythe. Because she had failed to address all relevant matters in her witness statement the Authority had to obtain this material evidence by questioning her during the investigation meeting, to ensure she had been given a full opportunity to respond to all of the claims against her. This lengthened the time that would otherwise have been required for an IM involving these types of claims;
- (h) Ms Bonsu-Marou also lengthened the investigation meeting by arriving late on the first day and departing unexpectedly and with almost no advance notice on both days of the investigation meeting. Although she claimed she had arrived late and departed early on the first day of the investigation meeting to attend a doctor (for her baby) the medical

certificate she provided did not support that. Paragraphs [14] to [23] of the substantive determination addressed this⁵;

- (i) Ms Bonsu-Marou was resistant to providing a medical certificate to explain why she had arrived at the investigation meeting late, had departed early and had failed to rejoin the investigation meeting by Teams that afternoon after a doctor had supposedly seen her baby. Repeatedly communications were required before one was eventually provided. When a medical certificate was eventually provided, it recorded the consultation had occurred on 1 October 2024 (not 3 October 2024 as she had claimed). It also said that “the patient” would be medically fit by 4 October 2024, which was the second scheduled day of the investigation meeting. However, Ms Bonsu-Marou did not engage with the Authority about that, requiring the investigation meeting to be adjourned part heard in order to give her another opportunity to participate;
- (j) Ms Bonsu-Marou made unfounded allegations about Ms Smythe, that required her to spend time and money responding to. Information presented during the investigation meeting established that such allegations were unsupported by any credible evidence, and should not have been made;
- (k) Ms Bonsu-Marou pursued arguments that were unsupported by her own documents and witnesses;
- (l) Ms Bonsu-Marou repeatedly sent irrelevant information to the Authority, which caused Ms Smythe to incur legal costs because all of Ms Bonsu-Marou’s communications had to be reviewed by Ms Smythe’s counsel in case any of them turned out to be relevant;
- (m) Because Ms Bonsu-Marou had refused to accept service of the statement of problem by the Authority via the usual way of email or track and trace courier, Ms Smythe was required to personally serve it on her. That required additional attendances by Ms Smythe’s counsel to engage a process server and to provide the Authority with proof of service. This

⁵ *Smythe v Bonsu-Marou*, above n1.

extra work would not have been required if Ms Bonsu-Maró had accepted service by the Authority by email or courier in the normal way;

- (n) After the substantive determination has been issued, Ms Bonsu-Maró unsuccessfully sought a non-publication order in response to media interest in this matter, even though she had no legitimate grounds for doing so. Ms Bonsu-Maró also engaged in multiple unnecessary communications requesting documents she had already been provided and had access to via her email. These actions required attendances by Ms Smythe's counsel, thereby increasing her actual legal costs. The Authority had given Ms Bonsu-Maró hard copies of the bundle of documents Ms Smythe had prepared and of her witness statements on three separate occasions, because Ms Bonsu-Maró turned up to both IMs without any documents (not even her own witness statements);
- (o) Before lodging her statement of problem, Ms Smythe attempted to resolve this matter by asking Ms Bonsu-Maró to provide her with a copy of the employment agreement she had signed and to pay her for the work she had done. Had Ms Bonsu-Maró availed herself of these reasonable opportunities to resolve this matter at a very early stage, then Ms Smythe would not have incurred any legal costs, as these proceedings would not have been necessary. Ms Bonsu-Maró would also have paid Ms Smythe considerably less than the Authority ordered her to pay Ms Smythe in its substantive determination;
- (p) Ms Smythe offered to settle the issue of costs for less than she has been awarded in this costs determination. Ms Smythe did that so she could avoid incurring the additional legal costs associated with making a costs application to the Authority. Had Ms Bonsu-Maró accepted that reasonable costs offer, then she would have contributed less towards Ms Smythe's legal costs than she has been ordered to so. Ms Smythe would also have avoided incurring any of the \$3,489.10 legal costs she has been charged for making this costs application. Both parties would therefore have been financially better off regarding the issue of costs.

[29] Prior to the investigation meeting Ms Bonsu-Maró was repeatedly informed that manner in which she was electing to conduct her case was potentially putting her at risk of adverse costs consequences.

[30] When assessing costs in this matter the Authority has been mindful that Ms Bonsu-Marou was a self-represented party, so she was given considerable leeway in terms of preparing and presenting her case. The Authority Officer also devoted a lot of time and resources to ensuring Ms Bonsu-Marou was aware of what was required from her and why. This went far beyond what would normally be involved for a self-represented party.

[31] The factors that have been identified in this costs determination as warranting an increase to the notional starting tariff represented exceptional conduct by Ms Bonsu-Marou that fell outside the expected range of normal conduct from a self-represented litigant who was appropriately engaging in the investigation process. These factors therefore represented conduct that had unreasonably increased Ms Smythe's actual legal costs.

[32] Ms Smythe made a number of other valid criticisms in her costs submissions about the manner in which Ms Bonsu-Marou has conducted herself in connection with this matter. However, those concerns have not been set out in this determination, because they were not factors that warranted an adjustment being made to the notional starting tariff. As previously stated, an award of costs cannot be used to punish Ms Bonsu-Marou or to express disapproval about her conduct, unless such conduct had inflated Ms Smythe's actual legal costs.

[33] Ms Smythe's claim for a separate award of costs award to be made to her for this costs application did not succeed, because the notional daily tariff has been set to account for that already. It was however a factor that has been reflected in the amount by which the notional starting tariff has been increased.

[34] An uplift of \$6000.00 to the notional starting tariff was appropriate to reflect that Ms Bonsu-Marou's conduct of her case unreasonably and unnecessarily increased Ms Smythe's actual legal costs.

[35] As a cross check to ensure an uplift of this amount was proportionate to the conduct involved and costs incurred, the Authority noted that an uplift of \$6,000.00 was the equivalent of the notional daily tariff for the first day of an IM (being \$4,500.00) plus \$1,500.00 for costs submissions that should not have been necessary. An uplift of \$6000.00 therefore still resulted in a modest costs award in comparison with the total costs Ms Smythe has incurred and appropriately reflected the extra costs Ms Bonsu-

Maro had caused Ms Smythe to incur. An uplift to the tariff of \$6000.00 was therefore adopted.

What costs has Ms Smythe been awarded?

[36] Ms Bonsu-Maró is ordered to contribute \$14,000.00 towards Ms Smythe's actual legal costs for her successful substantive and costs claims. This represents \$8000.00 as the notional daily tariff plus a \$6,000.00 uplift to that notional starting tariff.

What disbursements can Ms Smythe recover?

[37] Ms Smythe's actual disbursements were \$71.56 for her filing fee, plus \$1,675.18 for the costs incurred for a process server to serve the statement of problem. The filing fee is \$71.55, but Ms Smythe provided a receipt to show she had actually paid a filing fee of \$71.56, so that was the amount she could recover.

[38] Ms Bonsu-Maró's refusal to allow service to occur by track and trace courier or email put Ms Smythe to the additional costs of engaging a process server, so she could ensure service of her claims and also prove that the statement of problem had been served on Ms Bonsu-Maró. It is therefore a fully recoverable expense Ms Smythe incurred, as is the filing fee.

[39] However, Ms Smythe's request to recover \$99.59 to reimburse her printing costs did not succeed, as parties are expected to bear the normal costs of preparing relevant documents for the investigation meeting.

[40] Ms Bonsu-Maró is ordered to reimburse Ms Smythe \$1,746.74 for the recoverable disbursements she had incurred, namely for her filing fee and because she was required to engage a process server to personally serve the statement of problem on Ms Bonsu-Maró.

Should interest be awarded?

[41] Schedule 2 of the Act gives the Authority a broad discretion to award interest.

[42] Given Ms Smythe has not been paid any of the money she was awarded in the substantive determination, it is anticipated that Ms Smythe may not be promptly paid the money she has been awarded in this costs determination. This award is for costs and

disbursements that Ms Smythe has already paid, so she can therefore be said to already be 'out of pocket' as a result of that.

[43] It is therefore appropriate to award Ms Smythe interest on the \$15,746.74 she has been awarded in this costs determination.

Orders

[44] Within 28 days of the date of this determination, Ms Bonsu-Maru is ordered to pay Ms Smythe \$15,746.74, being \$14,000.00 as a contribution towards her legal costs plus \$1,746.73 to reimburse her for the recoverable disbursements she has incurred.

[45] Interest is to run on the amount of \$15,746.74, or any part of it that remains outstanding, from the date of this costs determination until Ms Smythe has paid been all money she is owed in full. Interest is to be calculated using the Civil Debt Calculator on the Ministry of Justice website.

Rachel Larmer
Member of the Employment Relations Authority