IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 417
3377243

	BETWEEN	ERNESTINA BONSU-MARO T/A EBM MODELS Applicant
	AND	CAITLYN SMYTHE Respondent
Member of Authority:	Rachel Larmer	
Representatives:	Applicant in person Jonothan Whyte, counsel for the Respondent	
Investigation:	On the papers	
Information Received:	24 June 2025 from the Respondent	
Date of Determination:	15 July 2025	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter involved a re-opening by the Authority of its re-opening determination in *Bonsu-Maro v Smythe* dated 24 June 2025.[1]

Previous determinations

[2] The Authority issued a substantive determination in the matter of *Smythe v Bonsu-Maro t/a EBM Models* dated 7 April 2025, in which Ms Smythe was the successful party.[2]

[1] *Bonsu-Maro v Smythe* [2025] NZERA 364.
[2] *Smythe v Bonsu-Maro t/a EBM Models* [2025] NZERA 197.

[3] The Authority issued a costs determination in Ms Smythe's favour for the substantive matter on 18 June 2025.[3]

[4] Ms Bonsu-Maro's application to re-open the substantive investigation was unsuccessful.[4]

[5] The re-opening determination awarded Ms Smythe, as the successful party, costs of $1,250.00 plus GST. This represented a $1000.00 discount on the notional daily tariff for a half-day 'on the papers' determination. This decrease in the notional starting tariff reflected the Authority's belief that although Ms Smythe had participated in the investigation of the re-opening application, she had not lodged submissions.

IT issues raised

[6] After receiving the re-opening determination, Ms Smythe's counsel contacted the Authority officer that same day advising that he had lodged submissions a few minutes before the 12pm deadline on 23 June 2025. A review of the Auckland Authority's email address was unable to locate Ms Smythe's submissions as having been received.

[7] The Authority subsequently arranged for its IT department to conduct an IT audit of incoming emails from Ms Smythe's counsel at the material time. This audit determined that Ms Smythe's counsel's submissions had been received by the Authority's IT system, but had not been released to the Auckland Authority's email address (and therefore the Authority officer), likely due to the security settings that had been used in the email that had been sent.

Re-opening of the re-opening determination

[8] Because Ms Smythe's submissions (which had also been copied to Ms Bonsu-Maro) had been lodged within time but had not been received by the Authority officer (so had not been passed on to the Member) due to a technical IT systems problem occurring, costs on the re-opening determination were assessed as if Ms Smythe had not lodged submissions.

[9] But for the IT systems problem occurring, Ms Smythe's submission would have been passed on to the Member before the re-opening determination was issued on 24 June 2025.

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[3] *Smythe v Bonsu-Maro* [2025] NZERA 351.
[4] *Bonsu-Maro*, above n1.

[10] However, costs in the re-opening application had in fact been assessed on an incorrect basis, namely that Ms Smythe had not incurred legal costs for lodging submissions. This error resulted in Ms Smythe being awarded less costs than she would have been awarded had the Member seen her submissions before the original re-opening determination had been issued to the parties.

[11] Ms Smythe asked the Authority to exercise its discretion to re-open its reopening determination, so her costs award could be amended to reflect that she had in fact incurred legal costs for lodging submissions on Ms Bonsu-Maro's unsuccessful re-opening application.

[12] The Authority acknowledged it was appropriate to exercise its discretion under clause 4 of Schedule 2 of the Employment Relations Act 2000 (the Act) to re-open the costs and interest orders it had made in the re-opening determination, in order to avoid a miscarriage of justice occurring regarding the amount of costs Ms Smythe can recover from Ms Bonsu-Maro.

Outcome

[13] This determination supersedes, and therefore replaces, paragraphs [62] to [70] of the re-opening determination dated 24 June 2025 which related to the award of costs and interest to Ms Smythe. All other information, findings and orders in the re-opening determination dated 24 June 2025 remain unchanged.[5]

[14] Ms Smythe as the successful party in the original re-opening application was entitled to a contribution towards the actual legal costs she incurred in connection with defending it. Although Ms Smythe sought indemnity costs for her opposition to re-opening the substantive investigation, the Authority informed the parties in a Minute dated 29 May 2025 and 5 June 2025 that it would be adopting its usual notional daily tariff approach to assessing costs in this matter.

[15] Ms Smythe incurred actual legal costs of $2,213.18 GST inclusive on Ms Bonsu-Maro's unsuccessful re-opening application, so that is the maximum Ms Smythe could potentially be awarded in costs.

[5] *Bonsu-Maro*, above n1.

[16] The investigation of the re-opening application was treated as if it had involved a half-day of investigation meeting time. Therefore the notional starting point for assessing costs was $2,250.00, being half of the notional daily tariff for the first day of an investigation meeting.

[17] There were no factors that should result in the notional starting tariff being adjusted, other than a slight reduction to align it with Ms Smythe's actual legal costs, as these were slightly less than the notional daily tariff, so that was the amount she has been awarded.

[18] Within 28 days of the date of this determination, Ms Bonsu-Maro is ordered to pay $2,231.18 GST inclusive to Ms Smythe as a contribution towards her actual legal costs on the original re-opening application.

Should interest be awarded?

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

[20] Ms Smythe has not been paid any of the money she was awarded in the substantive determination that was issued in April 2025. It can therefore reasonably be anticipated that Ms Smythe may not promptly pay the costs contribution Ms Smythe has been awarded in this second re-opening determination.

[21] Ms Smythe's legal costs incurred for defending the re-opening application are an out of pocket expense which she had already incurred, so it was appropriate to award her interest on the $2,213.18 GST inclusive legal costs she has been awarded in this second re-opening determination.

Outcome

[22] Because Ms Bonsu-Maro's original re-opening application did not succeed, the findings and orders in the substantive determination dated 7 April 2025 and in paragraphs [1] to [61] of the reopening determination dated 24 June 2025 continue to apply unchanged.[6]

[6] *Smythe,* above n2; and *Bonsu-Maro,* above n1.

[23] The Authority makes the following new orders in this second re-opening determination:

(a) Within 28 days of the date of this determination, Ms Bonsu-Maru is ordered to contribute $2,213.18 GST inclusive towards Ms Smythe's actual legal costs for Ms Bonsu-Maro's original re-opening application;

(b) Ms Bonsu-Maro is ordered to pay interest on any part of the $2,213.18 GST inclusive legal costs Ms Smythe has been awarded in this determination that had not been fully paid to her by 13 August 2025.

(c) Interest is to be calculated using the Civil Debt Calculator on the Ministry of Justice website, and is to run from 13 August 2025 until all money Ms Smythe is owed, including interest, has been paid in full.

Rachel Larmer
Member of the Employment Relations Authority