

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 55
3032274

BETWEEN MELISSA BOWEN
Applicant

AND BANK OF NEW ZEALAND
Respondent

Member of Authority: Rachel Larmer

Representatives: Rebecca Rendle and Meghan Bolwell, counsel for the
Respondent
No appearance for the Applicant

Investigation Meeting: On the papers

Submissions and Further Information Received: 4 February 2022 from the Respondent

Date of Determination: 25 February 2022

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The respondent seeks a costs order of \$6,750 towards the actual legal costs it incurred in relation to the Authority's determination that held that all of the disputed material that the applicant had filed in support of her substantive claims was privileged and therefore inadmissible.¹

¹ [2021] NZERA 19.

Background

[2] At 9.59pm on 21 December 2021, the applicant filed witness statements in reply and additional documents which contained or referenced the respondent's privileged information, over which it had not waived privilege. The applicant filed further documents on 24 December 2021.

[3] The respondent wrote to the applicant on 22 December 2021 requesting that the disputed material in the witness statements be withdrawn by 10am the following day and re-filed without reference to the privileged material. The applicant responded via her lawyer confirming that she would not be withdrawing the disputed material.

[4] The respondent then made an urgent application to the Authority seeking orders that the disputed material was privileged and therefore inadmissible. The Authority issued a determination dated 28 January 2022 that granted the respondent the orders it had sought.²

[5] In paragraphs [84]-[86] of its admissibility determination the Authority confirmed that the respondent as the successful party was entitled to a contribution towards its costs.

[6] The Authority indicated that the notional starting point for applying the daily tariff would be \$4,500 to recognise the considerable amount of information that was filed by the parties and the urgency that was associated in determining issues involving the disputed material. The respondent agrees that it was an appropriate starting point for assessing costs.

Application for costs

[7] The parties were encouraged to resolve costs by agreement, but that has not occurred. The respondent seeks an order for costs in its favour of \$6,750 which represents an 50% uplift to the notional starting tariff of \$4,500.

[8] The respondent says this uplift is reasonable and appropriate for the following reasons:

- (a) It incurred significant costs (almost \$20,000) which is well in excess of the amount it is seeking from the applicant as a contribution towards its actual costs.

² Above n2.

- (b) Comprehensive legal submissions were provided on 5 January 2022 and submissions in reply on 7 January 2022. Further information was also filed by the parties between 10 – 17 January and on 21 January 2022;
- (c) The respondent was the wholly successful party regarding its application;
- (d) The applicant filed the witness statements and bundle of documents late in the evening on 21 December 2021 which had the effect of giving the respondent limited time to address the admissibility and privilege issues before the Christmas closedown occurred on 23 December 2021;
- (e) The applicant also filed additional documents containing privileged material on 24 December 2021. The Authority was closed between 25 December 2021 and 4 January 2022;
- (f) The applicant failed to give the respondent any advance notice of her intention to file privileged material in respect of her substantive claims, which were due to be investigated during a substantive investigation meeting scheduled to occur from 1 – 15 February 2022;
- (g) The respondent had significantly delayed in seeking to challenge the status of the 31 January 2017 meeting (a delay of over four years) and of item MB3 (a delay of over three years);
- (h) The late introduction of the disputed material in the applicant's evidence in reply required the respondent to deal with this matter urgently over the Christmas/New Year period;
- (i) Both counsel and the respondent's key witness, who swore an affidavit in support of the orders the respondent had sought, were both out of Auckland over this period which made it more difficult for them to file affidavits and submissions in accordance with the very tight deadlines that the respondent had objected to but which had been imposed on it by the Authority;
- (j) The urgency of the matter and the fact that considerable work had to be completed during the closedown period resulted in the respondent incurring increased time and costs in relation to locating/attempting to locate relevant documents, taking instructions and making arrangements for an affidavit to be sworn on Great Barrier Island;

- (k) The respondent had previously sought to resolve matters directly by requesting that the applicant re-file amended documents without the inadmissible material but she had declined to do so, thereby putting the respondent to the time and expense of having to obtain orders from the Authority in order to ensure that privileged material was excluded from the Presiding Member who was about to start the substantive investigation on 1 February 2022;
- (l) Despite the admissibility issues already being before the Authority, the applicant then filed a Will Say statement of J on 14 January 2022 in breach of the timetabling orders that had been made by the Presiding Member regarding the filing of evidence in the substantive matter which had required this to have been filed on 12 January 2022;
- (m) J's Will Say statement contained additional privileged and confidential material and referred to matters that had been expressly excluded in the witness summons dated 23 December 2021;
- (n) This action meant that the respondent was required under considerable urgency to apply to the Authority (this Member) for further orders on 17 January 2022 in relation to J's Will Say statement, so that this Member could determine the admissibility issues that arose from that along with the admissibility issues that arose from the applicant's filing of the respondent's privileged material;
- (o) Both applications were made under considerable urgency to ensure that the Authority had issued determinations prior to the commencement of the substantive investigation meeting scheduled for 1 February 2022;
- (p) On 21 January 2022 the applicant was granted an adjournment of the scheduled substantive investigation, after the majority of submissions and information had been submitted with urgency in relation to admissibility of evidence issues this costs determination relates to;
- (q) Notwithstanding that adjournment, the respondent was still required to pursue its application for a determination regarding the disputed material because the applicant had still not agreed to withdraw the disputed material voluntarily;
- (r) The respondent points out that the resolution of the disputed material issues were of significant importance to it because it included serious allegations that strongly denied.

Applicant's submissions

[9] The applicant was given an opportunity to file cost submissions but elected not to. The Authority emailed the parties on 14 February 2022 noting that the applicant had missed the deadline of 11 February 2022 for filing her costs submissions.

[10] The Authority confirmed it would be determining costs on the disputed material determination based on the information that it had available, namely that which had been filed by the respondent on 4 February 2022.

Adjustments to the notional starting tariff*Decrease to the notional starting tariff*

[11] The respondent's submissions foreshadowed that the applicant may have wanted to rely on claims of financial hardship. However, no evidence or information about that has been provided to the Authority, so the applicants possible (in)ability to pay is to be treated a neutral factor in such circumstances.

[12] The Authority is not aware of any factors that should result in the notional starting tariff being reduced.

Increases to the notional starting tariff

[13] The Authority is satisfied that this is an appropriate matter in which an increase of 50% to the notional starting tariff of \$4,500 should be applied.

[14] The manner in which the applicant elected to deal with the disputed material was concerning. She did not file all information relevant to the Authority's determination of privilege and admissibility issues from the outset. Instead, it was drip-fed to the Authority and respondent over time, thereby increasing costs and time and urgency for those involved in this matter.

[15] There was no satisfactory explanation as to why the applicant had delayed for three or four years in seeking clarity on the disputed material. The applicant was clearly on notice well in advance of her filing of the disputed material that the respondent considered such material privileged and therefore inadmissible.

[16] The applicant was given an opportunity to withdraw the disputed material voluntarily but refused to do so. That decision was unreasonable and put the respondent to unnecessary time and cost by requiring it to obtain an urgent determination in its favour.

Outcome

[17] The Authority orders the applicant to pay the respondent \$6,700 towards its actual legal costs in respect of the privilege and inadmissibility issues that the Authority determined on 28 January 2022.

Rachel Larmer
Member of the Employment Relations Authority