Attention is drawn to orders prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 216
3134439

	BETWEEN	GHX Applicant
	AND	HEC Respondent

Member of Authority:	Nicola Craig
Representatives:	Tanya Kennedy, counsel for the applicant Philip Skelton KC and Bridget Smith, counsel for the respondent
Submissions Received:	13 February and 1 March 2024 from the applicant 23 February 2024 from the respondent
Date of Determination:	16 April 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, identified as GHX, formerly worked for the respondent, identified as HEC. The employment relationship problem between them involved a mediated settlement agreement.

[2] The Authority has issued three previous determinations in this matter. The first declined an application by GHX for an interim injunction.[1] In the second the Authority concluded that there was insufficient basis to include HEC's chief executive as a party to this proceeding.[2]

[3] The third determination concluded that HEC had in some instances, through its comments, breached the settlement agreement with GHX.[3] Comments which would otherwise have been breaches were found to be justified given the unusual circumstances. Compliance orders were issued and a penalty of $2,500 imposed on HEC.

[4] The parties were encouraged to resolve any issue of costs between themselves but were unable to do so. GHX applied for costs. Submissions were received from both parties.

Submissions for GHX

[5] The submissions emphasise GHX's success. Compliance orders were a significant remedy sought by GHX throughout these proceedings and compliance orders were made by the Authority.

[6] In terms of the earlier two determinations, it is argued that GHX should be awarded costs on both. It was suggested that the Authority would more likely have imposed the interim injunction if it considered it had jurisdiction and had the matter been decided after the Supreme Court's decision in *FMV v TZB*, it would have had such jurisdiction.[4] As the successful party in the third determination the tariff is sought for those days.

[7] GHX also seeks substantial uplifts on the basis of a number of factors, including a Calderbank (without prejudice save as to costs) offer and conduct said to have unreasonably increased costs significantly.

[8] GHX made Calderbank offers in 2021. Since then, GHX has incurred around $50,000 in legal costs excluding GST. Conduct, particularly regarding documents, was

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[1] *GHX v HEC* [2021] NZERA 268.
[2] *GHX v HEC* [2021] NZERA 343.
[3] *GHX v HEC* [2023] NZERA 782.
[4] *FMV v TZB* [2021] NZSC 102.

identified resulting in many identified instances of case management conference and Authority directions.

[9] Taking into account all of these factors, total costs of $35,000 plus GST are sought.

Submissions for HEC

[10] HEC argues that an equitable outcome would see costs lie where they fall. It sees itself as the successful party, having defended the interim and joinder applications and succeeded substantively in defending three of GHX's five claims. The same outcome is seen as correct if a mixed success approach is used.

[11] HEC regards GHX's success as modest with a "nominal" penalty awarded against it but not its chief executive.

[12] If costs are to be awarded regarding the first determination, HEC argues they should be awarded to it as the successful party. Notional tariff costs of $2,250 for the investigation meeting leading to the first determination should be deducted from the $8,000 tariff for the investigation meeting relating to the third determination, leaving a tariff of $5,750.

Costs discussion

[13] The Authority has the power to award costs.[5] This power is discretionary and is to be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the principles guiding the Authority's approach to costs are described as including:

- 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

[5] Employment Relations Act 2000, Schedule 2, cl 15.

- Costs generally follow the event
- Awards will be modest
- Frequently costs are based on a notional daily tariff.[6]

Tariff

[14] I begin by establishing the Authority's daily tariff rate for this matter. Three determinations were issued. The first required half a day's investigation meeting. The second was completed on the papers and the third involved a two day investigation meeting.

[15] The first meeting's tariff is $2,250. Some portion of the tariff could be identified for the on the papers second determination but in light of the discussion below, that is not necessary. For the third determination, adding $4,500 for the first day and $3,500 for the second, gives starting point of $8,000.

Success

[16] There is some complexity to the costs assessment given the three determinations and other stages which this matter has been through. I have considered the decision in *Coomer v J A McCallum and Son Limited.*[7]

[17] On the face of it HEC was successful in the first determination. The likely impact of the Supreme Court's decision in *FMV v TZB* on whether an interim injunction could have been ordered is a question best left for another day.[8] Any comment regarding whether an interim injunction would have been granted had the Authority had jurisdiction must be speculative in the absence of a full assessment of the interim injunction tests in the first determination once the lack of jurisdiction was identified. The third determination certainly suggests an arguable case.

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[6] *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.
[7] *Coomer v J A McCallum and Son Limited* [2017] NZEmpC 156.
[8] *FMV v TZB* [2021] NZSC 102.

[18] As regards the second determination, GHX sought to have the chief executive QOI joined as a party, arguing QOI had breached the settlement agreement and should have a compliance order made against him.

[19] In other cases, a director or chief executive of a respondent might not object to being a party and the hearing of a joinder application would not be necessary. Although HEC was successful in opposing this joinder application ultimately a compliance order was made against QOI, a possibility referred to in the second determination. In those circumstances there is an argument that costs should lie where they fall regarding the second determination.

[20] In the third and substantive determination GHX was successful, although not entirely so. GHX's arguments about HEC's communications with representatives of the connected organisation IMR were not successful as they were found to be justified in the unusual circumstances. Other claims such as whether staff not being instructed by HEC as required by the settlement agreement, and the Authority making orders about Official Information Act releases, were not established.

[21] GHX was successful in establishing that statements to a journalist and some internal communications breached the settlement agreement. They thus achieved compliance orders against HEC and QOI as well as a penalty against HEC. The penalty was well less than was sought for multiple breaches. However, it is not at all unusual in the Authority for the maximum $20,000 penalty against organisations to be sought for each of multiple breaches. A penalty imposed of substantially less than that claimed is not unusual and not widely seen as a failure.

[22] Importantly, on the evidence before me there was no way of GHX achieving the success achieved other than pushing through to a substantive investigation meeting and determination. GHX is entitled to a contribution to costs.

Calderbank offer

[23] GHX made the same Calderbank offer twice in 2021 after the interim application was rejected. They were clearly marked as such and made with plenty of time for acceptance and to avoid subsequent incurrence of costs.

[24] The offer envisaged the Authority making comprehensive confidential consent orders restricting HEC's actions, similar to those later sought from the Authority.[9] In addition non-publication orders were sought. HEC would have paid $20,000 to GHX. HEC rejected the offer.

[25] The package contains a mix of elements. The money is more than GHX was awarded in penalty but GHX has since incurred a more substantial amount in legal fees. The Authority did make non-publication and compliance orders. The terms of the consent orders in the offer go somewhat further than those made by the Authority. However, in the absence of evidence of attempt by HEC to negotiate more limited orders with GHX achieving orders in the Authority against both HEC and QOI, HEC's refusal should be taken into account and some uplift made.

Conduct

[26] It is fair to say that documents were a substantial challenge to all involved in this proceeding. Documents obtained by GHX under a Privacy Act request and an Official Information release to the journalist referred to in the third determination became caught up with documents relevant to the Authority's investigation. Different redactions were made for different purposes.

[27] Persistent efforts were made on GHX's behalf to challenge concerted attempts by HEC to either not provide documents or provide them in redacted form. HEC resisted, although made some efforts to work though these difficulties denying that there was any "smoking gun" to be found. At the very end it agreed to provide some remaining documents in order to ensure the investigation meeting proceeded.

[28] In the meantime, numerous case management conferences were held and multiple directions issued including by a different member to deal with material argued to be subject to "without prejudice" privilege. Over time HEC strongly raised various different defences including lack of relevance, legal privilege, third party confidentiality agreement obligations and privilege against self-incrimination, some of which were hard to see as sound bases for exclusion. This did not assist and warrants a modest uplift.

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[9] The third determination – [2023] NZERA 782 at [115].

Outcome

[29] A nuanced assessment is needed.[10]

[30] There was a strong element in this case of GHX wanting vindication through finding out what had happened regarding HEC, QOI, the IMR appointment and settlement agreement obligations, as well as preventing future difficulties. It seems that only through the obtaining of documents and particularly, receiving evidence given at the investigation meeting, GHX was able to go some way to achieving that. This came at a substantial legal cost. I must however be influenced by the requirement to keep costs awards modest.

[31] GHX should receive a contribution towards GHX's costs for the substantive determination. An uplift is also justified on the bases of GHX's Calderbank offer and some of HEC's conduct regarding documents.

[32] I conclude that HEC is to pay GHX the following amounts within 28 days of the date of this determination:

- $15,000 as a contribution to GHX's costs; and
- $71.56 for the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority

[10] *Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156 at [37].