

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 264  
3005373

BETWEEN                      MELISSA JEAN OPAI  
Applicant

AND                              COMMISSIONER OF POLICE  
Respondent

Member of Authority:        Rachel Larmer

Representatives:            Rani Amaranathan, counsel for the Applicant  
Hamish Kynaston and Nicola Ridder, counsel for the  
Respondent

Investigation Meeting:      On the papers

Submissions Received:      8 February 2019 from Applicant  
13 December 2018 from Respondent  
23 January 2019 from Respondent

Other Information:           4 and 19 March 2019 from Applicant

Date of Determination:      03 May 2019

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Commission of Police (Police) successfully defended Ms Opai's substantive claims.<sup>1</sup> Ms Opai had previously succeeded in a preliminary jurisdiction issue.<sup>2</sup>

[2]     The Commissioner of Police (Police) now seeks an order that Ms Opai contributes \$15,000 towards its actual legal costs. Ms Opai says she should not be ordered to pay more than \$8,000 costs, which is the current notional daily tariff for a two day investigation.

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<sup>1</sup>     *Opai v The Commissioner of Police* [2018] NZERA Auckland 379.

<sup>2</sup>     *Opai v The Commissioner of Police* [2017] NZERA Auckland 357.

[3] Ms Opai also sought a stay of costs until her challenge of the substantive determination to the Employment Court had been resolved and/or until her other (as yet unheard) Authority claims have been determined.

[4] The parties attempted to resolve costs by agreement, but were unable to do so.

### **Starting point for assessing costs**

[5] The law regarding the assessment of costs in the Authority is so well settled that there is no need to set out all of these well-established principles. Suffice to say, costs are discretionary, the discretion must be exercised on a principled basis, and that a successful party is normally entitled to an award of at least some of their actual costs.

[6] The Authority adopts its usual notional daily tariff based approach to costs. This matter involved a two day investigation meeting. The current notional daily tariff is \$4,500 for the first day and \$3,500 for each subsequent day.

[7] The notional starting tariff for assessing costs in this matter is therefore \$8,000. This notional starting tariff must then be adjusted to reflect the particular circumstances of this case.

### **Police's actual legal costs**

[8] The Police say that their actual legal costs in defending Ms Opai's claims exceed \$200,000 to date. The Police's August invoice for attending the investigation meeting and preparing closing submissions was \$63,420 before GST.

### **Factors warranting an increase in the notional starting tariff**

[9] The Police seek a \$7,000 increase to the notional starting tariff.

[10] The Police claim that the notional daily tariff should be increased to reflect that:

- (a) The significant costs associated with preparing for the investigation meeting were incurred because Ms Opai's claims were complex and detailed. The Police say Ms Opai made a number of wide-ranging and general information requests, and required a number of irrelevant documents to be included in the joint bundle. Police say that unnecessarily increased its costs in identifying and

sourcing the documents she had requested and in collating and preparing the joint bundle for use during the Authority's investigation.

- (b) Both hearing days were longer than usual to enable the matter to be heard within the two days that had been allocated for the investigation meeting.
- (c) Considerable work was required by Police after the investigation meeting had concluded in terms of preparing closing submissions and responding to evidential issues that arose in the context of Ms Opai's closing submissions.

[11] Police say that Ms Opai's claims in relation to the 258 report which was in issue in this matter were overstated and never had a strong basis, so should not have been pursued.

[12] Ms Opai disputes that any of the matters identified by Police should result in an uplift to the costs that are to be imposed. Ms Opai claims that the factual issues were made more complex and the proceedings were more prolonged than necessary as a result of the Police's failure promptly to provide documents and to explain the nature and different versions of documents it had provided her.

[13] Ms Opai further says that the evidential issues the Police raised in relation to her closing submissions should have been raised during the preliminary determination on the jurisdiction issue.

[14] Ms Opai says that failure of the Police to disclose information about the 258 process when she requested it in March 2014, and repeated her requests up until February 2017, contributed to the fact of Ms Opai's personal grievance and prolonged the outcome of her grievances.

[15] The Authority finds that the manner in which Ms Opai pursued her claim unnecessarily increased the Police's legal costs. The notional starting tariff should be increased by \$2,000 to reflect that.

**Factors warranting decrease to the notional daily tariff.**

[16] Ms Opai submitted that the notional starting tariff should be reduced for the following reasons:

- (a) That she was successful in a preliminary application regarding jurisdiction of the Authority to investigate her unjustified disadvantage grievances relating to issues relating with the 258 report;
- (b) The Police's conduct in relation to disclosure of information and explanations for information disclosed, which she says prolonged the resolution of the issues and added to the factual complexity and volume of documents required during the Authority's investigation;
- (c) The Police's objection in closing submissions to evidence Ms Opai had given for the preliminary determination, which it had not challenged in evidence it filed for the preliminary determination (which the Police did not file any evidence on) unnecessarily increased her legal costs; and
- (d) Her ability to pay an award of costs.

[17] Ms Opai's employment with the Police ended at the end of last year. She is currently without a job so is not receiving a salary or wages. Ms Amaranthan submitted that Ms Opai currently has no income and is "*probably impecunious*".

[18] Ms Opai filed an affidavit setting out her financial circumstances. She is currently in receipt of a weekly benefit of \$444.94, which includes an accommodation supplement of \$165 per week.

[19] Ms Opai has a one-third share in a home which, based on the Government Valuation (and subtracting the existing mortgage), is worth approximately \$68,580. She has a third share of households chattels which she values at \$10,000 (one third of the \$30,000 total value she has ascribed to the chattels), a motor vehicle which she has valued at \$7,000.

[20] Ms Opai also has \$19,500 unsecured credit card debts which she is currently repaying at the rate of \$300 per fortnight. She is responsible for mortgage payments of \$1114 per fortnight.

[21] Ms Opai is single, without dependents, and has no other forms of income.

[22] Ms Opai says that it was not until her High Court trial in mid-2018 that Inspector Brady gave evidence about why one version of the categorisation form said "*potential performance*" and the other version said "*potential fast track*" and it was not until the High

Court trial that Senior Sergeant Culpin formally raised the date discrepancy in the 258 report, namely that 30 October 2013 should have read 30 September 2013.

[23] Ms Opai says it was the Police's failure to properly explain these different versions of the documents until shortly before the investigation meeting that caused her to incur additional unnecessary legal costs.

[24] Ms Opai further says that the nature and implication of some documents disclosed by Police were unclear and not fully explained by Police until the duration of the investigation meeting. She relies specifically on:

- (a) The process followed for a conduct check was not fully explained until the investigation meeting;
- (b) The information identified from a conduct check was not provided until the investigation meeting;
- (c) The NIA number assigned to the 258 matter was not fully explained until Police had filed its evidence in 2018 which at that point explained that although a NIA number is assigned it cannot be traced to Ms Opai's name.

[25] The Authority finds that the Police should bear responsibility for some of the document issues that arose which resulted in additional time and legal costs.

[26] Ms Opai is also entitled to a credit of \$750 towards her costs to reflect her success on the preliminary jurisdiction issue.

[27] The Authority also accepts that Ms Opai has very limited means by which to pay an award of costs and that there is no imminent prospect of her financial situation changing.

[28] The award of costs in this case is likely to be a significant burden on Ms Opai. In addition she is also facing additional costs as a result of her challenge and the further as yet unheard claims which are currently before the Authority.

[29] While an unsuccessful party can expect to face some hardship as a result of costs, the Authority considers there are access to justice issues and 'ability to pay' costs considerations associated that warrant decreasing the notional starting tariff by \$4,000 to reflect these factors.

**Costs order**

[30] Ms Opai is ordered to pay \$6,000 (being \$10,000 increase - \$4,000 decrease) towards the Police's actual legal costs. That amount has included the adjustment that was made in her favour to reflect that her success on the preliminary issue.

**Should the award of costs be stayed?**

[31] Ms Opai asked that the order for costs be stayed pending the outcome of her challenge to the Employment Court and/or the resolution of her multiple other unresolved employment issues, which are currently before the Authority.

[32] The Authority does not consider that a stay of costs in this matter is appropriate.

[33] The parties need finality regarding the 258 report issue and a costs award is an important part of finally resolving all aspects of that issue.

[34] Notwithstanding that view, it still remains open to the parties to come to a repayment agreement and/or for Ms Opai to seek a stay of costs from the Employment Court, which will be hearing her challenge.

**Rachel Larmer**  
**Member of the Employment Relations Authority**