

[2] While the Authority has endeavoured to observe the Employment Court's non-publication order, as far as possible, to avoid including information that may identify the parties, that has been unavoidable in some respects due to the:

- (a) Nature and extent of the information that H and C have put into the public domain;
- (b) Previous media reports;
- (c) Need to discuss information in this determination that was relevant to the Authority's assessment of costs in this matter;
- (d) Citations that have been required for cases referred to in this determination.

Employment relationship problem

[3] RPW has been the successful party at every stage of these proceedings.

[4] The usual position is that costs follow the event, meaning an unsuccessful party is normally expected to have to contribute towards the successful party's actual legal costs. There is no good reason to depart from that usual practice in this case.

[5] RPW as the successful party is therefore entitled to recover some of its actual costs from H and C. This determination assesses the amount of costs RPW should be awarded, and how costs are to be apportioned between H and C.

Nature of these proceedings

[6] RPW incurred legal costs because of H's and C's multiple deliberate:

- (a) breaches of the civil obligations they voluntarily agreed to in a settlement agreement that was certified by a mediator under s 149 of the Employment Relations Act 2000 (the Act), (the certified agreement); and
- (b) obstructions of the Authority's investigation into their breaches of the certified agreement.

[7] The ambit of these proceedings was summarised in paragraphs [22]-[27] of the Authority's substantive determination.³

³ *RPW v H and C* [2018] NZERA Auckland 338.

RPW's submissions

[8] RPW sought a contribution of at least \$30,000 towards its actual costs, which it advised were at least double that amount.

[9] RPW based its \$30,000 costs claim on a notional daily tariff of at least four days' investigation meeting time. That gave a 'notional starting tariff' of \$15,000 (\$4,500 first day + \$10,500, being \$3,500 x 3 remaining days), which RPW submitted should be doubled to reflect that H and C had unreasonably and unnecessarily increased its actual costs.

No engagement by H and C

[10] H and C elected not to participate in the Authority's costs investigation, so they failed to provide any information or submissions relevant to the Authority's assessment of costs.

[11] In the absence of any costs submissions from H and C, the Authority's costs assessment was based on the available information, all of which was disclosed to H and C.

Authority determinations in this matter

[12] This costs determination is the seventh determination the Authority has been required to issue in these proceedings. The following determinations involving these same parties have previously been issued:

- (a) *R v A and C*, second non-publication order dated 27 July 2018;⁴
- (b) *R v A and C*, third non-publication order dated 13 August 2018;⁵
- (c) *R v A and C*, first compliance order dated 16 August 2018;⁶
- (d) *R v A and C*, second compliance order dated 27 August 2018;⁷
- (e) *RPW v H and C*, substantive determination dated 1 November 2018;⁸
- (f) *RPW v H and C*, penalties determination dated 5 March 2018.⁹

[13] The Authority's citation of the parties' names changed after the Employment Court's interim non-publication order dated 6 September 2018 was brought to the Authority's

⁴ [2018] NZERA Auckland 237. The first non-publication order was issued in email directions dated 20 July 2018.

⁵ [2018] NZERA Auckland 250.

⁶ [2018] NZERA Auckland 253.

⁷ [2018] NZERA Auckland 275.

⁸ Above n3.

⁹ [2019] NZERA Auckland 121.

attention.¹⁰ Prior to that, the Authority was not aware of the Employment Court's Minute dated 24 August 2018.

Principles applying to costs in the Authority

[14] The full Employment Court in *PDO Ltd (formerly Rush Security Limited) v Da Cruz* identified the following guiding principles for the Authority's assessment of costs, namely:¹¹

- Whether to award costs, and in what amount, was discretionary;
- The Authority's costs discretion must be exercised in accordance with principle, and not arbitrarily;
- The Authority's ability to award costs was consistent with its equity and good conscience jurisdiction;
- Equity and good conscience must be considered on a case by case basis;
- Costs cannot be used as punishment or to express disapproval of an unsuccessful party's conduct;
- However, conduct by an unsuccessful party that increased the successful party's costs unnecessarily can be taken into account to increase or decrease the costs awarded;
- The Authority can assess whether some or all of any parties' costs were unnecessary or unreasonable;
- Costs generally follow the event;
- The Authority may consider without prejudice except as to costs ("Calderbank") offers;
- Awards of costs by the Authority will be modest;
- The Authority may assess costs based on a notional daily rate;
- The nature of the case can also influence costs, an example of that being where the Authority considers that costs should lie where they fall.

[15] These principles were considered and affirmed by the full Employment Court in *Fagotti v Acme and Co Limited*, in a decision that involved reviewing the Authority's costs assessment practices, particularly in light of Calderbank offers.¹²

Notional daily tariff

[16] The Authority's "*Practice Note 2 - Costs in the Authority*" records its usual practice of applying "*a notional daily tariff based approach*" to assessing costs for Authority proceedings.¹³

[17] The current notional daily tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent investigation meeting day. That gives a 'notional starting

¹⁰ *RPW v H and C* [2018] NZEmpC 103.

¹¹ [2005] 1 ERNZ 880.

¹² [2015] NZEmpC 135.

¹³ 30 June 2016 at paragraph 4.

tariff” that may then be adjusted, on a principled basis, by the Authority to reflect the particular circumstances of each case.

Issues to be determined

[18] The following issues are to be determined by the Authority:

- (a) How many days of investigation meeting time did this matter involve?
- (b) What is the notional starting tariff?
- (c) Should the notional starting tariff be reduced?
- (d) Should the notional starting tariff be increased?
- (e) What is the Authority’s ‘provisional costs assessment’?
- (f) Does the ‘provisional costs assessment’ need to be further adjusted in order to do justice between the parties?
- (g) What costs and disbursements can RPW recover?
- (h) How should the costs and disbursements be apportioned between H and C?

How many days of investigation meeting time did this matter involve?

[19] The Authority’s investigation into RWP’s claims involved:

- (a) One ‘by telephone’ investigation meeting;
- (b) A one day ‘in person’ substantive investigation meeting;
- (c) Five ‘on the papers’ investigation meetings, including this costs determination.

[20] Conducting investigations ‘on the papers’ is one of the ways in which the Authority is able to ensure that its problem solving procedures are flexible, in accordance with the object stated in ss 143(c) and (d) of the Act.

[21] It is usually more cost efficient and timely for the Authority to be able to conduct ‘on the papers’ investigations. There was also an urgency to three of the ‘on the papers’ investigations because H and C had refused to:

- (a) comply with their obligations under the certified agreement;

- (b) remove disparaging and negative remarks about RPW from C's public Facebook page;
- (c) stop making public disparaging and negative remarks about RPW while the Authority investigated RPW claims; or
- (d) comply with the Authority's non-publication and compliance orders.

[22] The Employment Court has confirmed that the notional daily tariff is not restricted to 'in person' investigation meeting days, but may also include other matters such as preparation time.¹⁴

[23] The Authority is therefore able to assess the number of days' investigation time that was involved in these proceedings by including the time involved in the 'on the papers' investigations, for the purposes of fixing the total number of days' investigation time this matter involved, in order to apply the daily tariff.

[24] For the purposes of assessing costs, the time taken in these proceedings should be viewed as amounting to four days of investigation meeting time, consisting of:

- (a) One day for the first and second determinations, involving the second and third non-publication orders;
- (b) One day for the third and fourth determinations, involving the first and second compliance orders;
- (c) One day for the fifth determination, involving the substantive investigation meeting that was held in Hamilton;
- (d) One day for the sixth, and this seventh, determination involving penalties and costs.

[25] The above time allocations reflect conservative estimates of the time associated with each determination.

¹⁴ *Carter Holt Harvey Limited v Eastern Bays Independent Industrial Workers Union* [2011] NZEmpC 13 at [32] and *PBO v De Cruz* above n11.

What is the notional starting tariff?

[26] The notional starting tariff for assessing costs is therefore \$15,000 consisting of \$4,500 for the first day plus \$10,500 (being \$3,500 per day x 3 days) for the second, third and fourth days of investigation meeting time.

Should the notional starting tariff be reduced?*Ability to pay costs*

[27] Financial hardship of a costs award on an unsuccessful party is a factor that could potentially reduce the costs that would otherwise have been awarded, if the evidence supported the need for such an adjustment.

[28] During these proceedings H and C were invited to provide evidence about their financial circumstances, if they wanted any potential financial hardship they believed they would suffer taken into account by the Authority when it was determining the various issues before it.

[29] The Authority identified the type of financial information it expected to see from H and C if they wanted their financial circumstances considered. They were also offered a non-publication order to ensure their financial information was kept confidential.

[30] H and C had the following opportunities to provide information about their financial circumstances to the Authority, namely when:

- (a) filing evidence prior to the substantive investigation meeting;
- (b) filing written submissions after the substantive investigation;
- (c) submissions and information regarding penalties were sought; and
- (d) these costs were being assessed.

[31] Despite having had multiple opportunities to do so, H and C have chosen not to provide any evidence about their financial circumstances or ability to pay an award of costs.

[32] What H and C have told the Authority, is that they “*will never pay a cent*” of any money the Authority orders them to pay. That appeared to be a matter of principle, because H and C disagreed with the Authority’s determinations, rather than based on their financial circumstances.

[33] The only information the Authority had was the Employment Court's comment in *RPW v H and C* that H had told it C was running at a loss.¹⁵ However the Court also specifically noted when it made that remark that H and C had not properly placed their financial circumstances before the Court.

[34] It is not uncommon for a company's financial situation to ebb and flow. There could be many reasons why a company that was running at a loss would still be able to pay costs. That is why full disclosure of a party's financial situation is required before costs are discounted based on an inability to pay.

[35] The comment by the Employment Court, that H told it C was running at a loss, is insufficient to warrant reducing the costs, that would otherwise have been awarded in these proceedings, on the grounds of financial hardship.

Financial evidence required

[36] The Employment Court in the following cases made it clear that a claim of financial hardship had to be based on financial evidence:

- (a) *O'Hagan v Waitomo Ventures Limited* held that a claim of undue financial hardship had to be supported by acceptable evidence, such as details about the party's assets, liabilities, income and expenditure.¹⁶
- (b) *George v Auckland Council* held that although a party's ability to pay was relevant to an assessment of costs, any claim of financial hardship must be supported by sufficient evidence.¹⁷ In that case the applicant had referred to her liabilities but not provided information about her assets other than referring to a house that she owned. The Court was not advised of the value of the property or the applicant's equity in it, so the Court declined to make an adjustment on the basis of the limited financial information that had been provided.
- (c) *Hook v Stream Group (NZ) Pty Limited* held mere claims of financial hardship would not suffice for the purposes of assessing costs.¹⁸ The plaintiff's failure

¹⁵ [2018] NZEmpC 131 at [15].

¹⁶ [2012] ERNZ 124 at [37].

¹⁷ [2014] NZEmpC 100 at [51].

¹⁸ [2013] NZEmpC 243 at [8].

to put his financial position before the Court resulted in the Court declining to consider his ability to pay costs as a relevant factor when it assessed the amount of costs to be awarded.

- (d) *Merchant v Department of Corrections* held that assessment of an undue hardship claim required consideration of the total financial position of the party seeking an adjustment on that basis, so required disclosure of assets, liabilities, income and necessary expenditure.¹⁹

[37] The Employment Court in *Gates v Air New Zealand Limited* observed that a certain level of hardship is likely to be considered an acceptable consequence for unsuccessfully engaging in litigation.²⁰

[38] There is no financial evidence before the Authority that justifies a reduction to the notional starting tariff.

Were H's and C's breaches necessary to prevent harm?

[39] Should H's and C's subjective view that their breaches were necessary to prevent harm to C's clients be a factor that reduced the notional starting tariff?

[40] H and C essentially claimed that 'protection' of C's clients on health and safety grounds meant H and C had to repeatedly:

- (a) publicly disparage and make negative remarks about RPW; and
- (b) obstruct the Authority's investigation into RPW claims against them.

[41] H's and C's breaches were not objectively reasonable or justified on health and safety grounds. Paragraph [294] of the Authority's substantive determination summarises the evidence that fundamentally undermined H's and C's claims that their multiple breaches were necessary to prevent harm.²¹

[42] Even if H and C had valid points to make on behalf of C's clients, that could and should have been done in a way that did not:

- (a) breach H's and C's legal obligations;

¹⁹ [2009] ERNZ 108 at [29].

²⁰ [2010] NZEmpC 26 at [21].

²¹ Above n3.

- (b) breach C's clients' statutory good faith obligations or their duty of fidelity; and
- (c) expose C's clients to the risk of adverse consequences against them personally.

[43] In paragraph [168] of its penalties determination the Authority identified other more timely and effective ways of addressing C's clients' concerns, none of which involved taking unlawful action or putting C's clients personally at risk of adverse consequences, for example:²²

- (a) Filing Authority claims for C's clients would have been an obvious and speedy way of addressing unresolved workplace concerns.
- (b) Applying for urgent mediation was another obvious option.

[44] The Authority further notes that H declined the Authority's offer, made on 27 July 2018, to direct C's clients and RPW to attend urgent mediation of the underlying issues that had resulted in these proceedings.

[45] The Authority therefore considered that H's and C's breaches were more likely than not attempts by them to coerce others to meet their (H's and C's) demands or face reputational damage, because those who did not give in to H's and C's demands were publicly attacked by them.

[46] The Employment Court in *RPW v H and C* recognised the self-serving nature of the public attacks that H and C engaged in when it described the attacks on the Authority Member as "*despicable and reprehensible*." The Court also pointed out that:²³

The modus adopted by [H and C] in their attacks on the Authority Member and the Court seems to be that, when there is any development in the proceedings which is disadvantageous [to them], disparaging comments are made.

[47] The Authority considered that same comment could be applied to H's and C's attacks on RWP and its professional advisors. H and C would publicly attack them when H and C did not get their own way. The timing of the escalation of H's and C's breaches aligned with decisions taken in these proceedings that H and C disagreed with, not with any new workplace issues.

²² Above n9.

²³ Above n1 at [23].

Outcome on factors reducing notional starting tariff

[48] None of the parties identified any factors that should result in the notional starting tariff being reduced. Having carefully considered all of the available information, the Authority has not identified any.

[49] The notional starting tariff will therefore not be reduced.

Should the notional starting tariff be increased?

[50] RPW asked for the notional starting tariff to be at least doubled, because H's and C's conduct had unnecessarily and unreasonably significantly increased its actual legal costs. RPW's claim has considerable merit.

Background to these proceedings

[51] Prior to filing proceedings RPW repeatedly pointed out to H and C that their conduct was inappropriate, threatening, and did not advance their clients' cause. RPW also pointed out that H's and C's actions were contrary to C's clients' best interests, breached good faith and H's and C's obligations under the certified agreement.

[52] RPW notified H that his emails to RPW employees had aggravated their stress levels to the extent that they had become unwell, requiring future communications to be via RPW's lawyers. RPW's lawyers advised H they were happy to engage in constructive discussions with him, but that he should refrain from blackmailing RPW and its staff.

[53] RPW had also asked H and C multiple times to take down or remove negative and disparaging posts about it from C's public Facebook page that were damaging its reputation. H and C refused to do so.

[54] Having first made a number of attempts to resolve the issues, it was only when that failed that RPW filed these proceedings, in order to hold H and C to the civil obligations they had voluntarily entered into, but were refusing to honour. That was also a necessary step by RPW towards getting the offending material removed from public display.

Prior Authority case involving breaches by H and C of a non-disparagement clause in a certified agreement

[55] Prior to RPW filing these proceedings, H and C had also (with two other parties) been respondents in a different Authority matter that had involved breaches by them of a non-disparagement clause, that they had agreed to be bound by in a settlement agreement that had been certified by a mediator under s 149 of the Act (the s149 settlement).

[56] The s 149 settlement in that previous case was between one of C's clients and that client's former employer, and it included a clause that stated the parties and C would not make derogatory remarks or disparaging comments about the other.

[57] The Authority issued three determinations in that other matter, *Turuki Healthcare Services v Makea Ruawhare*:²⁴

- (a) The first determination regarding interim non-publication and compliance orders was served on H and C on 26 March 2018;
- (b) The second determination, that made the interim orders recorded in the first determination final and also imposed penalties and general damages on the respondents, was served on H and C on 1 May 2018;
- (c) The third determination involved costs and that was served on H and C on 1 June 2018.

[58] Although H and C challenged the second *Turuki* determination on 29 May 2018, it is the timing of the service of the Authority's prior *Turuki* determinations that was relevant to an assessment of costs in this matter. All of the *Turuki* determinations were served on H and C before RPW filed its original Statement of Problem in these proceedings on 13 June 2018.

[59] That timing of the service of the three *Turuki* determinations on H and C meant that when the Authority issued its case management directions in this matter on 20 July 2018, and in particular the first interim non-publication order, H and C already knew that the Authority had previously determined that C was legally required to comply with a non-disparagement clause it had agreed to under a s 149 settlement agreement.

²⁴ [2018] NZERA Auckland 95; [2018] NZERA Auckland 136; [2018] NZERA Auckland 177.

[60] Despite that prior knowledge, H and C deliberately engaged in similar breaches in this matter. That unnecessarily increased RPW's legal costs, because it was required to file these proceedings to enforce H's and C's obligations under the certified settlement, in circumstances in which H and C must have already known that way they were conducting themselves was wrong.

Original Statement of Problem

[61] A review of RPW's original Statement of Problem illustrates the exponential expansion of this matter by H and C, at RPW's cost, after the Authority had issued a non-publication order that would have prevented that from occurring.

[62] RPW's original Statement of Problem identified five posts by H on C's public Facebook page that breached the certified agreement. Therefore at the outset of this matter the Authority's investigation was confined to just the:

- (a) "*Original post*", dated 21 April 2018;
- (b) "*First post*", dated 27 April 2018;
- (c) "*Second post*" consisting of RPW's confidential meeting notes H added to the first post on C's Facebook page on 27 April;
- (d) "*Third post*", dated 28 April 2018 involving H's comment on the confidential meeting notes; and
- (e) "*Fourth post*", dated 28 April 2018.

[63] Although the Authority's substantive determination gave some idea of how extensive the proceedings were beyond RPW's initial claims, it did not give the full picture. H and C engaged in so many obstructions of the Authority's investigation, that these breaches had to be consolidated into 11 broad categories of obstructive behaviour, because it was impractical to have separately identified each obstructive act.

Authority's directions

[64] The matter was allocated to the Presiding Member on 20 July 2018 and urgency was granted due to the seriousness and ongoing nature of the alleged breaches.

[65] The parties were also directed to attend urgent mediation. However mediation did not actually occur, due to the way in which H engaged with Mediation Services.

[66] Case management directions were issued to the parties by email on 20 July 2018. These directions included (among other things) an interim non-publication order that the parties were told had been made to:²⁵

- (a) preserve the position until the Authority could speak to the parties, scheduled to occur a week later;
- (b) ensure RPW's potential remedies weren't rendered nugatory by the material that remained visible on C's public Facebook page; and
- (c) enable the Authority and parties to focus resources on resolving the substantive issues expeditiously.

Breach of first non-publication order unnecessarily increased RPW's costs

[67] If H and C had complied with the Authority's first non-publication order issued on 20 July 2018, as they were legally required to do, then RPW would have avoided almost all of the legal costs it incurred in these proceedings.

[68] The Authority estimates that around 90% of RPW's actual legal costs were likely to have been incurred after 20 July 2018, and therefore arose from H's and C's obdurate defiance of the Authority's directions and orders.

Unnecessary escalation of these proceedings

[69] RPW's costs were significantly increased by H and C, because they deliberately and unnecessarily escalated this matter from a straightforward case that involved five alleged breaches of a certified agreement, consisting of only 11 pages of evidence to support the alleged breaches, into proceedings that ended up involving:

- (a) 27 alleged breaches by H and C of the certified agreement;
- (b) so many obstructions by H and C of the Authority's investigation into the claims against them that it was impractical to separately identify each obstructive act;

²⁵ Above n3 at [149]-[154].

- (c) three non-publication order determinations;²⁶
- (d) investigation of 24 proven breaches of the Authority's non-publication orders;
- (e) two compliance order determinations;
- (f) multiple breaches of the Authority's compliance orders; and
- (g) over 700 pages of evidence.

[70] There were no legitimate health and safety reasons, or any other reasonable grounds, for H and C to have expanded these proceedings in the way they did. H's and C's deliberate actions therefore unnecessarily required RPW to incur additional legal costs.

Urgency

[71] During an Authority case management conference held on 27 July 2018, the representatives were advised of the usual practice of parties putting their disputed issues on hold while the Authority determined the dispute.

[72] H and C were invited to pause making disparaging and negative remarks about RWP until the Authority could determine this matter, but they declined to do so. H and C also informed the Authority they would not be complying with Authority directions or orders they disagreed with.

[73] H's and C's overbearing attitude and cavalier approach to their legal obligations meant these proceedings had to be conducted under considerable urgency. Urgent compliance orders were issued to compel H and C to comply with the Authority's third non-publication order and with the certified agreement.

[74] That urgency should be reflected in costs because these additional urgent determinations would not have been necessary if H and C had complied with the Authority's previous orders.

[75] When the Authority refused to meet H's and C's demands to stop investigating the claims against them, they significantly increased their public, and in many cases personalised,

²⁶ There were two additional non-publication orders that were not issued as stand-alone determinations; the first interim non-publication order was contained within the case management directions set out in the Authority's email to the parties dated 20 July 2018 and the fourth permanent non-publication order was contained in paragraph [1] of the substantive determination *RPW v H and C* [2018] NZERA Auckland 338.

attacks on and abuse of RPW, its lawyers and the Authority. Addressing H's and C's misconduct in these proceedings unnecessarily increased RPW's legal costs.

What effect should the Calderbank offer have on the notional starting tariff?

[76] A "Calderbank" offer is another name for a "without prejudice except as to costs settlement offer" where a party attempts to resolve the dispute or litigation on agreed terms, to avoid incurring ongoing legal costs.

[77] The full Employment Court in *Fagotti v Acme & Co. Limited* held that the Court of Appeal's observations in *Health Waikato v Elmsly* and *Bluestar Print Group (NZ) Ltd v Mitchell*, that a "steely approach" should be taken to Calderbank offers, applied to Calderbank offers made in connection with Authority proceedings.²⁷

[78] On 1 August 2018 RPW sent H and C a Calderbank offer. RPW offered to settle its claims, by discontinuing these proceedings, if H and C agreed to:

- (a) consent to a compliance order being issued that required them to abide by the terms of the certified agreement; and
- (b) pay \$20,000 towards RPW's actual legal costs within five days of agreement being reached by the parties.

[79] RPW stated that its offer was open for acceptance until 12pm on 3 August 2018 at which time it would expire without further notice.

[80] This offer was made after the second non-publication order had been issued on 27 July 2018 but before RPW had filed its evidence and submissions on the first compliance order application.²⁸ Only one Authority determination had been issued at that point.

[81] H and C would have been better off if they had accepted RPW's Calderbank offer. Rejecting it resulted in two compliance orders being issued against H and C, three more non-publication orders being issued, penalties of \$26,400 each being imposed on them, as well as incurring the significant liability they now have to contribute towards RPW's legal costs.

²⁷ Above n12 at [109]; *Health Waikato Ltd v Elmsly* [2004] ERNZ 172 (CA) at [53] and *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385.

²⁸ Above n4.

[82] However, in order for a Calderbank offer to be taken into account when assessing costs, the unsuccessful party must have had sufficient time to consider and respond to it.

[83] Two days was not enough time for H and C to have properly considered RPW's Calderbank offer. H's and C's refusal to accept RWP's Calderbank offer therefore has to be treated as a neutral factor, so it does not increase the notional starting tariff.

Additional legal costs H and C unnecessarily caused RPW to incur

[84] H's and C's flagrant misconduct in these proceedings unnecessarily put RPW to significant additional legal costs, in particular:

- (a) Instead of one Statement of Problem, RPW had to file five Statements of Problem to keep up with H's and C's multiple breaches.
- (b) Instead of 11 pages of evidence that supported the five claims made in the original Statement of Problem, RPW had to file over 700 pages of documents to cover all of the additional claims and other relevant evidence.
- (c) RPW had to hand up a new bundle of documents on the day of the substantive investigation meeting to cover new breaches, and scheduled hearing time had to be taken up with reviewing this new material.
- (d) The escalating breaches by H and C required the list of issues to be determined by the Authority to be revised in consultation with the parties and, because of the tight timeframes involved, that had to occur under urgency.
- (e) RPW had to respond to multiple frivolous and vexatious claims and submissions by H and C, that a reasonable or knowledgeable employment advocate should have known were devoid of merit.
- (f) RPW was faced with H and C repeatedly making claims and submissions that the Authority had already found were unsuccessful. H and C did that without challenging the Authority's determinations.²⁹
- (g) RPW and its lawyers, in pursuing these proceedings, were subjected to unnecessarily aggressive and personally abusive communications from H and C.

²⁹ The first determination that H and C challenged was *RWP v H and C* [2019] NZERA Auckland 121, which was the penalties determination dated 5 March 2019.

- (h) RPW was subjected to all of H's and C's irrelevant, intemperate and potentially prejudicial communications with the Authority that had to be withheld from the Presiding Member.
- (i) RPW had to receive duplicates of inappropriate communications due to H's and C's unreasonable actions. Redacted versions of the parts of H's and C's communications that had been reviewed by another Member, and either withheld or partially redacted before being released to the Presiding Member, also had to be disclosed to RPW again (even though it already had the original unredacted communication) so that all parties knew exactly what the Presiding Member had and had not seen.
- (j) Eight formal minutes/directions had to be issued to address H's and C's conduct, that included repeated statements that they would not be complying with the Authority's directions.
- (k) RPW received additional unnecessary communications as a result of H and C missing timetable deadlines, the Authority chasing H and C up to see if they wanted to respond to the issue they had missed a deadline for, then H and C ignoring what they had been asked about and communicating instead irrelevancies, such as attacking those involved in these proceedings;
- (l) H and C publicly accused RPW and its lawyers of criminal wrongdoing, for making a Calderbank offer.
- (m) H and C tried to persuade the DHB that funded RPW into withdrawing its funding (under threat of adverse publicity) so that RPW would be financially unable to continue with these proceedings.
- (n) H put false and misleading information about these proceedings and the Authority's telephone conference, directions, orders and determinations into the public domain.
- (o) When the Authority made decisions in these proceedings that H and C believed were unfavourable to them, H and C escalated their public attacks on and abuse of RPW and its lawyers on C's public Facebook page and tried to interfere with RPW's funding.

- (p) RPW provided submissions on a proposed third compliance order, arising from H's and C's breaches of Authority directions not to record the telephone conference with the parties, although that did not result in the Authority issuing a stand-alone determination.
- (q) RPW had to review 'submissions' filed by H and C that contained irrelevant material.
- (r) RPW was subjected to time wasting communications because many of H's and C's communications to the Authority, all of which had to be copied to RPW, were irrelevant, inappropriate or unnecessary.
- (s) RPW had to seek two compliance orders under urgency because H and C repeatedly deliberately breached the Authority's orders, but did not challenge them.

[85] On the basis of the above conduct, all of which unnecessarily and significantly increased RPW's actual costs, the notional starting tariff should be doubled.

What is the Authority's 'provisional costs assessment'?

[86] After applying the notional daily tariff (\$15,000), then adjusting it by doubling it, the Authority's 'provisional costs assessment' is that RPW should be awarded total costs of \$30,000.

Does the 'provisional costs assessment' need to be adjusted in order to do justice between the parties?

[87] It is important that the Authority's usual 'tariff based approach' to costs is not applied in a rigid way, because the costs awarded must appropriately reflect all of the circumstances of this particular case.

[88] Having assessed provisional costs at \$30,000, other factors also had to be considered to check whether an award of costs to RPW of \$30,000 could be contrary to the interests of justice, or inequitable between the parties.

Objects of the Act

[89] One concern is whether an award of costs to RPW of \$30,000 might be contrary to the objects of the Act. It is not.

[90] The way in which H and C conducted these proceedings was an affront to the philosophy, principles and objects of the Act. In particular see ss 3(a)(i),(v),(vi), s 4, ss 143(a)-(d) and (f), and s 160(1)(f) of the Act, namely:

- (a) the promotion of good faith in all aspects of the employment environment and of the employment relationship;
- (b) building productive employment relationships;
- (c) mutual trust and confidence;
- (d) legislative good faith behaviour;
- (e) mediation as a primary problem solving mechanism;
- (f) reducing the need for judicial intervention;
- (g) good faith employment relations;
- (h) the requirement for parties in employment relationships to be active and constructive in establishing and maintaining productive employment relationships in which parties were responsive and communicative;
- (i) the focus of the employment institutions on supporting good faith behaviour;
- (j) recognition that prompt problem solving by those in employment relationships was more likely to support those relationships and make them more successful; and
- (k) the Authority's powers to follow whatever procedure it considers appropriate, consistent with its flexible problem solving jurisdiction, that is not restricted by strict procedural requirements.

[91] H and C deliberately undermined the procedure the Authority had adopted, under s 160(1)(f) of the Act, that would have allowed the original substantive claims to be resolved in a timely and cost effective manner. By doing so H and C significantly and unnecessarily increased RPW's actual costs.

[92] H and C also acted contrary to the objects of the Act by engaging in conduct during these proceedings that breached a mediated settlement, undermined existing employment relationships and delayed resolution of any underlying workplace concerns. H and C also put

C's clients at risk of penalties being imposed on them personally for the multiple breaches that were occurring.

Reasonableness of the costs RPW incurred

[93] RPW and its lawyers conducted themselves in an economical and professional manner throughout, despite reprehensible personalised public attacks on, and abuse of them, by H and C.

[94] RPW's lawyers made it clear to the Authority that, as a public funded organisation, RPW wanted to minimise its legal costs as much as possible. However H's and C's conduct made these proceedings unnecessarily time consuming for all involved.

[95] RPW understandably required a far higher level of legal advice and support than would normally be the case for claims involving alleged breaches of a certified s 149 settlement agreement. Increased legal assistance was clearly needed by RPW to be able to deal with the intimidating tactics H and C adopted in these proceedings.

[96] These proceedings would have been unnecessarily time consuming and unusually stressful for RPW and its lawyers because of the belligerent way H and C engaged in the investigation process.

[97] It was not unreasonable for RPW to have incurred actual legal costs in excess of \$30,000 in light of the unique and significant challenges that were associated with conducting these proceedings.

Proportionality

[98] RPW's attempts to recover \$30,000 of its actual legal costs was not disproportionate to the outcome it achieved, namely total penalties of \$52,800 and a public condemnation of H's and C's unlawful conduct.

[99] Nor was an award of \$30,000 costs out of proportion to the urgency or the number of claims, amount of evidence and variety of legal issues that had to be considered in the course of these proceedings.

Nature of the claims

[100] This case involved enforcement of a certified agreement and penalties for obstructing the Authority's investigation into multiple breaches of a certified agreement. H and C elected to operate outside the law and took matters into their own hands in a way that unnecessarily increased RPW's costs.

[101] H's and C's subjective belief that it was necessary or appropriate for them to engage in the behaviour they did, was objectively unreasonable. H's and C's view about the need for them to act in the way they did was contradicted by the evidence reviewed by the employment institutions.

[102] H and C put forward the same arguments they made to justify their conduct of these proceedings to the Employment Court, which imposed a penalty on H for H's and C's breaches of the Authority's two compliance orders.³⁰

[103] In concluding that H's and C's behaviour was unreasonable, unnecessary and contrary to the interests of C's clients, the Employment Court observed:

- (a) "*Serious*" "*misguided*" and "*blatant breaches*" of the certified agreement had occurred;³¹
- (b) "*The breaches of [H and C] were inappropriate*";³²
- (c) H's and C's actions "*could have severe consequences for their client*";³³
- (d) H was "*clearly stepping outside his proper role and should cease doing so*";³⁴
- (e) H and C had made "*disgraceful, contemptuous comments*" about these proceedings on social media;³⁵
- (f) H's and C's public attacks "*could only be described as despicable and reprehensible*";³⁶
- (g) H's "*conduct having regard to the potential interests of his clients was misguided*";³⁷

³⁰ Above n10, n1, n15.

³¹ Above n10 at [13] and n15 at [12].

³² Above n1 at [25].

³³ Above n15 at [12].

³⁴ Above n10 at [22].

³⁵ Above n10, at [22].

³⁶ Above n1, at [23].

³⁷ Above n1 at [25].

- (h) H and C had “*put the benefit which their clients obtain [...] at risk*”;³⁸
- (i) H’s and C’s breaches were “*brazen and intentional*”;³⁹
- (j) H and C had made “*extensive comments*” that were not just disparaging but “*could be described as abusive*”;⁴⁰
- (k) The effectiveness of H’s and C’s anti-bullying crusade had been compromised by their “*inappropriate behaviour*” in these proceedings.⁴¹

[104] The Employment Court further noted H’s and C’s propensity to publicly attack others in response to developments in these proceedings that they considered were disadvantageous to them.⁴² That approach by H and C unnecessarily and considerably expanded the ambit, and therefore cost to RPW, of these proceedings.

[105] The nature of the claims H and C made (in terms of the rationale they put forward for the inappropriate behaviour they engaged in) is not a factor that warrants a reduction being made to the provisional costs that had been assessed.

Equity and good conscience considerations

[106] Equity and good conscience considerations do not warrant a reduction being made to the provisional costs assessment.

[107] H and C engaged in blatant, brazen, contemptuous breaches of their legal obligations, knowing that their actions were causing RPW to have to incur additional legal costs.

[108] Ironically, having unnecessarily caused RPW to have incurred these additional legal costs, H and C then publicly attacked RPW for doing so. H’s and C’s public attacks went so far as disgracefully claiming that RPW was misusing taxpayer funds on these proceedings, when it was H’s and C’s deliberate unlawful actions that had caused that expenditure.

[109] The employment institutions have made it clear RPW has acted reasonably and appropriately in connection with these proceedings. Notwithstanding that, RPW has suffered

³⁸ Above n1 at [22].

³⁹ Above n1 at [20].

⁴⁰ Above n1 at [19].

⁴¹ Above n1 at [22].

⁴² Above n1 at [23].

financially and reputationally because of the way H and C deliberately responded to these proceedings.

[110] In stark contrast to RPW's professional conduct, H and C treated the statutory employment processes contemptuously.

[111] The following comment made by the Employment Court, when imposing a penalty on H for the same sort of conduct H and C has engaged in during these proceedings, is equally relevant to the Authority's assessment of the fairness of its provisional costs assessment:⁴³

In this case there have been blatant breaches. Some of the information placed on social media has been tantamount to contempt of the Authority and the Court. At times, it has seemed that anarchy has reigned. The actions of the defendants have been an affront to the purposes of the mediation process under the Act to resolve employment relationship problems and promote good faith dealings. I have already mentioned that the actions of the defendants could also have had severe consequences for their client. [...]

Conduct of the parties

[112] RPW conducted itself in a responsible and professional manner, consistent with the good faith philosophy that underpins the Act.

[113] H and C did not.

[114] H and C engaged in exceptionally poor behaviour that demonstrated a wilful disregard for known facts and clearly established law. They appear to have deliberately escalated RPW's actual legal costs.

[115] There was no need for H and C to have conducted themselves in the way they have because as employment advocates they knew that they could have:

- (a) filed Authority proceedings on behalf of C's clients to address any unresolved workplace issues;
- (b) requested urgency if necessary, to ensure any urgent unresolved issues, such as claims that an employee was being required to work in an unsafe workplace, could be determined urgently; and

⁴³ Above n15 at [12].

- (c) filed a challenge with the Employment Court to some or all of any Authority determination that they disagreed with.

[116] That would have been an appropriate way for H and C to have pursued any genuine concerns they may have had on behalf of C's clients, instead of deliberately and unnecessarily increasing RPW's legal costs in the way they did.

Comparable cases

[117] This matter is in a category of its own in terms of the level and extent of the egregious misconduct by H and C that unnecessarily increased RPW's legal costs.

[118] A review of the following cases did not establish that doubling the notional starting tariff in this case was inconsistent with previous case law.

[119] In *Nisah v LSG Sky Chefs New Zealand Ltd (No 1)* the Employment Court approved the approach the Authority had taken to assessing costs, which had involved doubling the tariff, although the Court ended up reducing costs based on ability to pay, because it had financial information that was not available to the Authority.⁴⁴

[120] In *Catanuto v Te Runanga O Whaingaroa* the Authority awarded the successful party \$21,000 costs for a three day investigation meeting.⁴⁵ That involved doubling the then \$3,500 per day tariff to reflect that the unsuccessful party's conduct had substantially and unnecessarily increased the successful party's costs.

[121] In *Tex Onsite Limited v Hill* the Authority awarded the successful party \$31,500 costs, based on applying the daily tariff to nine days, consisting of three days of investigation meeting time plus six days' preparation time plus \$16,736.63 disbursements, inclusive of fees for a digital forensic specialist.⁴⁶

[122] In *Whitten v Ogilvy New Zealand Limited* the Authority uplifted the notional daily tariff for a three day investigation meeting from \$9,000 to \$21,000.⁴⁷ A multiplier of three was applied to the then daily tariff of \$3,000, to reflect that the unsuccessful party's conduct had unnecessarily increased the successful party's costs.

⁴⁴ [2018] NZEmpC 8 at [372] and [384].

⁴⁵ [2014] NZERA Auckland 225.

⁴⁶ [2016] NZERA Auckland 67.

⁴⁷ ERA AA200A/10.

[123] In *Carter Holt Harvey v Eastern Bays Independent Industrial Workers Union*⁴⁸ the Employment Court on challenge awarded costs of \$25,000 for an Authority matter. That award involved increasing the Authority's tariff from \$3,000 to \$5,000 per day and applying it to five days, consisting of a four day investigation meeting plus one extra day for preparation to reflect the complexity of the matter.

Access to justice considerations

[124] The provisional costs assessed by the Authority do not need to be reduced to reflect access to justice considerations.

[125] H and C are employment advocates who did not incur any legal costs because they represented themselves. The level of costs they are now facing resulted from their deliberate flouting of Authority directions and orders.

[126] The level of costs incurred by RPW has therefore been within H's and C's control. Had they acted appropriately in connection with these proceedings, then their potential costs liability would be substantially lower.

Good faith considerations

[127] H's and C's conduct in this matter has been the antithesis of the good faith philosophy that underpins employment relations in this country.

[128] Public debate, and representation of and advocacy for those involved in employment relationships, should occur without personalised abuse of others.

[129] Good faith considerations support an award of \$30,000 costs to RPW.

Costs in the Authority are expected to be moderate

[130] The expectation is that costs awarded by the Authority should be moderate, so consideration must be given to whether an award of \$30,000 costs would be inconsistent with that principle. It would not be.

[131] This was a uniquely challenging matter that reasonably required RPW to sustain legal costs well in excess of the tariff. The following factors made an award of \$30,000 costs

⁴⁸ [2011] NZEmpC 13.

‘moderate’ in these particular circumstances, because they all unnecessarily increased RPW’s actual costs:

- (a) The considerable urgency required;
- (b) Repeated public disparagement by H and C of RPW and its professional advisors;
- (c) Public personalised abuse of, and attacks, on RPW’s lawyer;
- (d) Bad faith claims by H and C of criminal wrongdoing by RPW and its lawyers;
- (e) Bad faith claims by H and C of misuse of taxpayers money;
- (f) An extended public social media disinformation campaign by H and C that fundamentally misrepresented these proceedings and the Authority’s directions, orders and determinations;
- (g) Attempts by H and C to derail this investigation by interference with RPW’s funding;
- (h) Attempted intimidation of, and personalised attacks on, Authority Members by H and C; and
- (i) Deliberate public defiance of the Authority’s directions and orders.

Costs must not be used to punish an unsuccessful party

[132] It is important to recognise that an award of costs by the Authority must not be used to punish H and C, because they have already been punished by the penalties that were imposed on them for their breaches of the Act.⁴⁹

[133] However, H and C deliberately and repeatedly engaged in conduct they knew would unnecessarily increase RPW’s legal costs. As employment advocates, H and C knew better than most that they would face costs consequences for their clearly unlawful actions. RPW also put H and C on notice they risked an increased costs liability if they continued breaching their legal obligations.

[134] An award of \$30,000 costs to RPW in the particular circumstances of this case would not amount to punishment of H or C.

⁴⁹ Above n9.

[135] It simply reflects a modest contribution to less than half of RPW's actual costs, based on well-established costs principles, that H and C were aware of when they chose to act in the way they did.

What costs and disbursements can RPW recover?

[136] Having engaged in a balancing exercise to achieve a just result, the provisional costs assessment of \$30,000 in favour of RWP reflects an appropriate and principled exercise of the Authority's costs discretion.

[137] Accordingly, RPW is entitled to recover \$30,000 towards its actual legal costs plus its \$71.56 filing fee.

How should costs be apportioned between H and C?

[138] Because H and C are two separate legal personalities/entities, the costs that have been awarded to RPW must be apportioned between them.

[139] H, as the sole director and shareholder of C, has complete authority and control over C. H is also well known as the public face of C and is effectively its 'controlling mind'. The evidence established that C did not do anything in this case without H's direct input, authority and approval.

[140] There were no material differences between H and C in terms of the various actions and/or omissions they engaged in together that unnecessarily and unreasonably increased RPW's costs. It is therefore appropriate for the costs liability in this matter to be apportioned equally between H and C.

[141] Accordingly, H and C must contribute \$15,000 each towards reimbursing RPW for some of its actual legal costs. H and C must also share equal responsibility for reimbursing RPW its \$71.56 filing fee, by each paying RPW \$35.78.

Authority's costs orders

[142] RPW is awarded \$30,000 towards its actual legal costs plus \$71.56 to reimburse its filing fee.

[143] Within 28 days of the date of this determination:

- (a) H is ordered to pay RPW \$15,035.78, being;
 - (i) \$15,000 towards its actual legal costs; plus
 - (ii) \$35.78 to partially reimburse RPW's filing fee,
- (b) C is ordered to pay RPW \$15,035.78, being;
 - (i) \$15,000 towards its actual legal costs; plus
 - (ii) \$35.78 to partially reimburse RPW's filing fee.

Rachel Larmer
Member of the Employment Relations Authority