

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 611
3085319
3172525

BETWEEN NICOLA MAREE WATKINS
Applicant

AND HIGHMARK HOMES
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, in person
 Danny Jacobson, representative for the Respondent

Investigation Meeting: On the papers

Determination: 18 October 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] This determination deals with costs relating to Authority determinations issued on 30 November 2022¹ and 1 December 2022.² The issue of costs arising from those determinations was held over pending the outcome of Ms Watkins' application to reopen those determinations. In a determination issued on 4 August 2023 Ms Watkins' reopening application was not granted.³ In a determination issued on 7 September 2023 a costs award for that reopening application was made in favour of Highmark Homes Limited (Highmark).⁴ As indicated in that costs determination, the Authority would now determine the outstanding costs on the information filed in accordance with the relevant timetables.⁵

¹ *Nicola Maree Watkins v Highmark Homes Limited* [2022] NZERA 632.

² *Nicola Maree Watkins v Highmark Homes Limited* [2022] NZERA 638.

³ *Nicola Maree Watkins v Highmark Homes Limited* [2023] NZERA 418.

⁴ *Nicola Maree Watkins v Highmark Homes Limited* [2023] NZERA 506.

⁵ Above at [3].

[2] In the 30 November and 1 December 2022 determinations costs were reserved and timetables set for memoranda to be filed if the parties were unable to resolve the issue of costs themselves.⁶

[3] In a memorandum filed and served on 12 December 2022 Highmark advised the parties had not been able to resolve costs between them and that it seeks orders of costs in its favour in respect of those two matters. Ms Watkins did not file a reply memorandum within the timetables set or otherwise engage with the Authority on the matter of costs as they relate to these applications.

Costs principles

[4] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- 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.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

3085319

Highmark's claim for costs 3085319

[5] Highmark seeks a significant costs award as a contribution to actual costs incurred of \$51,945.38 (including GST) in responding to the applicant's personal grievance claim and pursuing its counterclaim for breach of employment agreement and damages. Highmark also seeks a modest contribution to actual costs incurred of

⁶*Nicola Maree Watkins v Highmark Homes Limited* [2022] NZERA 632 at [55] – [57] and *Nicola Maree Watkins v Highmark Homes Limited* [2022] NZERA 638 at [15] – [17].

\$500 in filing this costs memorandum. Supporting invoices have been provided. It submits the award sought is warranted given:

- a starting point of \$24,165 is fair applying a multiplier of three to the actual investigation meeting time of two days;
- Highmark was largely successful in the preliminary determination which dealt with the jurisdictional issue of what personal grievances Ms Watkins had raised;⁷
- despite this determination, which Ms Watkins did not challenge she filed significant information beyond the scope of the issues identified by the Authority for determination and to which Highmark was obliged to respond causing it to incur further and unnecessary costs;
- Ms Watkins' conduct in filing without prejudice material which required Highmark to incur further and unnecessary costs in raising objections which were dealt with by the Authority in November 2021 and May 2022; and
- Highmark made a realistic 'walk away' settlement proposal to Ms Watkins on 3 December 2021 which it says was unreasonably rejected. It says had it been accepted the costs Highmark have incurred in this matter and the other matters before the Authority brought after that date would have been avoided.

Costs analysis – 3085319

[6] Highmark was the successful party in the matter. It is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs. It is accepted Highmark has incurred actual costs in respect of this matter and that it should receive a contribution to costs incurred. In assessing an appropriate award of costs the notional daily tariff is a starting point.⁸ The investigation meeting for this matter took two days. The applicable daily tariff is \$4,500.00 for the first day and \$3,500 for any subsequent day of the same matter. The starting point for considering costs in this matter is \$8,000.00.

⁷*Nicola Maree Watkins v Highmark Homes Limited* [2020] NZERA 467.

⁸ <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>

[7] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the starting point.

[8] The 'walk away' offer was made before the investigation meeting for this matter was heard and the bulk of preparation for it was complete. Had it been accepted the cost of litigation to both parties would have been avoided. An uplift for the rejection of walk away offer is warranted.

[9] With respect to how conduct of the parties may have contributed to costs being unnecessarily incurred, it is accepted the factors identified by Highmark including Ms Watkins approach to the scope of the investigation have increased the costs it has incurred in respect of this matter. A contribution to the costs incurred in filing the costs memorandum is declined. In respect of the preliminary matter between the parties, costs have been determined on a no order basis.⁹

[10] Taking all relevant factors into account an award of \$9,000 is ordered.

3172525

Highmark's claim for costs 3172525

[11] Highmark seeks a contribution of \$4,500.00 to actual costs incurred of \$6,353.76 (including GST) in successfully opposing Ms Watkins' application to reopen the Authority determination issued on 13 November 2020.¹⁰ Highmark also seeks a contribution to actual costs incurred of \$500 in filing the supporting costs memorandum. Supporting invoices have been provided. It submits the award sought is warranted given:

- Ms Watkins' delay in making the re-opening application amounts to an abuse of process and made for the ulterior motive of delaying or otherwise placing a barrier in front of the High Court bankruptcy proceedings between the parties;
- though the matter was determined on the papers the costs incurred by Highmark in relation to this matter are actual and reasonable and required researching relevant law, perusal of the significant volume of

⁹ N7 at [49].

¹⁰ N7.

documentation on which Ms Watkins sought to rely and drafting, filing and serving responding documentation and submissions; and

- Highmark made a realistic ‘walk away’ settlement proposal to Ms Watkins on 3 December 2021 which it says was unreasonably rejected. It says had it been accepted the costs Highmark have incurred in this matter and the other matters before the Authority brought after that date would have been avoided.

Costs analysis - 3172525

[12] Highmark was the successful party in the matter. It is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party’s costs. It is accepted Highmark has incurred actual costs in respect of this matter and that it should receive a contribution to costs incurred. In assessing an appropriate costs award the notional daily tariff is a starting point. As this matter was determined on the papers, the appropriate starting point in this matter is half the applicable first day notional tariff of \$4,500 being \$2,250 because the cost of attending an investigation meeting was avoided.

[13] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the starting point.

[14] The ‘walk away’ offer was made before Ms Watkins lodged the reopening application. While, in general terms, this litigation would have been avoided had the offer been accepted, given the reopening application was not in the contemplation of the parties when the walk away offer was made there is insufficient link between the walk away offer and this reopening application and determination. There is to be no uplift for the walk away offer.

[15] It is not appropriate to speculate as to Ms Watkins motivation for filing the reopening application and this is not a ground for an uplift. A costs award is not a punishment.

[16] Taking all relevant factors into account an award of \$2,000 is ordered.

Outcome

[17] Within 21 days of today's date Nicola Maree Watkins is ordered to pay Highmark Homes Limited \$11,000.00 without deduction being a contribution to costs reasonably incurred.

Marija Urlich
Member of the Employment Relations Authority