

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 225  
5432307

BETWEEN MELANIE ROSE CATANUTO  
Applicant

A N D TE RUNANGA O  
WHAINGAROA INC  
Respondent

Member of Authority: Rachel Larmer

Representatives: Penny Swarbrick and Anaminka Singh , Counsel for  
Applicant  
Emma Butcher, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 14 May 2014 from Applicant  
28 May 2014 from Respondent

Date of Determination: 10 June 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A Te Runanga O Whaingaroa Inc (the Board) is ordered to pay Ms Catanuto \$21,000 towards her actual legal costs and \$684.88 towards her actual disbursements.**

**Employment Relationship Problem**

[1] In its substantive determination<sup>1</sup> the Authority held that Ms Catanuto had been unjustifiably dismissed. Ms Catanuto's breach of good faith claim was also successful, but her penalty claim was not. Her claims for lost commission and loss of benefits were adjourned *sine die* at the joint request of the parties.

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<sup>1</sup> [2014] NZERA Auckland 150.

[2] Ms Catanuto withdrew her claim for reinstatement as a remedy at the commencement of the Authority's investigation meeting on 16 January 2014.

[3] Ms Catanuto seeks indemnity costs and disbursements of \$59,542.49. She claims that the manner in which the Board conducted its case was directly responsible for the legal costs she incurred given the raft of allegations she was required to respond to and the seriousness of the allegations which, if upheld, would have had a serious impact on her integrity and career prospects.

[4] Ms Catanuto says she incurred additional time and expense due to the Board alleging to the Authority that one of her supporters had covertly recorded the Authority proceedings, potentially in breach of the Authority's non-publication orders. As it turned out Ms Catanuto had no involvement in or knowledge of the covert recording which the Authority now understands was done by the wife of one of the Board's current board members.

[5] In the alternative, if the Authority is not prepared to award indemnity costs then Ms Catanuto submits the notional daily tariff of \$3,500 be doubled to \$7,000 to reflect the unnecessary additional costs she was put to because of the manner in which the Board elected to conduct its case.

[6] The Board submits this is not an appropriate case for indemnity costs and that the notional daily tariff should be reduced not increased. The Board claims that Ms Catanuto was not required to take an active role in resolving the covert recording issue other than to state via her counsel that she had no knowledge of or involvement with it.

### **The law**

[7] The legal principles that apply to costs in the Authority are so well established that I do not need to set them out – see *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>2</sup>. Whilst the Court of Appeal in *Bradley v. Westpac Banking Corporation*<sup>3</sup> recognised that indemnity costs may be awarded where a party has behaved very badly or unreasonably the Authority ultimately has the discretion to assess costs in its jurisdiction.

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<sup>2</sup> [2005] 1 ERNZ 808

<sup>3</sup> [2009] NZCA 234

[8] I decline to award indemnity costs because I consider that adopting the Authority's usual notional daily tariff based approach to costs is more appropriate in this case.

**What is the starting point for assessing costs?**

[9] The notional daily tariff is currently \$3,500. This matter involved a three day investigation meeting so the starting point for assessing costs is \$10,500 (3 x \$3,500). I must then go on to consider, on a principled basis, whether there are any factors arising from the particular circumstances of this case which warrant adjusting the notional starting tariff.

**Are there any factors which would warrant a reduction in the notional daily tariff?**

[10] The Board submits that Ms Catanuto did not approach her case economically. I do not accept that.

[11] The Board claims its costs were significantly increased due to her choice to vigorously pursue reinstatement as a remedy, initially as an urgent interim reinstatement and then as a permanent remedy. I do not accept that. It is not surprising given the unsatisfactory process Ms Catanuto was subject to and the complete lack of information she was given both during the process and at the time of her dismissal that she would respond as she did.

[12] Ms Catanuto sensibly agreed to forgo her interim reinstatement application in light of the Authority's offer of an early substantive investigation meeting. She also wisely withdrew her reinstatement claim in light of the Authority expressing concerns at the outset of the investigation meeting about the practicalities of the parties working together given that Ms Catanuto was the Chief Executive and the Board held the strongly expressed view that did not want to work with her.

[13] I do not consider the reinstatement put the Board to additional unnecessary expense.

[14] I also reject the Board's submission that the tariff should be decreased because Ms Catanuto pursued unusually high remedies that had little prospect of success and did not in fact succeed. I do not consider the remedies claimed put the Board to unnecessary additional expense.

[15] The Board says it is a cash poor community organisation largely dependent on funding. It claims that because it is not a profit making organisation and a substantial costs award will cause it and its beneficiaries' hardship. No evidence was produced in support of these submissions.

[16] If a party wants costs reduced on the grounds of hardship or inability to pay then it is up to that party to produce evidence in support of such a claim. The Board has not done so. Therefore the Board's financial position is not a factor I have taken into account when assessing costs.

[17] If what the Board says is true about its financial situation I would have expected it to have taken a realistic view of the merits of it successfully defending Ms Catanuto's claims. If the Board had acknowledged the very obvious and fundamental flaws in the process it adopted that would have saved both parties considerable time and cost.

[18] I find that there are no factors which would warrant a reduction to the notional starting tariff.

**Are there any factors which should result in an increase to the notional daily tariff?**

[19] I accept Ms Catanuto's submission that the manner in which the Board elected to conduct its case substantially and unnecessarily increased her legal costs. I find that it is appropriate to reflect that in the level of costs she is awarded.

[20] As early as 06 November 2013 the Authority identified to the Board that it was expected to specifically address in its evidence what if anything it had done to comply with its s.4(1A) good faith obligations and each of the four procedural fairness tests in s.103A(3) of the employment Relations Act 2000 (the Act).

[21] Instead of doing this the Board elected to avoid these issues completely in the evidence it produced to the Authority. If the Board had done what the Authority asked that then it would have been obvious that it had not complied with its statutory obligations. That in turn should have alerted it at that early stage to the fact it would be unable to procedurally justify Ms Catanuto's dismissal.

[22] Instead the Board maintained the untenable position that Ms Catanuto should have known (without being told and without being provided with answers to her

questions and without being provided with even one document) what the Board had based its disciplinary concerns on. This was a completely unrealistic position to adopt and one which put Ms Catanuto to considerable unnecessary expense because she was required to spend considerable time and cost addressing basic information and process issues.

[23] It should also have been obvious to the Board from the outset that it had failed to comply with its own disciplinary process, that it had failed to respond to Ms Catanuto's requests for information and clarification of the disciplinary concerns, and that it failed to provide her with information it said it would give her before it actually dismissed her. Instead of conceding any of these issues the Board again caused Ms Catanuto additional unnecessary expense by putting her to the cost of proving each of these deficiencies.

[24] The two decision makers who gave evidence to the Authority both admitted that at least some aspects of their process and decision making had been unfair to Ms Catanuto. When giving their evidence these two decision makers did not know what evidence they had relied on when making their findings against Ms Catanuto, they did not know or understand what her explanations were to a number of the concerns, they had not assessed the information she had provided in support of her explanations and could not explain why her information had been rejected.

[25] These were all serious red flags that the Board would not be able to justify its decision. Rather than face up to the evidence its own witnesses had given the Board continued to maintain that its actions and how it acted were what a fair and reasonable employer would have done in all the circumstances. This again put Ms Catanuto to additional unnecessary cost by having to present evidence in respect of each of the Board's many failings.

[26] The Board put Ms Catanuto to the additional unnecessary expense of establishing that she had not engaged in serious misconduct in respect of each of the 22 allegations it had raised with her when ultimately by the time it filed its submissions it had reduced the allegations it relied on in support of her dismissal to three allegations only. She should have been told that at the outset.

[27] The Board also relied on each of its 22 disciplinary concerns as giving rise to contribution in circumstances where it should have been clear the evidential basis for

that view was simply not there. Ms Catanuto was again put to the unnecessary additional expense of explaining in considerable detail both in her evidence and submissions her view of each of these matters.

[28] Ms Catanuto was put to the additional unnecessary cost of responding to the Board's claims that she had engaged in subsequently discovered misconduct. The Board's evidence about this was weak because it relied entirely on hearsay evidence from someone who was not personally involved in such matters. This contrasted with direct evidence Ms Catanuto provided about the events in issue.

[29] Interestingly the Board elected not to follow up on Ms Catanuto's explanation by interviewing the people she had identified as being directly involved in the matter preferring instead to put her to the expense of proving her evidence about this matter.

[30] I acknowledge that costs must not be used to punish an unsuccessful party so I am careful to ensure that does not occur here. However where a successful party has been put to unnecessary additional cost because the unsuccessful party has elected to run clearly untenable arguments and has pursued a position which is not supported by its own evidence and which is contrary to widely accepted case law then it is appropriate to reflect that in the costs that are awarded.

[31] I am satisfied that has occurred in this case and these are all factors which warrant doubling the notional starting tariff.

[32] I do not rely the covert recording issue to increase the notional daily tariff because I consider that would have had a negligible impact on Ms Catanuto's overall costs given she denied involvement in and knowledge of such matters.

[33] I order the Board to contribute \$21,000 towards Ms Catanuto's actual legal costs.

#### **What if any disbursements should be awarded?**

[34] Ms Catanuto claims unspecified disbursements of \$301.50 plus Employment Relations Authority hearing fees of \$613.32.

[35] It is up to Ms Catanuto, as the party claiming contribution towards her actual disbursements, to provide the Authority with sufficient information to satisfy itself that these were properly incurred and were at a reasonable level. That has not

occurred. I am therefore only prepared to reimburse her for disbursements that I know were actually incurred.

[36] Ms Catanuto incurred a filing fee of \$71.56 and Employment Relations Authority hearing fees of \$613.32. I therefore am satisfied that it is appropriate to order the Board to pay Ms Catanuto \$684.88 towards her actual disbursements. I decline to make any order regarding other unspecified disbursements.

**Outcome**

[37] The Board is ordered to pay Ms Catanuto \$21,000 towards her actual costs plus \$684.88 towards her actual disbursements.

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