

**NOTE: See paragraph [3]  
regarding order prohibiting  
publication of certain  
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 692  
3001443

BETWEEN                      FMV  
   Applicant  
  
AND                                TZB  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Applicant in person  
   Tim Clarke, counsel for the Respondent  
  
Memoranda received:      From the Respondent on 31 October 2024  
   From the Applicant on 14 November 2024  
  
Determination:              20 November 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]      A determination issued on 3 October 2024 concluded the Authority could not investigate and determine a personal grievance FMV wished to pursue against her former employer, TZB.<sup>1</sup> Her application had to be treated as withdrawn as no action had been taken on it for more than three years. Even if the matter was not treated as withdrawn, the application was outside certain time limits set by the Employment Relations Act 2000 (the Act). FMV's request for leave to pursue her grievance outside those limits was declined because she had not established the delay resulted from exceptional circumstances of the type for which such leave could be granted.

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<sup>1</sup> *FMV v TZB* [2024] NZERA 584.

[2] The determination reserved the issue of costs and encouraged the parties to resolve any issue of costs between themselves. They were unable to do so and TZB lodged a memorandum seeking an order for costs of \$9,000. In reply to TZB's request FMV submitted costs should lie where they fell, that is each party should bear its own costs.

### **Order prohibits publication of names of the parties and a representative**

[3] An order made under clause 10 of Schedule 2 of the Act is in place prohibiting publication of the names of the parties and the name of FMV's mother.<sup>2</sup>

### **Factors**

[4] In determining costs the Authority applies well-established tenets to the particular circumstances of the case.<sup>3</sup> Those tenets recognise that a successful party should receive a contribution to its reasonably incurred costs and expenses; costs should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional 'daily rate' as a starting point to assess costs.

[5] Undue rigidity in applying the daily rates is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may take account of settlement offers made by either party, the financial means of a liable party to pay costs, the preparation required in particularly complex matters and whether conduct of any party unnecessarily increased the costs they incurred.

[6] This case required a balancing of two factors of particular relevance - the modest level at which costs are usually set and the effect of a rejected settlement offer on what amount should be awarded as costs.

### **TZB's submissions**

[7] TZB sought a contribution towards its costs because it was completely successful in its application that the matter had to be treated as withdrawn. Treating

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<sup>2</sup> *FMV*, above n 1, at [3]-[8].

<sup>3</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies) and Employment Relations Act 2000, Sch 2 cl 15(1).

the matter in that way was required because neither FMV nor the Authority had taken any action on it for more than three years.<sup>4</sup>

[8] TZB had also succeeded in its arguments that, firstly, FMV's claim was already out of time when she had lodged her application in the Authority in December 2016 and, secondly, that leave should not be given to raise a personal grievance out of time.

[9] It said addressing the limitation issues had required detailed submissions and affidavit evidence. It submitted the time involved in providing those submissions and an affidavit was equivalent to a one-day investigation meeting so the assessment of costs should start at the Authority's usual daily tariff for costs of \$4,500.

[10] TZB's costs memorandum recounted the Authority's extended efforts, starting in 2017 and continuing into 2022, to get FMV to provide medical records relevant for assessment of several issues in her claim, including questions about what happened during the delay in lodging her claim in the first place. TZB said its costs were unnecessarily increased by having to respond to extensive memoranda and emails FMV had lodged on that issue.

[11] TZB submitted the costs award should be increased because FMV had rejected a settlement offer made in September 2020. TZB had offered a settlement sum of \$150,000, on a "without prejudice save as to costs" basis, after the Court of Appeal upheld a High Court decision to strike out the parallel proceedings FMV was seeking to pursue in the civil jurisdiction. The offer was made on condition FMV discontinued claims in the Authority, the Human Rights Review Tribunal and the Supreme Court.

[12] FMV rejected the settlement offer on 24 October 2020. Subsequently the Supreme Court, the tribunal and the Authority each found FMV was not entitled to go ahead with proceedings in their respective jurisdictions. She was, eventually, unsuccessful in each forum so would have been substantially better off if she had accepted the 2020 settlement offer.

### **FMV's submissions**

[13] FMV submitted costs should lie where they fell because:

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<sup>4</sup> Employment Relations Act 2000, Sch 2 cl 14(2).

- Her claims were genuine and meritorious, recounting her view of what had happened in her employment up to her resignation on 21 January 2010.
- TZB had unnecessarily increased costs by arguing over whether FMV had the capacity to proceed with the claim she lodged in the Authority on 23 December 2016.
- TZB was wrong to assert her claims were time-barred from the outset.
- TZB's settlement offer was not a reasonable amount to settle her claims in the civil courts, the tribunal and the Authority. In responding to the settlement offer in 2020 FMV had, instead, proposed \$1.5 million as a reasonable settlement sum.

### **Assessment**

[14] FMV's proceedings in the Authority ended due to jurisdictional issues concerning the delays in progressing her claim, both before it was lodged in 2016 and during the pause FMV had asked for in August 2018 while she pursued proceedings elsewhere and which then lasted more than three years. Determination of costs had to be made on the basis of the actual outcome in the Authority's determination, not on FMV's view about the merits of her case if she had been in time to progress it.

[15] While delays and difficulties caused by FMV resisting production of her medical records had unnecessarily increased costs for TZB, the major factor requiring an upward adjustment of the daily tariff was the information regarding the substantial settlement offer made to FMV in October 2020. The offer was made without admission of liability and, from context at that time, a rational response to the prospect of ongoing litigation costs for TZB in the Supreme Court, the tribunal and the Authority. The amount offered was also comparable to awards made in cases where allegations similar to those made by FMV had been successfully established. It was, therefore, a reasonable offer, made with adequate time given for her to consider and respond.

[16] The daily tariff of \$4,500 was an appropriately modest starting point for the assessment of costs, given the length and extent of participation required from TZB in responding to FMV's proceedings.

[17] A doubling of that amount was also appropriate in light of the contrast between the outcome, with FMV not permitted to go ahead with her case in the Authority, and what she could have obtained if she had accepted the reasonable settlement offer made

in October 2020. A firm approach is required to setting costs in such situations because the scarce resources of the Authority should not be drained by litigants who refuse reasonable settlement offers, seek to proceed with litigation and fail to achieve a better outcome than was offered.<sup>5</sup>

[18] FMV made no submissions and provided no evidence on her financial capacity to meet an award of costs.

[19] Weighing those factors, the award of \$9,000 sought by TZB was a relatively modest and appropriate amount to order FMV to pay as costs.

### **Order**

[20] By no later than 28 days from the date of this determination FMV must pay TZB \$9,000 as a contribution towards costs incurred in responding to her application to the Authority.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>5</sup> *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20].