

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 485
3267961

BETWEEN INY
 Applicant

AND HYI
 Respondent

Member of Authority: Marija Urlich

Representatives: Applicant in person
 Danny Gelb, advocate for the Respondent

Investigation Meeting: On the papers

Submissions received: 26 July 2024, from the Respondent
 5 August 2024, from the Applicant

Determination: 16 August 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority issued a determination on 19 June 2024 declining INY's application to have a s 149 record of settlement set aside.¹ Costs were reserved. The Authority then took steps to timetable an investigation of INY's alternative claim which sought to enforce the record of settlement. On 23 July INY withdrew that claim. At the request of HYI a timetable for filing memoranda as to costs was set. The parties' memoranda are before the Authority.

¹ *INY v HYI* [2024] NZERA 359.

[2] This determination also deals with whether the interim non-publication order should be made permanent.²

Costs principles

[3] 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.

HYI's claim for costs

[4] HYI seeks an award of \$3,375, as a contribution to total costs of representation incurred in respect of this matter of \$8,451.87 which, it submits, do not include costs incurred subsequent to July 2024 including drafting costs memoranda. Supporting information has been provided. HYI submits the award sought is warranted given:

- it successfully defended the claim and costs should follow the event;
- it incurred costs unnecessarily in dealing with the substantive matter which INY withdrew;
- the investigation of the preliminary matter was conducted on the papers which required filing of affidavits and submissions; and
- applying the current daily tariff of \$4,500 for the first day a reasonable starting point for a matter conducted on the papers is \$2,250, being half a hearing day.

² Above [5].

INY's position on costs

[5] INY submits the appropriate starting point for a consideration of costs is \$1,125, being one quarter of the applicable daily tariff and an appropriate award is \$500 paid at the rate of \$10 per week given:

- the determination was preliminary and related to a narrow point of law;
- the documentation the parties were required to file was limited and the case management conference held to timetable the investigation was short;
- no costs have been incurred in respect of the withdrawal of the second issue; and
- INY's ability to pay any costs award is limited caused in part by the ongoing effects of their work injury which required considerable time off work, costs of medical care and moving cities to find work.

Costs analysis

[6] HYI successfully defended INY's claim and 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.

[7] Using the notional daily tariff approach, the applicable daily tariff is \$4,500 with each subsequent day at \$3,500. Though this matter was determined on the papers given its particular circumstances including the reasonably detailed timeline and supporting information required to be before the Authority the starting point for a costs consideration is half the first day tariff of \$2,250.

[8] There are factors which warrant a decrease in the application of the tariff - the matter for determination was narrow and though limited the information as to INY's reduced financial circumstances is accepted as a relevant and significant factor.

[9] A fair costs award, given all the relevant circumstances is \$1,000 in HYI's favour which INY is ordered to pay in two tranches - \$500 by Friday 6 September 2024 and \$500 by Friday 27 September 2024.

Non-publication order

[10] HYI opposes the non-publication order being made permanent. It says the claim was vexatious and frivolous and to issue a non-publication order may encourage such claims.

[11] There is clear information before the Authority that publication of their identity may have a harmful impact on INY including information from INY's doctor. It is apparent to the Authority that INY's application was sincere. A permanent non-publication order is appropriate to minimise the risk of harm to INY and is made in respect of the identity of the parties and any information which may identify them, including medical information: clause 10(1) second schedule Employment Relations Act 2000.

Marija Urlich
Member of the Employment Relations Authority