IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 39
3125798

	BETWEEN	NEW ERA IT LIMITED Applicant
	A N D	ANDREW HOOD Respondent

Member of Authority:	David G Beck
Representatives:	Amy Keir and Penny Shaw, counsel for the Applicant Glenn Jones, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	22 December 2021 from the Applicant 1 February 2022 from the Respondent
Date of Determination:	15 February 2022

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] By way of a determination of 30 November 2021 the Authority dealt with an application by New Era IT Limited (New Era) seeking various remedies flowing from alleged breaches arising out of a record of settlement (ROS) that New Era had previously entered with Andrew Hood pursuant to section 149 Employment Relations Act 2000 (the Act). New Era was successful in their predominant claim that as per s 149(4) of the Act Mr Hood was liable for

penalty actions for each identified breach. The Authority ordered that for five accumulated breaches, a penalty of $15,000 be paid by Mr Hood to New Era. [1]

[2] New Era was unsuccessful in persuading the Authority that additional remedies including damages for alleged loss of profit flowing from identified breaches were appropriate. The Authority determined the only available remedies were those arising from s 149(4) of the Act (discretionary penalties). [2]

[3] The parties were asked to explore resolving costs by agreement but failed to do so. The investigation meeting took place over three full days and a further half day for submissions.

New Era's submission

[4] Ms Shaw, in alluding to the well settled principles and approach by the Authority and case law, suggested that given New Era's success in obtaining penalty awards an uplift in the daily tariff which the Authority normally applies is appropriate and seeks an award of $22,000 and the filing fee of $71.56.

[5] Ms Shaw acknowledged that New Era had 'mixed success' in their application and referenced Judge Smith's comment in *Coomer v JA McCallum & Son* that a nuanced approach of competing considerations is appropriate. [3] Ms Shaw pointed to a view that during the investigation meeting limited time was taken up in New Era pursuing their unsuccessful claim for damages for loss of profit.

[6] Ms Shaw then emphasised that Mr Hood's conduct leading up to and during the investigation meeting unnecessarily prolonged proceedings including the late production of relevant evidence and that some documentation under his control had to be produced via summoned witnesses.

[7] Generally, Ms Shaw submitted the case was "of more than usual complexity" and warranted a costs uplift.

---

[1] *New ERA IT Limited v Hood* [2021] NZERA 535.
[2] At [74].
[3] *Coomer v JA McCallum & Son Ltd* [2017] NZEmpC 156.

Andrew Hood's submission

[8] Mr Jones sought to first place matters in perspective by noting New Era alleged 20 separate breaches of which three quarters were unsuccessful and that the damages claim had been dismissed for lack of jurisdiction which was an issue foreshadowed by the Authority Member prior to the matter being set down.

[9] Mr Jones then went on to suggest that New Era had unnecessarily increased its own costs by claiming damages in the face of clear authority to the contrary. After alluding to relevant case law principles and citing *Coomer,* Mr Jones invited the Authority to "stand back and assess the matter in the round, the respondent was at least successful as the applicant". Mr Jones' view was that arguably "equity and good conscience dictates that costs lie where they fall".

[10] On the latter issue of equity, Mr Jones pointed to the power imbalance between the parties and Mr Hood's modest means (that the Authority canvassed in assessing the penalties).

[11] In addition, Mr Jones noted that Mr Hood had been a respondent party in an earlier unsuccessful application by New Era to have proceedings against Mr Hood and three other ex-employees of New Era consolidated and removed to the Employment Court. [4] Costs were reserved and Mr Jones pragmatically suggested that any costs I award in Mr Hood's favour should be essentially offset or "brought to account" against any costs award in favour of New Era in these proceedings. The latter investigation meeting was determined 'on the papers' and Mr Hood's then counsel, Mr Jones contributed a legal submission.

Cost principles

[12] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [5] including costs are not to be used as a punishment or as a reflection on how either party conducted

[4] *New Era IT Limited v Andrew Hood, Philip Gourley, Laura Kaye, Stephen McGirr and Contrast NZ Limited* [2021] NZERA 128.
[5] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority. [6]

Assessment

[13] A general principle for a successful party is that costs should 'follow the event' and here New Era was successful in establishing breaches that led to an imposition of what can best be described as a significant penalty.

[14] I also have regard in the circumstances that this dispute involved breaches of a s 149 of the Act record of settlement, the upholding of which is to be treated with due regard as it involves a 'compromise' where value is exchanged in the clear expectation that all matters are resolved on a full, final and confidential basis and that the parties have assumed binding ongoing obligations.

[15] Looking at the totality of the two proceedings and applying discretion, I consider that in the first proceedings of New Era's unsuccessful removal application a costs award in favour of Mr Hood is appropriate and, in the circumstances, I award him a credit of $2,000.

[16] In the second proceedings that followed I consider there is merit in Ms Shaw's suggestion that Mr Hood unnecessarily drew out proceedings by a lack of timely disclosure of information that basically established his culpability. I do not consider the matter to have been overly complex from a legal perspective and there is equal merit in Mr Jones' contention that New Era incurred unnecessary costs in pursuing compensatory damages.

[17] Applying all the factors identified, considering the nature of the proceedings that largely vindicated New Era and assessing the matter in its totality I do think it is fair to award New Era a modest uplift in the amount of costs the Authority would normally award.

[18] I asses an award of $15,000 to be fair and equitable in all the circumstances but reduce such by $2,000 to take account of an award as indicated in Mr Hood's favour for the earlier proceedings.

---

[6] Section 160(2) Employment Relations Act 2000.

Award

[19] I order Andrew Hood to pay New Era IT Limited the sum of $13,000.00 as a contribution to legal costs incurred and a filing fee of $71.56.

David G Beck
Member of the Employment Relations Authority