

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 153
3000592

BETWEEN KIM RANDLE
 Applicant

AND THE WAREHOUSE LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Gregory Bennett, advocate for Applicant
 Penny Swarbrick, counsel for the Respondent

Submissions Received: 24 November 2017 from the Respondent
 No submissions received from or on behalf of the
 Applicant

Date of Determination: 18 March 2019

COSTS DETERMINATION OF THE AUTHORITY

[1] On 30 October 2017 Ms Randle’s personal grievance claim was dismissed.¹ This determination deals exclusively with costs associated with the Authority’s investigation into that matter.

[2] On 24 November 2017, The Warehouse Ltd, (“The Warehouse”) as the successful party, applied for an order to have Ms Randle contribute to its costs.

[3] In early December 2017 the Authority reminded the applicant’s representative, Mr Gregory Bennett, that a response on The Warehouse’s application was due.

[4] On 19 December 2017, Mr Bennett advised, by email, that he thought the Authority had already received submissions. He said he was overseas but would

¹ *Randle v The Warehouse Limited* [2017] NZERA Wellington 108

resend an application. The Authority inquired as to when it could anticipate receipt of that material.² No further information was forthcoming.

[5] In mid-2018 the Authority dismissed an application lodged Ms Randle's behalf in February 2018 to reopen its investigation.³ Ms Randle has since elected to challenge that matter to the Court but her election does not operate as a stay on matters before the Authority, unless the Authority or the Court orders otherwise.⁴ No order has been made by the Authority nor was I provided with any information to indicate such an order has been made by the Court.

[6] The issue of costs was not progressed until December 2018 when the Authority again sought a response from Mr Bennett. On 7 December 2018 and again on 19 February 2019 the Authority sent correspondence Mr Bennett asking whether the applicant wished to furnish any information as to costs. He did not reply to either of those inquiries.

[7] On 4 March in 2019 the Authority notified Mr Bennett by email that if the applicant wished to provide submissions on costs these should be provided no later than mid-day on 7 March 2019. The Authority advised it would not accept documentation concerning costs after that date. No response to that communication was received until 11 March 2019 when the Authority received an email from Mr Bennett simply stating "*I am overseas till the end of March. I will respond on my return*".

[8] Mr Bennett's engagement with the Authority on this matter had been unsatisfactory. He advised the Authority in 2017 that he would provide a response to The Warehouse's application for costs but did not do so. Three additional inquiries by the Authority were simply not answered. The Authority's most recent request received a response after the stipulated timeframe in which to comment had passed, and, in any event, did not address the substantive content of it. Ms Randle has had more than ample opportunity to provide comment on the issue of costs. No explanation has been provided for the ongoing delay to do so.

[9] On balance, I am unwilling to extend the timeframe to allow Ms Randle to provide a response to costs where no assurance has been given that these will be

² 20 December 2017

³ *Randle v The Warehouse Ltd* [2018] NZERA Wellington 70

⁴ Employment Relations Act 2000, s 180

provided in a timely manner. The Warehouse is entitled to have its application determined as follows.

The law

[10] Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act) provides the Authority with a discretionary power to awards cost. The discretion must, however, be exercised on a principled basis.

[11] In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the Employment Court set out a range of principles to guide the Authority when assessing costs.⁵ In that judgement the Court recognised that the principles applied to a costs assessment in the Authority are not necessarily as comprehensive or as prescriptive as those that may be in the Employment Court. The principles set out in *Da Cruz*⁶ are now so well established I have not restated them in full. Relevant to this matter:

- costs awards are discretionary but generally follow the event;
- the Authority's usual approach is to assess costs using a notional daily tariff. The tariff is currently set at \$4,500 for a first day, and \$3,500 for every subsequent day, of an Authority's investigation of a matter.

Discussion

[12] Applying the principle that costs follow the event, it is appropriate to make an order that Ms Randle to pay a contributory sum towards the costs incurred by The Warehouse. At issue is the quantum of the order.

[13] The investigation lasted a full day which, applying the tariff equates to an order of \$4,500. The Authority must then consider whether there are any factors which warrant an uplift or reduction to the sum.

[14] The Warehouse Limited seeks a contribution of \$6,750. That sum is said to encompass an application of the Authority's daily tariff plus costs associated with the provision of written submissions where time constraints precluded the representatives from providing oral submissions.

⁵ [2005] ERNZ 808

⁶ Above.

[15] I am satisfied it is also both fair and reasonable to take into account the time it would have taken the parties to provide oral submissions. It was agreed by the parties that submissions would be provided in written form rather than have the parties return to the Authority's investigation meeting the following day, particularly where neither the parties nor the representatives resided in the region.⁷

[16] An upward adjustment of \$750 is appropriate where I estimate the provision of oral submissions by the parties would likely have required between 1 and 1.5 hours.

[17] The applicant's failure to respond to The Warehouse's application means I am unable to assess whether there are any factors which might provide cause to downscale the quantum of the award.

Orders

[18] Ms Kim Randle is ordered to pay the sum of \$5,250 to The Warehouse Limited as contribution towards the costs it incurred in successfully defending her claim.⁸

Michele Ryan
Member of the Employment Relations Authority

⁷ At the investigation meeting.

⁸ Pursuant to the Employment Relations Act 2000, Schedule 2, clause 15.