

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 506
3206159

BETWEEN NICOLA MAREE WATKINS
Applicant

AND HIGHMARK HOMES
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, in person
Danny Jacobson, representative for the Respondent

Investigation Meeting: On the papers

Determination: 7 September 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 4 August 2023 which declined Ms Watkins' application to reopen two earlier determinations.¹ Costs were reserved and a timetable set for memoranda to be filed if the parties were unable to resolve the issue of costs themselves.²

[2] In a memorandum filed and served on 16 August 2023 Highmark advises the parties have not been able to resolve costs between them and it seeks an order of costs in its favour. Ms Watkins has not filed a reply memorandum within the timetable set to do so or otherwise engaged with the Authority on the matter of costs as they relate to this reopening application.

¹ *Nicola Maree Watkins v Highmark Homes Limited* [2023] NZERA 418.

² N1 at [32] and [34].

[3] With the issuing of this costs determination the purpose of placing in abeyance the determination of costs for the matters for which reopening was sought is exhausted.³ The Authority will move to determine costs in relation to those two matters on the information filed in accordance with the relevant timetables.

Highmark's claim for costs

[4] Highmark seeks a costs award of \$3,500 as a contribution to actual costs incurred of \$3,593.76 plus GST in responding to the reopening applicant. Highmark also seeks a modest contribution to actual costs incurred in seeking a costs award for which it has incurred further costs of \$474.38. In addition, Highmark seeks an order of interest on any costs award made in its favour. Supporting invoices have been provided. It submits the award sought is warranted given:

- the reopening application merits a significant uplift because it was an abuse of process made for the ulterior motive of delay or to place some other barrier to the High Court bankruptcy proceedings between the parties;
- Highmark made a realistic 'walk away' settlement proposal to Ms Watkins on 3 December 2021 which it says was unreasonably rejected. It says had it been accepted the costs Highmark have incurred in this matter and the other matters before the Authority brought after that date would have been avoided; and
- the reopening application was without merit with no basis in law or fact and was an attempt to relitigate events already canvassed.

Costs principles

[5] 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.

³ Direction of the Authority 3 March 2023 (3206159).

- 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.

Costs analysis

[6] Highmark was the successful party in the matter. 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. It is accepted it has incurred actual costs in respect of this matter and that Highmark should receive a contribution to costs incurred. In assessing an appropriate costs award the notional daily tariff is a starting point. As this matter was determined on the papers, the starting point should be half the applicable first day notional tariff of \$4,500 being \$2,250 because the cost of attending an investigation meeting was avoided.

[7] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the starting point.

[8] The 'walk away' offer was made before Ms Watkins lodged the reopening application and indeed prior to the issuing dates of the determinations for which reopening was sought. While it is axiomatic this litigation would have been avoided had the offer been accepted because the subject determinations would not have existed, the distance in time is too great to make the link sought. There is no uplift for the settlement offer.

[9] It is not appropriate to speculate as to Ms Watkins motivation for filing the reopening application and is not a ground for an uplift. A costs award is not a punishment.

[10] Taking all relevant factors into account an award of \$2,000 is ordered.

[11] An award of interest on the costs award is not appropriate because at this date Highmark has not been deprived of the sum awarded in costs.

Outcome

[12] Within 21 days of today's date Nicola Maree Watkins is ordered to pay Highmark Homes Limited \$2,000.00 without deduction being a contribution to costs reasonably incurred.

Marija Urlich
Member of the Employment Relations Authority