

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 346  
5398947

BETWEEN                      AFFAAN AZAAN  
Applicant

A N D                              UPINDER MANN  
ENTERPRISES LIMITED T/A  
VEGE OASIS  
Respondent

Member of Authority:        Rachel Larmer

Representatives:              Applicant in person  
Radhe Nand and Anna Wu, Counsel for Respondent

Investigation Meeting:        On the papers

Submissions:                  None from Applicant  
19 July 2013 from Respondent

Date of Determination:        08 August 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A.     Mr Affaan Azaan is ordered to pay Upinder Mann Enterprises Limited trading as Vege Oasis (Vege Oasis) \$4,500 towards its actual legal costs.**

**Employment relationship problem**

[1]     The Authority in its substantive determination dated 5 July 2013<sup>1</sup> held that Mr Azaan's unjustified dismissal grievance was unsuccessful and his unjustified disadvantage grievance was successful. Vege Oasis was ordered to pay Mr Azaan \$2,000 distress compensation for his disadvantage grievance.

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<sup>1</sup>            [2013] NZERA Auckland 286

[2] The parties were encouraged to resolve costs by agreement but failing that a timetable was set for costs to be dealt with by an exchange of memoranda. Agreement has not been reached so Vege Oasis now applies for full indemnity costs of \$12,500.

[3] Mr Azaan did not file any information in relation to costs. He advised the Authority he had instructed a lawyer to file a de novo challenge. Although Mr Azaan was advised he was still required to respond to Vege Oasis' costs application despite him contemplating proceedings in the Employment Court, no response was received.

### **Issues**

[4] The following issues are to be determined:

- a. Should Vege Oasis be awarded indemnity costs?
- b. If not, what is the starting point for assessing costs?
- c. Are there any factors that warrant adjusting the notional daily tariff?

### **Should Vege Oasis be awarded indemnity costs?**

[5] The leading case on an indemnity costs is the Court of Appeal decision in *Bradbury & Ors v. Westpac Banking Corporation*<sup>2</sup>. Indemnity costs are exceptional so require “*exceptionally bad behaviour*” or may be awarded where a party has behaved either badly or very unreasonably.<sup>3</sup>

[6] This matter does not meet the very high threshold required before indemnity costs may be imposed.

### **What is the starting point for assessing costs?**

[7] The correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs. The current notional daily tariff is \$3,500. This matter involved a one day investigation meeting. The starting point for assessing costs is therefore \$3,500.

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<sup>2</sup> [2009] NZCA 234

<sup>3</sup> Supra

## **Are there any factors that warrant adjusting the notional daily tariff?**

### *Factors which warrant a reduction in the notional daily tariff*

[8] Mr Azaan succeeded on one of his two claims so that success needs to be reflected in the costs awarded. The notional daily tariff should therefore be reduced from \$3,500 to \$2,000 to reflect that.

### *Factors which warrant an increase to the notional daily tariff*

[9] Vege Oasis relies on Mr Azaan's unreasonable rejection of its without prejudice except as to costs settlement offer dated 06 December 2012 to increase its award of costs. It says Mr Azaan should have accepted the \$2,500 he was offered to settle his claim at this early stage.

[10] Vege Oasis says that during the morning adjournment on the day of the investigation meeting it repeated this settlement offer which was again unreasonably rejected.

[11] Vege Oasis also made a further settlement offer to Mr Azaan regarding costs in which it offered to accept costs of \$6,250, less the \$2,000 which Vege Oasis had been ordered to pay to Mr Azaan as distress compensation. That offer would have resulted in Mr Azaan only having to pay \$4,250 to Vege Oasis. Mr Azaan was advised that if he did not accept the reduced costs offer then Vege Oasis intended to apply to the Authority for an order for recovery of its full costs.

[12] That offer was rejected by Mr Azaan and on 17 July Vege Oasis reiterated the offer to Mr Azaan and asked him to respond with a counter offer rather than merely rejecting Vege Oasis's offer outright. He did not respond.

[13] I accept the without prejudice except as to costs settlement offer made on 6 December 2012 would have avoided Vege Oasis incurring the costs of preparation for and attendance at the Authority's investigation meeting on 26 June 2013. I consider the notional daily tariff should be increased by \$2,500 to reflect that.

## **Outcome**

[14] The notional daily tariff is reduced to \$2,000 to reflect Mr Azaan's partial success. That figure is then increased to \$4,500 to reflect Mr Azaan's unreasonable

rejection of the 06 December settlement offer which unnecessarily increased Vege Oasis' costs.

[15] Mr Azaan is ordered to pay Vege Oasis \$4,500 towards its actual legal costs.

**Rachel Larmer**  
**Member of the Employment Relations Authority**