

[3] Through his counsel, Mr Kang, Mr Hare seeks:

- a. Either indemnity costs of \$7,758 plus GST or increased costs on the Authority's notional daily tariff;
- b. Costs in respect of the costs application of \$360 plus GST;
- c. Reimbursement of the Authority's filing fee of \$71.56; and
- d. Administrative disbursements of \$26.40.

[4] Mr Kang submits two reasons for seeking indemnity or enhanced costs. The first is that after paying his legal costs the financial remedies awarded to Mr Hare would be insufficient to redress the financial and emotional harm he suffered from his unjustifiable dismissal. Furthermore, Mr Hare had been unable to find stable full-time employment since his dismissal.

[5] Secondly, Mr Kang submits that Mr Hare's legal costs were incurred entirely because of the unreasonable conduct of his former employer. That conduct consisted of unreasonably dismissing Mr Hare and then unreasonably failing to accept his without prejudice offers made before and after mediation undertaken by the parties.

[6] I am not persuaded by the first reason and note Mr Hare was awarded the amount of compensation submitted by Mr Kang to be appropriate in the circumstances. He was also awarded the amount to which he was entitled under s 128 of the Employment Relations Act 2000 (the Act), being three months' ordinary time remuneration less his earnings during that period.

[7] Nor do I accept the second reason. This is partly on the basis that costs are not intended to further compensate a successful applicant. As (now Chief) Judge Ingles observed in *Mattingly v Strata Title Management Limited*:

It is not the function of a costs award to address any perceived deficiencies in the relief otherwise awarded to a successful party, much as it is not the function of a costs award to punish an unsuccessful party.²

[8] The other basis for not accepting Mr Hare's second argument justifying indemnity or enhanced costs is that the offers were not made on the basis of "without prejudice except as to

² *Mattingly v Strata Title Management Limited* [2014] NZEmpC 15 at [13] & [14].

costs". They therefore retain the privilege that attaches to "without prejudice" offers between parties.³

[9] Counsel for Galvanising (H.B.) Limited, Mr Gilmour, submits that costs should be awarded on the basis of the Authority's notional daily tariff. The parties are in agreement that the Authority's investigation meeting was completed within three quarters of a day for which the normal tariff is \$3,375.

[10] Mr Gilmour also queries the inclusion of costs associated with preparation for and attendance at mediation in the costs sought by Mr Hare, and refers to the Authority's Practice Note on that matter which is published on the Authority's website.⁴ The Practice Note includes the following at paragraph 12:

Costs associated with preparation for and attendance at mediation, whether by agreement of the parties or at the direction of the Authority, are not typically included in costs awards of the Authority (unless some particular or unusual circumstance of the case makes it appropriate to do so).

[11] I accept Mr Gilmour's submissions on both those matters. By my calculation \$2,916 of the amount sought by Mr Hare comprises costs incurred before and during mediation. If I were minded to award indemnity costs, the deduction of the costs associated with mediation would bring the total to \$4,842.

[12] I am not minded to do so, however, as I reject the reasons put forward for such a course of action. I find it appropriate to award the Authority's daily tariff on the basis of a three quarter day hearing. I am not persuaded there is any reason to increase the tariff.

[13] I note it is not the Authority's normal practice to add GST to the daily tariff and I find no good reason to depart from that practice in this instance.

[14] Nor is it normal Authority practice to award costs for the preparation of costs submissions and I am not persuaded to make such an award to Mr Hare.

³ *Pauanui Publishing Ltd v Loh* [2001] NZEmpC WC 43B/01 at [4].

⁴ James Crichton "Practice Note 2 - Costs in the Employment Relations Authority" (30 June 2016) The Employment Relations Authority www.era.govt.nz.

[15] Mr Hare seeks disbursements including the Authority's filing fee. I find the request reasonable in relation to the filing fee but decline his request for disbursements relating to administrative costs. In doing so I note that the only identifiable disbursements payable to a third party were incurred before mediation and therefore not included in the costs normally awarded by the Authority. There is no good reason to depart from that practice.

Orders

[16] Galvanising (H.B.) Limited is order to pay Mr Hare, as a contribution to the costs he incurred in successfully bringing his personal grievance application to the Authority, \$3,375 and to reimburse him \$71.56, being the Authority's filing fee.

Trish MacKinnon
Member of the Employment Relations Authority