

Authority's daily tariff, of no less than \$10,000 plus GST given the alleged unreasonable manner in which the JLR pursued its application and the unnecessary costs imposed on Mr Marwah.

[4] JLR says there is no justification for the Authority to order indemnity costs, which is misconceived and unsupported by evidence. It says the application should be treated as a normal application and the daily tariff for half a day investigation meeting should be applied, at \$2,250.

Costs principles

[5] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 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.
- 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.

Discussion

[6] Mr Marwah successfully defended the application for interim orders, and costs should follow that event.

[7] Although the Authority finds below that JLR's conduct unnecessarily increased Mr Marwah's costs, it is not accepted this is a case where an award of indemnity costs is warranted – the nature of conduct to justify such an award is simply not present and such an award would tend towards punishment in the circumstances.

[8] Had an investigation meeting been held in this matter, I consider up to two thirds of a day would have been required, attracting a daily tariff amount of around \$3,375.

[9] The Authority found there was an arguable case that the non-competition restraint in the parties' employment was enforceable and that Mr Marwah's actions in working for a competitor would be in breach of the relevant clause. The Authority found while it was arguable the non-solicitation restraints were reasonable and enforceable, the evidence presented was insufficient to show an arguable case that Mr Marwah has breached the non-solicitation restraint in respect of JLR's clients and staff members. Further, the Authority found no direct or compelling evidence that Mr Marwah had taken, kept or was using confidential information in his new employment.

[10] I accept that as an employer in a competitive industry, making the application was a reasonable response in an effort to protect its proprietary interests. However, at a 14 August 2025 case management conference, JLR was alerted to shortcomings in its case by Mr Marwah's counsel, including that damages would likely be an adequate remedy, the delay in the application for interim orders, and the lack of particulars supporting alleged breaches of the restraints and confidentiality clauses. JLR was therefore made aware of weaknesses in its case but chose to proceed regardless.

[11] Mr Marwah submitted that, having filed its application and affidavit at minimal legal expense, JLR effectively transferred the burden and complexity of the matter onto him, such that he was compelled to respond comprehensively to protect his livelihood and immigration status. JLR counters that the interim application was made prior to counsel being instructed by a 'lay person', namely its director Mr Law, who did not appreciate the 'niceties' of the balance of convenience and damages being an adequate remedy. However, the fact JLR has now instructed counsel and is being represented, indicates it had the ability and means to seek legal advice and make a more robust and substantiated case for interim orders. It certainly had sufficient time to do so before filing its application.

[12] JLR submits that the affidavits lodged with the Authority will not be 'wasted' and will be used at the substantive investigation meeting. I accept Mr Marwah's affidavit evidence will have utility for the substantive meeting, but additional and updating evidence will be necessary, particularly if JLR is able to better particularise its claims by that point.

[13] The Authority accepts JLR's application lacked particulars and was unsupported by sufficient evidence, and that this has increased Mr Marwah's costs by increasing the preparation required.

[14] JLR submits that had there not been 'active and continuing' breaches of the employment agreement restraint clauses by Mr Marwah, and had he abided by JLR 'cease and desist' notices, there would have been no concern on JLR's part and no need to make the interim application. That submission ignores that no breaches have yet been established on the balance of probabilities. It further ignores the factually complicating factor that Mr Marwah was attempting to address his own employment relationship problem with JLR and that his own claim before the Authority preceded JLR's.

[15] The Authority has taken into account that JLR signed an undertaking as to damages, knowing that JLR would be liable for damages if the application were unsuccessful. It has also taken into account that the application itself was not legally complex.

[16] Mr Marwah relies on a Calderbank offer in support of indemnity or increased costs. On 15 May 2025 and 23 May 2025, Mr Marwah made settlement proposals, offering to waive claims in exchange for resolution. JLR submits the letters did not offer any recompense or payment to JLR but proposed as part of a resolution that JLR forfeit all rights of claim against Mr Marwah including the restraint of trade clauses. It says the offers were not unreasonably rejected. The Authority does not consider that the offers made can be properly assessed in the absence of the substantive matters (which includes claims and counterclaims) between the parties being heard and determined. It is on balance premature to take them into account.

[17] In light of all of the above, the Authority considers an uplift in costs to \$6,500 to be appropriate.

Outcome

[18] James Law Realty Limited is to pay Tarun Marwah \$6,500 in costs within 14 days of the date of this determination.

Sarah Blick
Member of the Employment Relations Authority