

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 267
3103832

BETWEEN HWAN HEE KIM
 Applicant

AND JSY TRADING LIMITED
 Respondent

Member of Authority: Rowan Anderson

Representatives: Seungmin Kang, counsel for the Applicant
 Simon Laphorne and Kathryn Clarke, counsel for the
 Respondent

Submissions received: 26 April 2022 and 10 May 2022 from Applicant
 30 May 2022 from Respondent

Determination: 23 June 2022

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] On 13 April 2022 a determination was issued by the Authority in which the Authority Member found that Mr Kim was successful in his personal grievance claim.¹

[2] Costs were reserved and Mr Kim now seeks a contribution to the costs he incurred in pursuing the claim.

[3] Mr Kim seeks a contribution towards his costs in the amount of \$8,546.01.

[4] Included in the sum claimed are disbursements totalling \$1,171.01

¹ [2022] NZERA 142.

[5] The substantive proceeding involved two half-day investigation meetings, one of which was held via Zoom. Written submissions were provided following the investigation meeting.

[6] An uplift is sought by the applicant for the following reasons:

- (a) the respondent avoided service causing expenses relating to the engagement of a process server;
- (b) the respondent delayed filing a statement in reply causing it to incur costs in communications and seeking updates; and
- (c) the respondent pursued unmeritorious defences.

[7] The respondent submitted that, should the applicant be awarded costs, that he should be awarded \$2,250, or, in the alternative no more than the daily tariff of \$4,500. The respondent submitted that a downwards adjustment was appropriate for the following reasons:

- (a) Penalties were sought by the applicant but were not awarded; and
- (b) The applicant withdrew the unjustified disadvantage claim and the respondent had had to spend significant time defending the claim.

Consideration

[8] The Authority has discretion to award costs and expenses as it thinks fit, and the principles as to the exercise of that discretion are well known.² Those principles include that costs will generally follow the event, that awards will be modest, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.

[9] The daily tariff is usually taken as a starting point, although is not used in a rigid manner, with principled adjustments made having regard to the to the particular characteristics of a case.

[10] I accept that some allowance should be made in relation to the written submissions that were lodged following the conclusion of the investigation meeting.

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

On that basis, I find that the appropriate start point is \$5,375 being a day's tariff (\$4,500) plus a quarter of \$3,500 being a following day's tariff (\$875).

[11] I find that there is no basis for an uplift from the daily tariff approach in relation to claims as to the avoidance of service and delay in filing a statement in reply. I accept that neither of these matters related to deliberate conduct warranting an increase in any award of costs.

[12] In relation to the defences raised by the respondent, the applicant submitted that three matters were relevant to the issue of costs:

- (a) The claim as to the application of a trial period;
- (b) The claim as to abandonment of employment; and
- (c) The issue raised as to a post-employment delay in the applicant returning a key and uniform.

[13] Having regard to the above matters and the submissions made, I do not accept that any uplift is appropriate based on items (b) and (c). Neither issue formed a significant part of proceedings, nor would they have reasonably resulted in significant increased costs such as to warrant an uplift.

[14] I accept that the respondent's defence as to the purported trial period was bound to fail and had no prospect of success. However, I have also had regard to the withdrawal by the applicant of its unjustified disadvantage claim. I consider that, on balance having regard to both matters, there should not be a resulting uplift or downward adjustment based on those matters.

[15] Whilst penalties as sought were not awarded by the Authority, I do not consider the applicant's pursuit of those claims a reasonable basis for a downwards adjustment. I note that the Authority concluded that there were failures in compliance, albeit only on two of the three grounds claimed, and I have considered the discretionary nature of penalties in the Authority in reaching this conclusion.

[16] In relation to disbursements, the respondent accepts, in my view correctly, that the applicant is entitled to the filing fee of \$71.56. I find that the applicant should be reimbursed the filing fee. I add to that the translation costs sought in the amount of

\$92.00 for which an appropriate invoice was provided. Whilst the Authority may provide translation services, I find that the expense was necessary and reasonably incurred.

[17] I do not consider it appropriate to make an order in relation to the costs of the process server used by the applicant. I do not accept that the respondent deliberately avoided service.

[18] I accept, as submitted by the respondent, that it would have been reasonable for the applicant to have instructed a civil legal aid employment lawyer in Auckland. I do not accept the applicant's submission that a Korean speaking lawyer was essential. Therefore, I do not accept that it is appropriate for the Authority to order the respondent to pay the claimed disbursements relating to travel and accommodation.

Conclusion and Orders

[19] For the above reasons I order JSY Trading Limited to pay Mr Kim the sum of \$5,538.56 as a contribution towards the costs he incurred in pursuing his claim.

[20] Payment is to be made within 28 days of this determination.

Rowan Anderson
Member of the Employment Relations Authority