

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 175
5638163

BETWEEN RAJ KUMAR
 Applicant

A N D PUNJABI DHABA LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Mohammed Shahadat, Advocate for Applicant
 David Beck, Counsel for Respondent

Submissions Received: 25 September 2017, from the Applicant
 9 October 2017, from the Respondent

Date of Determination: 11 October 2017

COSTS DETERMINATION OF THE AUTHORITY

Within 14 days of the date of this determination the respondent is to make a payment of \$2,250 towards Mr Kumar's costs, together with a further \$136.76 in respect of disbursements incurred.

[1] By way of a determination of the Authority dated 30 October 2017¹, the Authority ordered the respondent to pay to Mr Kumar the sum of \$15,512.09 in respect of arrears of pay, holiday pay and statutory holiday pay. Costs were reserved and the parties invited to try to agree how they should be dealt with between them. I gather that they have been unable to agree.

[2] Mr Shahadat, for Mr Kumar, served and lodged a copy of his invoices and narrative, but did not seek to argue how much should be paid by the respondent. I

¹ [2017] NZERA Christchurch 144

infer that he is asking that the full amount be paid. The invoices total \$5,350 in costs, including GST, and \$136.76 in disbursements, including GST.

[3] Mr Beck, on behalf of Mr Kumar, argues that costs should lie where they fall. He submits that Mr Kumar was significantly well treated by the respondent's director, including assistance when he returned to India and assistance with his residence status.

[4] He also submits that Mr Kumar was only partially successful, as he did not recover the whole amount he had claimed, and that Mr Kumar did not approach the dispute with 'clean hands', although he does not say why. In the alternative, Mr Beck says that a contribution of \$2,000 should be ordered.

Underlying legal principles

[5] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[6] It is well established that the Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*² when setting costs awards³. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

² [2005] ERNZ 808

³ Confirmed as still applicable law by the full Employment Court in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

Discussion

[7] The general principle is that 'costs follow the event'. That is to say, the successful party recovers a contribution towards its legal costs from the unsuccessful party. This principle applies even if the unsuccessful party has incurred its own costs.

[8] I see no reason to disturb this principle in this case. Whilst Mr Kumar did not recover all of the arrears he originally claimed, he still recovered a significant amount, and the respondent's defence of the claim was at least partially founded on an ill-conceived basis. A contribution should therefore be made to Mr Kumar's costs by the respondent.

[9] The appropriate approach is the Authority's daily tariff, which for claims lodged on or after 1 August 2016 (as Mr Kumar's was) is \$4,500 for the first day and

\$3,500 for each day of investigation meeting thereafter.⁴ The investigation meeting lasted between 09.30 and 13.10, so half a day's tariff of \$2,250 is the starting point.

[10] Should this sum be uplifted to reflect additional work carried out by Mr Shahadat? Work carried out prior to the investigation meeting is taken into account in the daily tariff unless it was exceptional. Mr Shahadat's invoice for \$3,100 rendered prior to the investigation meeting contains a narrative which does not show any exceptionally unusual work, and so that work is to be subsumed in the daily tariff. It appears that no fee is claimed for work carried out after the investigation meeting. I therefore see no reason to uplift the tariff from its starting point.

[11] Should the sum be reduced? Mr Beck does not explain what aspect of Mr Kumar's "overall conduct of proceedings" should be taken into account, apart from a reference to imprecise pleadings being lodged which required additional directions. Mr Kumar did seek to amend his statement of problem to add a claim for relief which the Authority believed was not available to him. This was dealt with by the Authority prior to the investigation meeting.

[12] Furthermore, looking back on the file I note that whilst the Authority needed to direct Mr Kumar to produce better evidence, it also had to direct the respondent to do the same. Indeed, this was one of those cases where the Authority had to do a significant amount of work itself to analyse the data that was put before it by both parties. Whilst that is part and parcel of the Authority's role, there is no merit in an argument that the respondent had to incur significant extra costs because of the conduct of the applicant and his representative. If it did, it has not specified what those extra costs were.

[13] Furthermore, it should go without saying that it is immaterial to the matter of costs whether the respondent's director treated Mr Kumar well or not. Mr Kumar still had to bring a claim to the Authority to get redress for breaches of his statutory and contractual rights.

[14] In conclusion, an award of \$2,250 as a contribution towards Mr Kumar's costs is appropriate.

⁴ See the Authority's Practice Note 2 - Costs in the Employment Relations Authority

[15] Turning to the disbursements claimed, they are both legitimate, consisting of the Authority's lodgement fee and the cost of producing the common bundle. I therefore agree that the respondent should reimburse Mr Kumar these costs, including GST, given that Mr Kumar is almost certainly not GST registered⁵.

Orders

[16] I order the respondent to make the following payments to Mr Kumar within 14 days of the date of this determination as a contribution towards his costs:

- a. \$2,250; and
- b. \$136.76.

David Appleton
Member of the Employment Relations Authority

⁵ See *Judea Tavern Limited v Jesson* [2017] NZEmpC 120 at [12] and [20]