

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 661  
3159345

BETWEEN SUHEE LEE  
Applicant  
AND YAMAYA NZ LIMITED  
Respondent

Member of Authority: Marija Urlich  
Representatives: Seungmin Kang, counsel for the Applicant  
Jong Sun Lim, counsel for the Respondent  
Investigation Meeting: On the papers  
Determination: 9 November 2023

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**DETERMINATION OF THE AUTHORITY**

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[1] The Authority issued a determination on 2 October 2023 which ordered Yamaya NZ Limited (Yamaya) to pay Ms Lee wage and holiday pay arrears, calculate and pay interest on the arrears and ordered a penalty for breach of statutory duty half of which to be paid to Ms Lee.<sup>1</sup> In the same determination the Authority found Ms Lee had established personal grievances for unjustified disadvantage and unjustifiable dismissal and awarded reimbursement of lost wages and compensatory damages. Costs were reserved and a timetable set if the parties were unable to resolve this issue themselves which they advise has not been possible.

[2] Yamaya filed a memorandum seeking an order for payments of all awards, including any award of costs, be made by instalment. It has provided information in support of the instalment order sought. Ms Lee by way of memorandum seeks a contribution to costs and opposes the proposed payment by instalment.

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<sup>1</sup> *Suhee Lee v Yamaya NZ Limited* [2023] NZERA 572.

## **Costs principles**

[3] The Authority has power under clause 15 of Schedule 2 of the Act 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.

## **Ms Lee's claim for costs**

[4] Ms Lee seeks an award of \$24,333.74 as a contribution to costs and disbursements incurred. She is in receipt of legal aid receiving a total in relation to this matter of \$24,355.97 supported by a letter of confirmation from the Commissioner of Legal Services. She submits the award sought is warranted given:

- Ms Lee was successful in the substantive matter and costs should follow the event;<sup>2</sup>
- the investigation meeting for the substantive matter occupied three and a ½ days and therefore a starting point for costs is \$13,250 by application of the daily tariff;
- further costs of \$750 were incurred in an unsuccessful interlocutory matter brought by Yamaya;
- an uplift in the daily tariff of \$6,250 is appropriate because Ms Lee made two valid without prejudice save as to costs offers to Yamaya which if either had been accepted would have put it in a better position than as determined by the Authority; and

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<sup>2</sup> Ibid [51] total awards were made in favour of Ms Lee of \$28,636 (gross) with interest to be calculated on the arrears component of \$1,748.

- disbursements of \$4,083.74 (all but \$71.56 of which relate to counsel travel and accommodation costs) sought are reasonable because it was necessary for Ms Kim to instruct counsel fluent in Korean which required Mr Kang to travel.

### **Yamaya's response**

[5] Yamaya submits costs should be determined by application of the usual process.

### **Costs analysis**

[6] Ms Lee was the successful party and it is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs which in this matter involved the receipt of legal aid. A full costs award seems to be sought. The circumstances of this case do not justify an indemnity award. Ms Lee should receive a contribution to costs which I am satisfied were reasonably incurred.

[7] The notional daily tariff is a starting point. The applicable daily tariff is \$4,500.00 with each subsequent day at \$3,500.00. This matter involved investigation meeting time of approximately 3 and ½ days. The appropriate starting point for costs for this matter is therefore \$13,250.

[8] There should be an uplift for the two Calderbank offers Yamaya did not accept, having had a reasonable period to consider both. The first offer was made on 22 November 2021 for \$12,000 after the parties attended mediation and the second was made on 6 October 2022 for \$12,000 plus costs of \$11,084 plus GST after the first investigation meeting and before the resumption. Yamaya's failure to accept either offer was unreasonable - had it accepted Yamaya would have been better off financially and Ms Lee would not have unnecessarily been put to further expense. An uplift of \$2,000 is appropriate.

[9] A contribution to travel expenses of \$800 is allowed. It is accepted it was reasonable for Ms Lee to instruct Korean speaking counsel. Ms Lee is also entitled to reimbursement of the filing fee of \$71.56. No uplift is allowed for the interlocutory matter which was dealt with on the papers.

[10] Yamaya NZ Limited is ordered to pay Suhee Lee \$15,250 as a contribution to costs incurred and \$871.56 as a contribution to disbursements incurred.

### **Payment by instalments**

[11] In the earlier determination Yamaya was ordered to pay Ms Lee a total of \$28,636 (gross). Sections 123(2), 131(1A) and 135(4A) of the Act provide the Authority may order remedies awarded to settle a personal grievance, arrears and penalties are paid by instalment to the employee if the employer's financial position so requires.

[12] Yamaya seeks a payment instalment plan of \$200 per month and has provided information regarding its financial position including tax returns for the years 2022 and 2023, bank and visa statements and information from the inland revenue. It has also provided information regarding its income, debts and outgoings and information regarding the disposable income of the shareholders and their outgoings. The information shows Yamaya has modest means and will have difficulty meeting the total awards made in favour of Ms Lee.

[13] Yamaya invites the Authority to vary its determination to make the amounts payable to the government and not Ms Lee. The Crown was not party to the employment relationship between Ms Lee and Yamaya and the majority of the awards relate to compensatory damages for found grievances personal to Ms Lee and wage and holiday arrears. The Authority cannot revisit the penalty ordered in the context of an instalment payment application.

[14] It is not appropriate to consider the costs award made above within this instalment payment application given:

- (i) there was no costs award when the application for instalment payments was made; and
- (ii) the parties may yet be able to negotiate how the costs award is paid.

[15] Ms Lee opposes the payment instalment as proposed. She says the information in support of the application is not sufficient to support a finding that Yamaya's financial position requires payment by instalment. Further, she says it is not in the

interests of justice for an instalment order to be made as sought because it will take Yamaya 12 years to pay the amounts awarded putting her in the position of an unsecured creditor. She proposes in the alternative a payment period of three months, calculation of interest and the balance becomes due if there is default on any instalment plan.

[16] There are two issues for consideration – whether the financial position of Yamaya requires an order for instalment, and if so whether an order should be made that the awards made in favour of Ms Lee should be paid by instalment.

[17] The information before the Authority in support of Yamaya’s financial situation establishes it will be difficult for it to pay the balance in a lump sum. It is accepted Yamaya’s financial position requires an order for instalment payments. The outstanding balance of awards made in Ms Lee’s favour are substantial and include wage and holiday pay arrears none of which, on the information before the Authority appear to have been paid. At the proposed rate it will take Yamaya almost 12 years to pay Ms Lee the awards made in her favour in the earlier determination. This is not reasonable particularly given the length of time and the risk to Ms Lee of becoming an unsecured creditor.

[18] The following instalment payment plan of the total award of \$28,636 (gross) made in favour of Ms Lee in the Authority determination issued on 2 October 2023 is reasonable and is ordered:

- (i) Yamaya NZ Limited is to pay Ms Lee \$1,748 (gross) plus the interest calculation as ordered, without deduction by 5pm 30 November 2023;
- (ii) Yamaya NZ Limited is to pay the balance of the awards at the rate of \$4,481.33 by 5pm on the 20<sup>th</sup> day of each successive month until the total is paid in full with the first payment commencing on 20 December 2023 and continuing until the sixth and final payment is made on 20 May 2024; and
- (iii) failure to make payment of the instalments set out above will result in the whole amount becoming due and owing.

## **Outcome**

[19] Yamaya NZ Limited is ordered to pay Suhee Lee \$15,250 as a contribution to costs incurred and \$871.56 as a contribution to disbursements incurred.

[20] Yamaya NZ Limited is ordered to pay Suhee Lee \$28,636 (gross) plus a calculation of interest in accordance with the payment schedule set out at [18] above.

Marija Urlich  
Member of the Employment Relations Authority