

**Attention is drawn to the order
prohibiting publication of certain
information in this Determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 305
3137105

BETWEEN AMAR NATH
Applicant

AND ADVANCED KITCHENS
(NZ) LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Alex Kerjes, representative for the Applicant
Jonathon Whyte, counsel for the Respondent

Investigation Meeting: On the papers

Information and submissions received: 13 April - 27 June 2022 from the Applicant
13 May - 20 June 2022 from the Respondent

Determination: 8 July 2022

DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 1 April 2022 which ordered Advanced Kitchens (NZ) Limited to pay Mr Nath 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 Mr Nath.¹ In the same determination the Authority found Mr Nath had established a personal grievance for unjustifiable constructive dismissal and awarded reimbursement of lost wages and compensatory damages.² Costs were reserved and a timetable set if the parties were unable to resolve this issue themselves.

¹ *Amar Nath v Advanced Kitchens (NZ) Limited* [2022] NZERA 122.

² Total awards

[2] Within the timetable set submissions were filed on behalf of Mr Nath seeking a contribution to costs. Further information was subsequently provided to support the costs claim. AKL sought an extension to the timetable to file a memorandum on costs and sought 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 for which a non-publication order is sought.

Non-publication order

[3] AKL seeks a non-publication order over the two sets of financial information it has provided in support of its application for an instalment payment order. The order is not opposed. I am satisfied it is appropriate to grant the order sought over the subject information given it contains material that is confidential and commercially sensitive to AKL and for which there is no public interest in its publication.

[4] The Authority orders the two sets of financial information attached to Mr Whyte's email of 20 June 2022 are subject to a non-publication order issued under clause 10(1) of the Second Schedule of the Act.

Costs principles

[5] 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.

Costs analysis

[6] Mr Nath 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. It is accepted he has incurred actual costs of \$9,250.00 and total disbursements of \$212.56 in respect of this matter. He 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 subsequent days \$3,500.00. This matter involved investigation meeting time of approximately one day. Costs are sought of \$6,500 along with full disbursements.

[8] Mr Nath submits he attempted to engage with AKL to reach agreement over the issue of costs without success. He submits an increase in the daily tariff is justified because AKL's failure to meet deadlines and provide information during the investigation process has increased his costs so justifying an uplift in the daily tariff. He submits he does not seek to punish AKL through an award of costs.

[9] AKL submits a costs award of no more than the usual daily tariff would be "credible" because this was an uncomplicated matter and Mr Nath incurred modest costs. AKL requests a costs award of \$3,500 plus GST in costs to be paid in instalments.

[10] Having considered the submissions and information received and guided by the principals applicable to a consideration of costs Mr Nath is entitled to a costs award at the full first-day notional daily tariff of \$4,500 and to recover the disbursements I am satisfied he has incurred in this matter of \$212.56.

Payment by instalments

[11] Sections 123(2), 131(1A) and 135(4A) of the Act provides the Authority may order awards of remedies to settle a personal grievance, arrears and penalties are paid by instalment to the employee if the employer's financial position so requires.

[12] AKL has provided information regarding its financial position and a letter from its accountant dated 19 May 2022 in which they write that due to cashflow difficulties

AKL can only pay Mr Nath instalments of \$200 per week. Mr Nath does not appear to oppose the payment instalment as proposed.

[13] There are two issues for consideration – first whether the financial position of AKL requires an order for instalment, the second, whether an order should be made that the awards made in favour of Mr Nath should be paid by instalment of \$200 per week.

[14] The information before the Authority indicates AKL is in parlous financial circumstances. It is accepted the financial position of AKL requires an order for instalment payments. However, the information provided is not a complete picture of AKL's current financial position, and it is not clear on the face of the letter from the accountant how they have reached the view \$200 per week is an affordable instalment payment for AKL to make. The awards made in Mr Nath's favour are substantial and include wage and holiday pay arrears, which it is understood remain unpaid. At the proposed rate it will take AKL at least 3 years to pay Mr Nath the total ordered in his favour. While some weight is to be given to Mr Nath's apparent consent to the proposal it is not determinative of the matter. Having considered all the relevant factors, I am not persuaded the instalment payment order sought from the Authority is justified.

[15] In the circumstances the order sought by AKL to repay Mr Nath at \$200 per week is declined.

Outcome

[16] Auckland Kitchens (NZ) Limited is ordered to pay Mr Nath \$4,712.56 as a contribution to his costs and to reimburse disbursements.

[17] The application for instalment payments is declined.

Marija Urlich
Member of the Employment Relations Authority