

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 64  
5413997

BETWEEN                      POOJA PATEL  
Applicant

A N D                              OCS LIMITED  
Respondent

Member of Authority:        Rachel Larmer

Representatives:              Lawrence Herzog, Counsel for Applicant  
Stephen Langton and Angela Evans, Counsel for  
Respondent

Investigation Meeting:        On the papers

Submissions Received:        None from Applicant  
04 February 2014 from Respondent

Date of Determination:        25 February 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. Pooja Patel is ordered to pay OCS Limited (OCS):**
- a. \$10,000 towards its costs;**
  - b. \$ 19.45 towards its disbursements;**
  - c. \$250 towards this costs application.**

**Employment relationship problem**

[1] The Authority in its substantive determination dated 21 January 2014<sup>1</sup> held that Ms Patel's unjustified dismissal and wage arrears claims did not succeed. It also

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<sup>1</sup> [2014] NZERA Auckland 19.

noted that OCS as the successful party was entitled to a contribution towards its costs and the parties were encouraged to resolve costs by agreement.

[2] That has not occurred. OCS says it has incurred total costs of \$41,213.30 and total disbursements of \$1,338.60. OCS seeks costs of \$14,000 together with full reimbursement of its disbursements for the substantive matter and a further \$500 to cover its costs associated with preparing this costs application.

[3] Ms Patel has not filed any costs submissions.

[4] The principles relating to an assessment of costs in the Authority are so well known I do not need to set them out again here.

### **Issues**

[5] The following issues are to be determined:

- (a) What is the notional starting point for assessing costs for the substantive investigation?
- (b) Are there any factors which should decrease the notional starting tariff?
- (c) Are there any factors which should increase the notional starting tariff?
- (d) What if any disbursements should OCS be awarded?
- (e) What if any costs should OCS be awarded in respect of this costs application?

### **What is the notional starting point for assessing costs for the substantive investigation?**

[6] This matter involved a one day investigation meeting. OCS submits this matter should be treated as if it were a two day investigation meeting when assessing costs on the basis that an extra day should be allowed for the preparation of legal submissions which were filed after the investigation meeting due to insufficient time on the day of the meeting to hear submissions.

[7] I decline to do so. It is not the Authority's usual practice to add additional time to the investigation meeting time in the way proposed by OCS.

[8] Costs are to be assessed in accordance with the Authority's usual notional daily tariff based approach to costs. The current notional daily tariff is \$3,500. That must then be adjusted on a principled basis to reflect the particular circumstances of this case. I therefore proceed on the basis that the notional starting point for assessing costs in respect of this matter is \$3,500.

**Are there any factors which should decrease the notional starting tariff?**

[9] I am not aware of any factors which should result in a reduction to the notional daily tariff.

**Are there any factors which should increase the notional daily tariff?**

[10] I accept OCS submissions that that Ms Patel's conduct in respect of these proceedings has significantly unreasonably and unnecessarily increased its costs.

[11] Ms Patel rejected a reasonable *Calderbank* offer which OCS made nine days before the investigation meeting in an attempt to limit its own escalating costs. I find that Ms Patel was given sufficient time to consider this offer. This offer also warned Ms Patel that if it was rejected OCS would be seeking costs above the usual notional daily tariff rate for a one day investigation meeting due to her conduct of the proceedings.

[12] OCS says it incurred an additional \$14,121.50 after the date on which the *Calderbank* offer was made and that \$341.45 of its total disbursements were incurred from that date. Had Ms Patel accepted this offer then both parties would have avoided incurring additional costs.

[13] I also find that OCS's costs were unnecessarily increased because Ms Patel filed a Statement of Problem that was incomplete and did not disclose her claims properly. Clarification was sought by OCS in its Statement in Reply and then on four separate occasions from the Authority. Despite this Ms Patel's claims were still not totally clear at the outset of the investigation meeting so required further clarification prior to the commencement of her evidence.

[14] Ms Patel introduced a new disadvantage claim on 02 December 2013 after all of the evidence had been exchanged which necessitated OCS preparing additional evidence to address that point. Ms Patel then failed to advance this new claim at the investigation meeting.

[15] Ms Patel made requests for information which required OCS to spend time and money reviewing the requests and retrieving the documentation but then failed to rely on or refer to the majority of the information she had sought.

[16] Ms Patel made very serious allegations of witness tampering at a late stage in the proceedings which resulted in OCS having to incur further costs in urgently preparing affidavits to respond to those allegations. These allegations were then not raised by Ms Patel at the investigation meeting. I am satisfied these very serious allegations were entirely without merit.

[17] Ms Patel did not comply with the Authority's timetable directions regarding the filing of witness statements prior to the investigation meeting.

[18] Ms Patel was evasive and initially declined to answer questions that arose from misleading evidence she had submitted. Time was required because Ms Patel had to be directed to answer questions about documents she had generated but which had been prepared and were produced to the Authority as if they had come from an independent person and not her.

[19] Ms Patel initially advised the Authority that she would be calling five witnesses in total and that she wished to subpoena a further two witnesses to give evidence on her behalf. OCS says this increased its preparation costs because Ms Patel then subsequently informed the Authority that she would be calling three witnesses and would be requiring OCS to produce four of its employees to give evidence. Late in the proceedings Ms Patel withdrew one of the witness statements and in the end only two witnesses gave evidence for her at the investigation meeting.

[20] The Authority indicated prior to the investigation meeting that it did not have any questions for a particular witness so she could convert her statement into an affidavit to avoid attending if she was not required for cross examination. Ms Patel expressly required this witness to attend for cross examination and then Mr Herzog did not ask her any questions.

[21] Ms Patel also made claims regarding wage arrears and reimbursement for use of her private motor vehicle which she did not adequately address in her witness statement and which she was unable to satisfactorily explain during her evidence at the investigation meeting.

[22] Time was also spent during the investigation meeting whilst Ms Patel attempted to understand her own wage arrears claim and the evidence she had produced in support of it which she then subsequently had to admit she did not understand and was completely unable to explain to the Authority. Mr Herzog resurrected these matters in his closing submission despite Ms Patel having been unable to give evidence about them.

[23] Ms Patel withdrew a disadvantage claim/s at the commencement of the investigation meeting after OCS had addressed the issue in its closing submissions which were prepared ahead of the investigation meeting in the hope there would be sufficient time to have submissions on the same day after the evidence had been completed.

[24] I accept OCS's submissions that it faced wide-ranging, unfocused claims from Ms Patel (who was initially represented by an advocate and then by counsel who appeared at the investigation meeting) which challenged the integrity of OCS and of its employees.

[25] It is important to recognise that costs must not be used to punish an unsuccessful party. However it is appropriate for an award of costs to reflect the additional unnecessary expense that a successful party (or partially successful as the case may be) has incurred as a result of the unsatisfactory and time wasting manner in which the unsuccessful party has elected to conduct its case.

[26] There was no evidence before the Authority as to Ms Patel's means or ability to pay costs, nor was there any application by Ms Patel for a costs order to be paid by instalments. I have therefore fixed costs based on the information available to me today.

[27] I consider it appropriate to order Ms Patel to pay OCS \$10,000 towards its costs in respect of the substantive investigation.

**What if any disbursements should be awarded?**

[28] I consider the information OCS supplied in support of its disbursements claim is unsatisfactory. It bears the onus of establishing that disbursements were actually incurred and that it is fair and reasonable to require Ms Patel to contribute to some or

all of them. It has not discharged that burden in respect of all but one of the disbursements claimed.

[29] After reviewing the invoices submitted it is evident that disbursements are sought in respect of normal “office expenses” described on the invoices as “(faxes, photocopying, telephones).” There was no evidence these items were actual disbursements incurred. I consider it more likely these are expenses which are part of the normal costs associated with running a legal practice. I find that these are not properly recoverable by OCS from Ms Patel as disbursements.

[30] OCS seeks reimbursement for the courier fees associated with couriating documents to Ms Patel’s then representative who at that time was based in Whangaparoa. However there is no information before the Authority as to why a courier was required instead of normal post or why Ms Patel or her representative or even someone on their behalf could not have collected the documentation and delivered it to her representative in order to save on courier fees. I am not satisfied this disbursement was properly incurred.

[31] There is an invoice for \$241.50 paid to a legal firm for “witnessing affidavits”. I do not accept this is a disbursement which Ms Patel should be responsible for. It is the usual practice of many law firms to provide the witnessing of affidavits as a free service. There is no explanation as to why a firm that would charge for this service was selected to witness affidavits. I consider it unreasonable for Ms Patel to bear the cost of that.

[32] There were also disbursements claimed for taxis to and from Auckland Hospital and to a “client meeting”. Again there is no explanation as to why these charges had to be incurred so I do not consider it appropriate for Ms Patel to be held responsible for them.

[33] Although OCS has claimed for printing costs it has recorded these as “paid office expenses” on its invoice of 20 December 2013 so I am not prepared to require Ms Patel to reimburse that on the basis that it relates to an internal printing cost which I again consider is part of running a legal practice rather than a true external disbursements.

[34] I am satisfied that it is appropriate for OCS to be reimbursed by Ms Patel for couriating documents to the Authority. I therefore order Ms Patel to reimburse OCS \$19.45 for this courier charge.

**Costs on this application**

[35] I am satisfied that OCS has incurred costs in respect of this application and that it attempted to resolve costs with Ms Patel by agreement prior to doing so. I order Ms Patel to contribute \$250.00 towards OCS's costs in respect of this application.

**Rachel Larmer**  
**Member of the Employment Relations Authority**