

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 362
5396873

BETWEEN DYLAN ANDREW JAMES
PRICE-BRENNAN
Applicant

A N D JIREH AUTO TYRES
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Keshila Fayen, Advocate for Applicant
William Hung, Representative for Respondent

Investigation Meeting: On the papers

Submissions Received: 08 July 2013 from Applicant
No submissions from Respondent

Date of Determination: 13 August 2013

COSTS DETERMINATION OF THE AUTHORITY

- A. Jireh Auto Tyres Limited is ordered to pay Mr Dylan Price-Brennan \$5,950 towards his actual legal costs plus \$71.56 to reimburse his filing fee.**

Employment relationship problem

[1] In a substantive determination dated 13 June 2013¹ the Authority held that Mr Price-Brennan was unjustifiably dismissed. Mr Price-Brennan's claim for unpaid annual holiday pay was also successful. The amount of annual holiday pay Mr Price-

¹ [2013] NZERA Auckland 251.

Brennan is owed was fixed by the Authority in a determination dated 13 August 2013.²

[2] The parties were encouraged to resolve costs by agreement and failing that a timetable was set for costs to be fixed by the Authority. Agreement has not been reached so Mr Price-Brennan now applies for a costs order.

[3] Mr Price-Brennan seeks full indemnity costs of \$6,650 (GST inclusive) together with reimbursement of his \$71.56 filing fee. No response to the costs application has been received from Jireh Auto Tyres Limited (Jireh Autos).

Issues

[4] The following issues are to be determined:

- a. Should Mr Price-Brennan be awarded indemnity costs?
- b. If not, what is the starting point for assessing costs?
- c. Are there any factors warranting an adjustment to the notional starting tariff?

Should Mr Price-Brennan be awarded indemnity costs?

[5] Mr Price-Brennan incurred costs of \$6,721.56 which he says should be awarded in full on the grounds that they are reasonable. Mr Price-Brennan sought indemnity costs on the basis Jireh Auto's conduct had unnecessarily increased his costs. I find that does not give rise to indemnity costs in this particular case and is a matter. Rather that is a factor which can be adequately addressed under the Authority's normal notional daily tariff based approach to costs.

[6] This is not one of those exceptional cases in which indemnity costs is appropriate. None of the factors identified by the Court of Appeal in *Bradley & Ors v. Westpac Banking Corporation*³ apply to this matter. I decline to award indemnity costs on the grounds it is not appropriate to do so. This is a matter which should be subject to the Authority's normal notional daily tariff based approach to costs.

² [2013] NZERA Auckland 360.

³ [2009] NZCA 234.

What is the starting tariff for assessing costs?

[7] This case involved two investigation meetings; the first was to accommodate one witness who was going overseas whilst the second involved all of the other witnesses. There was approximately one and a half days investigation meeting time involved, so the starting point for assessing costs is \$5,250 (1.5 x current notional daily tariff of \$3,500). I therefore adopt \$5,250 as ‘the notional starting tariff’.

Are there any factors warranting an adjustment to the notional starting tariff?

[8] I am not aware of any factors, nor have any been drawn to my attention, which would warrant decreasing the notional starting tariff.

[9] In terms of factors increasing the notional daily tariff, Mr Price-Brennan submits his costs were unnecessarily increased by Jireh Auto’s conduct. In particular, he claims Jireh Auto:

- a. failed to constructively communicate with him;
- b. did not respond to his personal grievance;
- c. ignored his request for wage and time records;
- d. failed to communicate with his representative;
- e. ignored an invitation to mediation; and
- f. refused to participate in mediation after the Authority referred the parties to mediation.

[10] I accept that these are factors which would have unnecessarily increased Mr Price-Brennan’s costs so the notional starting tariff should be increased by \$500 to reflect that.

[11] Mr Price-Brennan also had to apply for an order fixing the amount of annual holiday pay he was owed. That should not have been necessary because the Authority set out in its substantive determination how the parties were to calculate the annual holiday pay owing. The notional starting tariff should be increased by a further \$200 to reflect this factor.

Outcome

[12] Jireh Auto is ordered to pay Mr Price-Brennan \$5,950 towards his actual costs. It is also ordered to reimburse Mr Price-Brennan \$71.56 for his filing fee.

Rachel Larmer
Member of the Employment Relations Authority