



# New Zealand Employment Relations Authority Decisions

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## Rankin v Unlimited Internet Limited (Auckland) [2017] NZERA 286; [2017] NZERA Auckland 286 (15 September 2017)

Last Updated: 22 September 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 286  
3001877

BETWEEN SCOTT RANKIN Applicant

AND UNLIMITED INTERNET LIMITED Respondent

Member of Authority: TG Tetitaha

Representatives: P Kiely/S Ball, for Applicant

B Edwards/M Cables, for Respondent

Submissions received: 17 July & 03 August 2017 from Applicant

31 July 2017 from Respondent

Determination: 15 September 2017

### COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

**A. Unlimited Internet Limited is ordered to pay Scott Rankin \$6,200 towards its actual legal costs.**

#### Employment relationship problem

[1] The Authority in its substantive determination<sup>1</sup> held that Mr Rankin was unjustifiably dismissed. The respondent was ordered to pay lost remuneration of \$2,600 and compensation of \$1,250 inclusive of a reduction of 75% for contributory behaviour. The applicant seeks

costs of \$6,500. Its actual costs were \$9,997.90. There is no issue about the reasonableness of this fee, especially given the involvement of Senior Counsel.

#### Starting point for assessing costs

[2] The Authority has adopted a notional daily tariff based approach to costs.<sup>2</sup> Matters lodged in the Authority from 1 August 2016 are subject to the increased daily tariff of

\$4,500.<sup>3</sup> This matter involved a one day investigation meeting. The starting point for assessing costs is therefore \$4,500.

#### Are there any factors that warrant adjusting the notional daily tariff?

*Factors which warrant a reduction in the notional daily tariff*

[3] The applicant seeks an increase in costs to reflect:

- a) Attending to the respondents unsuccessful application for disclosure of the applicants employment agreement with his new employer due to allegations of breaches of his non-solicitation and non-competition provisions;
- b) Failure to comply with a direction to disclose full transcripts of the conversations referred to in the respondents witness statements;
- c) Failure to comply with the directions for timetabling of evidence and filing significant evidence outside of the timetabling directions;
- d) An unsuccessful application for joinder of hearing of a counterclaim.

[4] All of the above matters would have unnecessarily increased the applicant's legal costs. There is evidence the applicant's lawyers:

- a) In respect of issue a), the applicants lawyers replied once by email. This would not justify any increase to the daily tariff;
- b) In respect of issue b) the applicants lawyers made at least two requests for disclosure on 4 and 11 May. The respondents reply necessitated the filing of a Memorandum seeking a direction for disclosure from the Authority. This matter ought to have been dealt with by consent. It occasioned unnecessary costs. This justifies an increase of \$1,000;
- c) In respect of issue c) required the applicants lawyers to reply to the requests to admit further evidence in support of a counterclaim/contributory behaviour. The late filing would have required further costs to be incurred by the applicant's lawyer in both objecting and considering the evidence filed. There was no explanation for the delay. To grant an extension was an indulgence. There was also evidence to show this information was available to the respondent to file within the timetabling directions. Given the non-compliance and additional preparation required an increase of \$700 is warranted.

[5] There is sufficient evidence to show the applicant's lawyers undertook the above work. A breakdown of the time spent would not greatly assist matters for costs. Therefore an increase to the daily tariff of \$1,700 is warranted or \$6,200.

[6] The respondent submits no costs are payable because the applicant unreasonable refused a *Calderbank offer* that he not seek reinstatement and withdraw his application. It states the applicant has overall achieved less because of the legal fees incurred and the late withdrawal of his reinstatement application.

[7] I also do not agree that no costs should be awarded. Costs follow the event. The *Calderbank offer* did not achieve more than the applicant achieved at hearing. The offer did not make any contribution towards legal fees. Given the applicant's possible recovery of

\$6,200 in legal costs he has achieved more than the settlement offer and more importantly is not in a negative position.

[8] The remedy of reinstatement is not a separate application. It is one of several remedies an applicant is entitled to seek if a personal grievance is proven. No separate statement in reply is required to be filed. Therefore it does not have the same costs considerations as the withdrawal of a personal grievance or breach application at hearing.

[9] There is little to support a claim for costs due to the withdrawal of this remedy. Only two respondent witnesses, the respondent directors Benjamin Simpson and his wife Jessica Simpson, gave evidence about reinstatement albeit in a very brief way. Mr Simpson essentially relied upon the same evidence he had produced in support of contributory behaviour to deny reinstatement. This evidence did reduce remedies so did not occasion any wasted costs. Mrs Simpson made a one line statement she could not work with the applicant again because of his "vindictive" behaviour towards herself and her husband, presumably referring to the issuing of these proceedings. That is insufficient to warrant any reduction in costs.

[10] The withdrawal primarily reduced the hearing time required for remedies. I decline to make any reduction in costs for the withdrawal of the remedy of reinstatement.

## **Outcome**

[11] Unlimited Internet Limited is ordered to pay Scott Rankin \$6,200 towards its actual legal costs.

## **TG Tetitaha**

## **Member of the Employment Relations Authority**