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Tree v Jansen Limited AA 169A/10 (Auckland) [2010] NZERA 596 (26 July 2010)

Last Updated: 3 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 169A/10 5154669

BETWEEN STEVE TREE

Applicant

AND JANSEN LIMITED

Respondent

Member of Authority: Robin Arthur

Representatives: Shelley Lomas for Applicant

Andrew Swan for Respondent

Submissions: 10 May 2010 from Applicant

3 June from Respondent

Determination: 26 July 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination AA 169/10 (13 April 2010) the Authority found Jansen Limited (JL) acted unjustifiably by failing to consult Steve Tree prior to deciding on the redundancy of his position and, before his employment ended, not discussing arrangements with him for an alternative role. A remedy of \$8000 as compensation for humiliation, loss of dignity and injury to feelings was awarded.

[2] JL also failed in a counterclaim for damages against Mr Tree. This related to its loss of a sale for its agency to sell a particular brand of cymbals.

[3] The parties were encouraged to resolve any issue of costs between themselves. They were not able to do so and Mr Tree lodged a memorandum seeking an order for all his legal costs since mediation, totalling \$6715.

[4] JL, in reply, submitted that, as Mr Tree failed in contending the redundancy was not for genuine commercial reasons, an *"extremely modest"* award of costs should be made for his success in gaining compensation for the flawed procedural manner by which the redundancy was carried out.

[5] JL has also exercised its statutory right to challenge the Authority's rejection of its counterclaim and asked the Employment Court to hear its damages claim against Mr Tree (ARC42/10).

[6] As is usual in these circumstances, the Authority now determines costs on its investigation. The costs determination may then also be the subject of challenge or, if the Employment Court reaches a different conclusion on the damages issue, the Court may decide to set aside the Authority's award of costs and substitute its own.

[7] Costs in this matter may be set by starting from a notional daily rate and then considering whether any applicable principles and factors require an adjustment up or down of that tariff in the particular circumstances of the case: *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808.

[8] Costs follow the event. Mr Tree was successful in establishing JL acted unjustifiably in how it carried out his dismissal for redundancy and that his actions did not, in the Authority's determination, cause whatever losses JL may have suffered in failing to sell its cymbals agency. I take \$3000 as the notional daily rate for a one-day investigation meeting of this type which involved hearing five witnesses and oral closing submissions from counsel.

[9] JL submitted the tariff should be reduced because of the time spent on Mr Tree's unsuccessful contention that the redundancy was not for genuine reasons. It is a proposition I would have accepted but for the considerable time also spent on JL's unmeritorious counterclaim for damages which required preparation by Mr Tree additional to his personal grievance application. This included evidence from a third party witness who was embroiled in the agency sale matter and detailed review of emails and other documentation. I consider preparation on that issue warrants an increase of \$1000 on the notional daily rate.

[10] I do not accept Mr Tree's submission that he should have an award for all his costs since mediation of \$6715. He seeks that on the basis that his full legal costs, including those incurred prior to and for mediation, totalled \$8437 and his net gain after receiving \$8000 compensation is small.

[11] Costs awards are predictably modest. A party needs to be advised about only incurring costs to a level *"reasonable in light of the amount likely to be recovered as remedies and costs from the Authority"*^[1]

[12] JL is to pay \$4000 to Mr Tree as a reasonable contribution to his costs incurred in his personal grievance application and responding to JL's unsuccessful damages claim.

Robin Arthur
Member of the Employment Relations Authority

[1] *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808 at [47].