

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 239
3025531

BETWEEN HIMANSHU MISTRY
Applicant

AND NEW ZEALAND
COMPLIANCE AND
REPAIRS LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Glenn Finnigan, counsel for the Applicant
Ivan Axenov, director of the Respondent

Submissions: 8 April 2019 from the Applicant and none from the
Respondent

Determination: 18 April 2019

COSTS DETERMINATION OF THE AUTHORITY

**A. New Zealand Compliance and Repairs Limited must pay costs
and expenses of \$7,071.56 to Himanshu Mistry.**

[1] By determination issued on 8 March 2019 the Authority found New Zealand Compliance and Repairs Limited (NZCRL) unjustifiably dismissed Himanshu Mistry. Mr Mistry was awarded remedies of lost wages and compensation for humiliation, loss of dignity and injury to feelings.¹

[2] The determination reserved costs. It encouraged the parties to resolve any issue of costs between themselves. It set a timetable for lodging memoranda if they were not able to do so and an Authority determination on costs was needed. It noted costs were usually set by use of a notional daily rate, unless particular circumstances

¹ *Mistry v New Zealand Compliance and Repairs Limited* [2019] NZERA 135.

or factors required an upward or downward adjustment of that tariff.² The determination also gave a preliminary indication that, on what was then known of the conduct of the case and subject to any submissions lodged by the parties, a 50 per cent uplift of the tariff was likely to be awarded.

[3] Mr Mistry lodged a costs memorandum seeking an uplift of the tariff to provide an award of costs of \$7,750, that is \$1,000 more than suggested in the preliminary indication. The memorandum was lodged outside the timetable set by the Authority but prior leave to do so was sought and granted.

[4] NZCRL had meanwhile filed a challenge to the Authority's determination in the Employment Court. An Authority officer advised the company that the Authority usually still proceeded to determine costs in such situations. The Court's practice directions allow a costs challenge to then be incorporated into the plaintiff's existing challenge to the Authority's substantive determination.³

[5] The Authority understood NZCRL's representative at the Authority investigation meeting no longer acted for the company so sent Mr Mistry's costs memorandum to NZCRL's director Ivan Axenov and advised him of the date by which any reply memorandum from the company should be lodged. No reply was received from NZCRL.

Assessing costs

[6] In exercising its discretion to award costs the Authority applies various principles relevant to the particular case. In this case Mr Mistry was entitled to an award of costs as the successful party. He was found to be unjustifiably dismissed. Various allegations made by NZCRL about Mr Mistry were, on the balance of probabilities, not established.

[7] Costs are not to be used to punish or express disapproval of an unsuccessful party's conduct but conduct that unnecessarily increased the costs of the successful party can be taken into account to lift a costs award.

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.

³ <https://justiceprod2-employmentcourt.cwp.govt.nz/assets/Documents/Publications/EMPLOYMENT-COURT-PRACTICE-DIRECTIONS-as-published-on-EC-Website20181214.pdf>

[8] Mr Mistry submitted NZCRL had unnecessarily increased his costs by the nature and extent of allegations about his conduct. Some of those claims were made in a counterclaim that was withdrawn. One, about supposed misconduct discovered after his dismissal, was the subject of extensive evidence. Its potential relevance was as a factor that could require reduction of any remedies due to contributory conduct under s 124 of the Employment Relations Act 2000.

[9] Addressing those issues required more preparation from Mr Mistry's counsel, both in considering the evidence of witnesses and preparing submissions. It undoubtedly lengthened the time and complexity of the Authority investigation meeting spent on matters that were, on the civil standard of proof, held to be unfounded allegations. This resulted in higher legal fees for Mr Mistry that, in light of the outcome, was an unnecessary increase in his costs.

[10] The key question for resolution in setting costs was therefore whether the appropriate uplift of the usual daily tariff was 50 per cent (that is from \$4,500 to \$6,750) or just over 70 per cent (up to \$7,750) as Mr Mistry sought.

[11] Mr Mistry's counsel advised that his total legal fees were likely to be \$18,000 plus GST. However, as those fees were incurred in light of the well-known daily tariff and frequent judicial reminders for representatives to be careful about the level of costs incurred, the level of likely fees was not a reason in this case to lift the tariff.

Order to pay costs and expenses

[12] The withdrawn counterclaim and the extra work required to respond to the ultimately unsubstantiated allegations about Mr Mistry did warrant an uplift. In the particular circumstances of this case, it was appropriate for the usual tariff to be uplifted to \$7,000. This was a reasonable and modest amount to require NZCRL to pay Mr Mistry as a contribution to his reasonably-incurred costs of representation. NZCRL must also reimburse him for the fee of \$71.56 paid to lodge his application in the Authority. NZCRL must pay Mr Mistry the total amount of \$7,071.56 awarded as costs and expenses by no later than 28 days from the date of this determination.

Robin Arthur
Member of the Employment Relations Authority