

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 428
3038375

BETWEEN	SHAILEN KUMAR Applicant
AND	JB HI-FI GROUP (NZ) LIMITED Respondent

Member of Authority: Nicola Craig

Representatives: Rhys Walter, counsel for the Applicant
Elizabeth Coates, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 2 July 2019 from the Applicant
15 July 2019 from the Respondent

Date of Determination: 19 July 2019

COST DETERMINATION OF THE AUTHORITY

- A. JB Hi-Fi Group (NZ) Ltd is ordered to pay to Shailen Kumar within 28 days of the date of this determination \$13,000.00 as a contribution towards his costs, along with \$71.56 for the filing fee.**

The first determination

[1] On 5 June 2019 I issued a determination¹ finding that:

¹ *Shailen Kumar v J B Hi-Fi (NZ) Ltd* [2019] NZERA 329

- (a) Shailen Kumar was unjustifiably dismissed by JB Hi-Fi Group (NZ) Ltd (JB or the company); and
- (b) JB was to pay Mr Kumar \$37,507.50 gross as reimbursement of remuneration, \$18,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and \$10,809.90 as lost benefits.

[2] Mr Kumar's claim to reinstatement was unsuccessful.

[3] The parties were invited to attempt to resolve the question of costs between themselves. They have not been able to do so and Mr Kumar has applied for costs.

Submissions on behalf of Mr Kumar

[4] Mr Kumar seeks \$23,097.75 as a contribution to his costs or alternatively, \$15,000 if an adjusted tariff approach is applied. His actual litigation costs are a little under \$30,000.

[5] The first figure sought by Mr Kumar is based on the fees incurred since a Calderbank offer which he made on 30 October 2018.

[6] The tariff calculation is based on three days for the investigation meeting plus a notional additional day to account for the fact that there was no time at the end of the three day meeting and substantial submissions were subsequently filed by both parties.

Submissions on behalf of JB

[7] JB considered that the notional daily tariff for the three investigation meeting days should be the starting point but that a reduction should be made due to Mr Kumar's failure to be granted reinstatement. It did not agree that any additional time should be recognised for the provision of submissions.

[8] JB filed a series of Calderbank offers from the parties, both from the months leading up to and including the investigation meeting, and in terms of costs issues, subsequent to the first determination. JB identified itself as being committed to seeking to resolve this matter in a pragmatic and reasonable way.

Costs award

[9] The Authority's power to award costs under clause 15 of Schedule 2 of the Employment Relations Act 2000 is governed by principles set out by the full Employment

Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*². These include a requirement that the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience. In addition, costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

[10] The starting point is an assessment of the daily tariff. The investigation meeting lasted three days. The notional daily tariff is \$4,500 for the first day and \$3,500 for subsequent days, amounting to \$11,500 for the hearing time in this case.

[11] The notional daily tariff includes a component for the preparation of submissions. In this case no additional hearing time was allocated for the presentation of submissions. However, on occasions a departure from the practice of not allowing additional costs for preparation of submissions is justified.³ In this case there were a number of aspects to the allegations against Mr Kumar which were not particularised in the company's contemporaneous documents. This contributed to extensive submissions being filed by both parties which the Authority found helpful. An uplift of \$1,500 is justified.

Calderbank offers

[12] The Calderbank offer relied on by Mr Kumar was made on his behalf on 30 October 2018, well before the investigation meeting dates in mid-December. It was clearly identified as being without prejudice save as to costs.

[13] Financially the offer required various payments totalling \$51,684, with only some components being taxable, as well as a contribution of \$11,150 towards his legal fees. In addition the offer required JB to provide a letter acknowledging that the dismissal was in error and reinstate Mr Kumar to his prior position. Mr Kumar incurred \$23,097.75 in legal costs after the Calderbank offer.

[14] JB's first Calderbank offer on 21 September 2018 was for \$10,000 under s 123(1)(c)(i) of the Act and \$2,000 plus GST for costs. JB then offered on 19 October 2018 to settle for \$20,000 under s 123(1)(c)(i) and \$5,000 costs. These offers are clearly indicated to be without prejudice save as to costs and occurred well before the investigation meeting.

² [2005] 1 ERNZ 808

³ *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [21]

[15] JB also made a further offer the day after the investigation meeting of \$35,000 under s 123(1)(c)(i) and \$20,000 plus GST for costs. It recognised that although most costs had already been incurred, further costs would be incurred in finalising submissions and filing memoranda as to costs.

[16] In conclusion I do not make any adjustment to the daily tariff for Mr Kumar's 30 October 2018 offer as, although it was for somewhat less money than he achieved in the substantive determination, it required JB to reinstate him which JB was not prepared to do and the Authority did not order. I also make no adjustment for JB's offers. The company's offers before the investigation meeting were all substantially lower than Mr Kumar achieved in the Authority. Even the offer the day after the investigation meeting was still less (including costs) than Mr Kumar has thus far achieved (excluding costs).

[17] The Calderbank offers regarding the cost issues show both parties attempting to achieve additional outcomes which they would not have been able to achieve via an Authority costs determination. Financially, Mr Kumar initially sought payment of his entire legal costs to date. JB offered to pay Mr Kumar the notional daily tariff rate of \$11,500. Mr Kumar then reduced his claim to \$27,983.86, very close to the amount now sought in the Authority. JB offered \$14,000 as a contribution to Mr Kumar's costs. Had this offer been without other conditions I would have considered a reasonable offer. However, it was conditional on several terms including a non-disparagement provision. Although such provisions are common in settlement agreements, in the situation where Mr Kumar had been involved in a process including an Authority determination I am not satisfied that it was unreasonable for him to reject that offer.

Partial success

[18] Mr Kumar was successful in his unjustified dismissal claim and achieved much of what was sought in terms of monetary remedies. However, JB was successful in defending Mr Kumar's claim for reinstatement.

[19] In *Coomer v JA McCallum & Son Limited*⁴ Judge Smith stated that a nuanced assessment of competing considerations is required in cases where parties have had mixed success. Reference was made to the Court of Appeal's statement that "... success on more

⁴ *Coomer v JA McCallum & Son Limited* [2017] NZEmpC 156

limited terms is still success".⁵ Mr Coomer could not have achieved his success, limited though it was, without lodging his claim in the Authority.⁶

[20] Had the reinstatement issue here occupied significant amounts of hearing time an adjustment may have been required. However, although some witnesses for JB gave evidence on this issue, it did not necessitate the calling of any additional witnesses or result in a considerable amount of additional hearing time. I therefore make no adjustment for this factor.

Conclusion

[21] To the notional daily tariff of \$11,500 I have allowed an uplift of \$1,500. I order JB to pay Mr Kumar within 28 days of the date of this determination the sum of \$13,000.00 as a contribution towards his costs and \$71.56 for the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority

⁵ *Weaver v Auckland Council* [2017] NZCA 330
⁶ *Coomer* at [43]