

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 55
5563719

BETWEEN AKMED AKMEDOV
Applicant

AND KH INTERNATIONAL LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Peter McKenzie-Bridle, Counsel for Applicant
Michael Smyth, Counsel for Respondent

Submissions Received: 29 March and 27 April 2016 from Applicant
20 April 2016 from Respondent

Determination: 18 May 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] On 10 March 2016 I issued a determination¹ in which I found Mr Akmedov has been unjustifiably dismissed. He was unsuccessful with four claims of unjustified disadvantage, as was KH International Limited (KH) with a counterclaim.

[2] Costs were reserved and Mr Akmedov now seeks a contribution toward those he incurred.

[3] It is accepted that in the normal course of events costs follow the event and normally the Authority will use a daily tariff approach when addressing such a claim.² The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

¹ [2016] NZERA Wellington 15

² refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

[4] That said Mr Akmedov relies on the High Court rules in seeking an award of full (indemnity) costs on the basis he has been completely successful. In saying this, and notwithstanding the failure of the disadvantage claims, it is submitted:

The Authority awarded the Applicant the full amount of compensation sought. He has been entirely successful. In light of that outcome, and the respondent's failure to make out any of his counter-claims, it is of no moment that the Applicant's claim for workplace bullying was unsuccessful.

[5] The response is costs should lie where they fall for three reasons. They are:

- a. Mr Akmedov was only partially successful and it took some time to investigate the matters upon which he failed;
- b. Mr Akmedov would have been better off had he accepted KH's calderbank offer; and
- c. Mr Akmedov *took an intransigent approach to settlement which relied on the flawed premise he was entitled to damages for lost earnings*. It is submitted that had he not done so the claim would have been capable of early settlement.

[6] In the alternate and should I not accept the idea costs lie where they fall, KH encourages me to use the tariff approach and then apply a reduction given Mr Akmedov's *mixed outcomes*, the calderbank, his behaviour in mediation³ and his *intransigent approach to settlement*. KH also notes the costs claim is not quantified.

[7] The calderbank offered compensation of \$2,000 plus a contribution toward costs of \$1,000.

[8] Mr Akmedov has replied. He argues the impression created by KH is inaccurate and alleges it was the respondent which acted aggressively. He advises the reason his costs claim is not quantified is that he was legally aided and anything he is awarded will be passed to the Board. For clarification he adds the bill currently totals \$5,539 but does not include the costs submissions.

³ It would appear from the correspondence Mr Akmedov called a halt in protest at KH's inadequate settlement offer

[9] The application for indemnity costs faces one significant obstacle. In this jurisdiction a costs award is a contribution and not full indemnification except in exceptional circumstances and where the type of behaviours discussed in *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 are present. Notwithstanding the various allegations there is no real evidence of such behaviour here or anything that approaches it.

[10] In the absence of further argument I will apply the tariff approach. The investigation took a day and a half so, applying the normal tariff of \$3,500 the award would be \$5,250. The question is whether or not I reduce the amount (perhaps as far as zero) as KH urges me to do.

[11] I conclude the arguments advanced by KH fail to persuade me to do so.

[12] The calderbank is ineffective as the offer it conveyed is less than Mr Akmedov achieved via the determination and once the issue of costs is determined Mr Akmedov will, despite the contrary assertion, be better off.

[13] The argument about partial success also fails to convince. I find Mr Akmedov's response more persuasive and here I note I did take an arguably cavalier approach to the disadvantage claims given a conclusion their success or otherwise would not affect the remedies.⁴

[14] I also disagree the evidence about these claims greatly extended the investigation. The claims formed an integral part of the factual background and were, in any event, also of interest to KH as they and allied matters formed part of an argument remedies be reduced⁵ and Mr Akmedov's behaviour led to its frustration which in turn led to it acting as it did.⁶

[15] Similarly the argument Mr Akmedov *took an intransigent approach to settlement* is, I conclude, weak. As already said the evidence suggest the offers made in mediation were less than he will achieve and all the documentation does is suggest he chose to reject what he saw an inadequate offer (which he is entitled to do) and did so in an expeditious way that avoided escalating costs.

⁴ n.1 at [52] and [57]

⁵ Section 124 of the Act

⁶ n.1 at [23]

[16] Given the above I conclude it appropriate to apply the standard tariff and accordingly order the respondent, KH International Limited, pay the applicant, Akmed Akmedov, \$5,250.00 (five thousand, two hundred and fifty dollars) as a contribution toward the costs he incurred in pursuing his claim.

M B Loftus
Member of the Employment Relations Authority