

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 210
3001444

BETWEEN

DAVID IRWIN
Applicant

A N D

AUNZ INVESTMENT GROUP
LIMITED
First Respondent

AND

YORK B YU
Second Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Glenn Finnigan, Counsel for the Applicant
May Moncur, Representative for the Respondents

Submissions Received: 20 June 2017 from Applicant
No submissions from Respondent

Date of Determination: 19 July 2017

**COST DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. AUNZ Investment Group Limited (AUNZ) and Mr Yu are ordered to contribute \$3,000 towards Mr David Irwin's costs and to reimburse the filing fee of \$71.56, both within 14 days of the date of this determination.**

The substantive determination

[1] In a written determination of the Authority issued on 6 June 2017¹, the Authority determined that:

¹ [2017] NZERA Auckland 162

- A. The applicant, Mr David Irwin was constructively dismissed by the first respondent, AUNZ Investment Group Limited (AUNZ). The constructive dismissal was unjustified.
- B. AUNZ was ordered to pay Mr Irwin the following sums within 21 days of the date of this determination:
- (a) \$7,500 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act), for humiliation, loss of dignity, and injury to feelings in respect of his unjustifiable dismissal;
 - (b) Pursuant to s.128(2) of the Act, reimbursement of lost salary in the sum of \$20,425 gross for the three month period from the date of dismissal on 18 November 2016;
 - (c) Reimbursement of the following amounts pursuant to Mr Irwin's employment agreement;
 - (i) Unpaid salary totalling \$29,888.97 gross (para.70(a) and (d) of this determination);
 - (ii) Unpaid salary totally \$18,109.59 net (para.70(c) and (e) of this determination);
 - (iii) Unpaid business expenses totalling \$5,689.38 net(para.70(b) of this determination);
 - (iv) Unpaid holiday pay for the period of employment totalling \$12,012.00 gross.
 - (d) AUNZ was ordered to pay to the Crown via the Authority a penalty of \$3,000 within 21 days of the date of the determination.
- C. Mr Yu was determined to have aided and abetted AUNZ to breach Mr Irwin's employment agreement. Mr Yu was ordered to pay to the Crown via the Authority a penalty of \$1,000 within 21 days of the date of this determination.

- D. Costs were reserved. Mr Irwin was given 14 days from the date of the determination to file a memorandum as to costs and AUNZ and Mr Yu were given 14 days in which to reply.

Costs determination

[2] On 20 June 2017, Mr Finnigan filed a memorandum seeking an indemnity costs award on behalf of the applicant, against both AUNZ and Mr Yu jointly and severally. Costs sought by Mr Finnigan amount to \$16,019.50. Alternatively, Mr Finnigan seeks cost comprising a half day calculated on a prorated basis of the Authority's current daily tariff \$4,500, namely \$2,250 plus an uplift in costs of a further \$4,500 plus the filing fee.

[3] Mr Finnigan seeks costs on these bases because of the additional costs incurred as a result of the failures by AUNZ and Mr Yu to properly engage and participate in the Authority's investigation. With regard to this, the Authority did issue a determination on the day of the investigation meeting as a result of the failures of AUNZ and Mr Yu which led to a delay of the investigation meeting. One of the reasons was because of Mr Yu's failure to engage with the Authority, there was no Mandarin interpreter available for him when he requested one on the morning of the meeting. A costs determination was issued requiring AUNZ and Mr Yu to pay Mr Irwin costs in the sum of \$1,968.75².

The Authority's daily costs tariff

[4] For matters filed in the Authority from 1 August 2016, the Authority's normal daily tariff increased from \$3,500 to \$4,500 for the first day of an investigation meeting. For each subsequent day of an investigation meeting the Authority's normal daily tariff remains at \$3,500³. This matter was filed in the Authority following the new costs regime which applies.

The Authority's power to award costs

[5] The Authority's power to award costs arises from Schedule 2, clause 15 of the Act. This confers a wide discretion on the Authority to award costs on a principled

² [2017] NZERA Auckland 126

³ Practice Note 2 Costs in the Employment Relations Authority

basis. I have referred to the applicable law in respect of costs in the Authority in the determination above⁴.

Indemnity costs

[6] Mr Finnigan seeks an indemnity costs award in respect of the costs incurred by Mr Irwin in bringing his claim against AUNZ and Mr Yu.

[7] Mr Finnigan has included all relevant invoices which provide a detailed schedule of costs which have been incurred by Mr Irwin in bringing his claim against AUNZ and Mr Yu. These costs are sufficiently detailed for the Authority's purposes and provide all the information that could reasonably be required in my view.

[8] Neither AUNZ nor Mr Yu have responded to the memorandum as to costs filed on behalf of Mr Irwin. Mr Finnigan submits that many of the failures by AUNZ and Mr Yu have increased the costs of resolving Mr Irwin's employment relationship problem and in fact there was no legitimate basis for them to defend Mr Irwin's claims.

[9] The Court of Appeal in *Bradbury v Westpac Banking Corporation*⁵ analysed the law on indemnity costs both here and in overseas jurisdictions. The decision was considered by the Employment Relations Authority in *Patel v Adamar Holdings Ltd*⁶. The Authority referred to the Court of Appeal's decision in *Bradbury* and observed that the Court of Appeal:

... identified that indemnity costs had been awarded in New Zealand where there is an allegation of fraud made, where the party making the allegation knew the allegation to be false and where irrelevant allegations of fraud are made.

[10] In *Patel*, the Member found that there had been an irrelevant allegation of fraud made and that the respondents, rather than treating the personal grievance claim on general principles, introduced:

... irrelevant fraud allegations which materially increased the hearing time, materially increased the time counsel for the applicant was required to be involved, and materially increased the number of documents and the number of witnesses required to resist these entirely unwarranted allegations.

⁴ Ibid paras.[6] and [7]

⁵ [2009] 3 NZLR 400

⁶ [2014] NZERA 135

[11] This is not the situation in the current case. I do not understand Mr Irwin to be claiming that there were irrelevant allegations of fraud made by AUNZ or Mr Yu and is not relying on *Bradbury*. Rather, reliance is on the many failures by AUNZ and Mr Yu to engage with the Authority's process which increased significantly Mr Irwin's costs.

[12] I do not consider this is a case in which indemnity costs are appropriate. I am going to deal with this matter on the usual basis that the Authority deals with costs claims. I shall apply the daily tariff. The Authority's discretion allows for an 'uplift' to take in to account circumstances where conduct has increased costs.

[13] The normal starting point for costs in the Authority is \$4,500 for the first day. The investigation meeting took a half day. This would equate to almost \$2,225 in costs based on the Authority's normal daily tariff.

[14] The Authority made an order as to costs on the day of the investigation meeting as a result of increased costs due to failures of AUNZ and Mr Yu to engage in the Authority's process which delayed the meeting.

[15] Taking in to account Mr Irwin's actual costs and there being no response from AUNZ or Mr Yu, I consider in the circumstances an award of costs of \$3,000 to be appropriate. This is an uplift of \$775. These costs are in addition to the costs award on the day of the investigation meeting.

[16] Accordingly, I make a costs award of \$3,000 against AUNZ and Mr Yu jointly and severally. This sum is to be paid to Mr Irwin within 14 days of the date of this determination together with the cost of the filing fee of \$71.56 within 14 days of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority