

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 453
3235759

BETWEEN	JUNGHWAN PARK Applicant
AND	DATA INSIGHT LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Seungmin Kang, counsel for the Applicant Jeremy Ansell and Caitlin Sargison, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	5 July 2024, from the Applicant 19 July 2024, from the Respondent
Determination:	26 July 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority issued a determination on 7 June 2024 which found Mr Park had established a personal grievance for unjustified dismissal and awarded compensatory remedies in his favour.¹ The remedies awarded included lost remuneration. Costs were reserved and a timetable set if the parties were unable to resolve this issue themselves which they advise has not been possible.

[2] Mr Park seeks by way of memorandum filed and served within the timetable a contribution to costs from Data Insight (DI). In addition, he seeks determination of the

¹ *Junghwan Park v Data Insight Limited* [2024] NZERA 334.

lost remuneration award because the parties have been unable to agree that sum. DI filed a memorandum in reply concerning costs and the calculation of the remuneration award. For completeness all information provided by the parties to the Authority concerning the calculation of the remuneration award has been considered.

Lost remuneration

[3] In the determination issued on 7 June Mr Park was awarded three months lost remuneration from after his employment ended less the amount he received in earnings related compensation.² His last day of employment was 14 June 2023, and he was paid one month's pay in lieu of notice as allowed under the parties' employment agreement.³

[4] The lost remuneration is before the Authority to determine because the parties have been unable to reach agreement. What ought to have been a straightforward arithmetical calculation – Mr Park's usual monthly salary x 3 less ACC payments received in that period – has not been possible because in May ACC advised Mr Park, he had been overpaid the sum of \$8,968.17 for the period 12 June 2023 to 6 August 2023 because “you were paid by both us and your employer for the period above”. The 21 May letter was not provided to the Authority prior to the determination being issued on 7 June 2024.

[5] Mr Park submits the advised sum is a debt owing ACC which he intends to repay. He has not provided information as to what the overpayments relate to or why he believes it is a debt owing to ACC other than reliance on the letter from dated 21 May 2024.

[6] The information before the Authority is that when Mr Park's employment ended, he was paid out his contractual notice and holiday pay - an entitlement that crystallised under his employment agreement when his employment ended. It is not payment for work performed in the period identified in the ACC letter because Mr Park was certified unfit to work from 14 June and from that date he was no longer employed

² Contribution to KiwiSaver and calculation of holiday pay were also ordered: N1 at [72].

³ N1 at [45].

by DI. Whether the payments from DI create an overpayment with ACC is a matter between Mr Park and that agency.

[7] DI is to pay Mr Park lost remuneration of \$10,093.88 – DI’s calculation of the delta between what Mr Park would have earned and what he received in accident-related compensation for the 13 week claim period is accepted. DI is also, as ordered to calculate on that sum and pay to Mr Park KiwiSaver contributions and holiday pay.

Costs principles

[8] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority’s approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority’s equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- 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.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

Mr Park’s claim for costs

[9] Mr Park seeks an award of \$9,750, as a contribution to total costs of representation incurred of \$23,194.28 (including GST where applicable) and disbursements of \$1,923.45. Supporting information has been provided. He submits the award sought is warranted given:

- he was the successful party and costs should follow the event;
- the investigation meeting required two investigation meeting days and filing of written closing submissions warrants an uplift of half second day notional tariff;

- the disbursements sought are reasonable given counsel is the only civil legal aid provider in New Zealand who is fluent in Korean and English, and this assistance was necessary and effective to Mr Park's successful prosecution of his claim; and
- DI's *Calderbank* offer of \$25,000 is not a relevant factor because Mr Park's total award exceeded that amount.

DI's position on costs

[10] DI submits there are several factors that warrant a reduction from the notional daily tariff:

- day 1 of the investigation meeting was truncated and involved total hearing time of half a day – the investigation meeting commenced at 11am and ended at 3pm to accommodate witnesses with a break for lunch;
- the disbursements sought, other than the filing fee are unreasonable, including food delivery charges. DI understands there are counsel based in Auckland who are fluent speakers of English and Korean who are civil legal aid providers; and
- DI made a valid *Calderbank* offer which would warrant a decrease in any costs award in Mr Park's favour because the proposals made would have led to a more beneficial outcome than that achieved by the party for whom costs are sought.

Costs analysis

[5] Mr Park was the successful party, and it is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs.

[6] The notional daily tariff is a starting point. The applicable daily tariff is \$4,500 with each subsequent day at \$3,500. I am satisfied this matter involved two days of investigation meeting. The parties' attendance at the first day spanned a normal investigation meeting day and the second day ran longer. The starting point is \$8,000.

[7] No allowance is to be made for filing of closing submissions – the matters canvassed were well known to the parties. DI's *Calderbank* offer, though valid falls

short of the total award made in Mr Park's favour. It does not warrant a decrease in the starting point nor an increase.

[8] A contribution to travel expenses of \$600 is allowed. It is accepted it was reasonable for Mr Park to instruct Korean speaking counsel and this has assisted the efficient investigation of this employment relationship problem. The information about counsel located in Auckland is noted however, it is not known if these were options available to Mr Park when he raised this employment relationship problem. He is also entitled to reimbursement of the filing fee of \$71.56.

[9] A fair costs award, given all the relevant circumstances is in Mr Park's favour at the daily tariff of \$8,000 plus reimbursement of the filing fee of \$71.55 and \$300.

Outcome

[10] Data Insight Limited is ordered to pay Junghwan Park \$10,093.88 and calculate on that sum and pay to Mr Park KiwiSaver contributions and holiday pay.

[11] Data Insight Limited is ordered to pay Junghwan Park \$8,000 as a contribution to costs incurred, \$71.55 to reimburse the filing fee and \$600 towards other costs reasonably incurred.

Marija Urlich
Member of the Employment Relations Authority