

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 135  
5411150

BETWEEN

JAYOTI SUMANBHAI  
PATEL  
Applicant

A N D

ADAMAR HOLDINGS  
LIMITED and ADAMAR No 1  
LIMITED  
Respondents

Member of Authority: James Crichton

Representatives: Jason Goodall, Counsel for Applicant  
Matthew Robson, Counsel for Respondents

Submissions Received: 20 February 2014 and 21 March 2014 from Applicant  
21 March 2014 from Respondents

Date of Determination: 8 April 2014

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**FINAL DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] By determination dated 23 January 2014 issued as [2014] NZERA Auckland 23, the Chief of the Authority (Member Monaghan) dealt with the substantive issues between these parties.

[2] Costs were reserved. In addition, the quantification of certain remedies awarded by the Authority remain in dispute and those two matters now fall for decision in this determination.

[3] The decision in respect of these outstanding matters has been allocated to me by the Chief of the Authority.

## **The claim for costs**

[4] Counsel for Ms Patel advises that at his initiative, attempts were made to resolve matters with counsel for the respondents but that the only response was to indicate that instructions had been received to file a challenge to the Authority's substantive decision.

[5] Of course, as counsel for the applicant correctly points out, a challenge does not operate as a stay and the Authority's process continues unless and until it or the Court determines otherwise.

[6] In relation to the quantification of remedies issue, counsel for the applicant refers the Authority to his letter to counsel for the respondents dated 13 January 2014 (although the letter concerned is actually dated 13 February 2013; presumably 2014 is the correct year. ).

[7] The applicant submits that the calculations implicit in that letter are derived from the unchallenged evidence before the Authority in the substantive investigation. Ms Patel seeks an order for the payment to her of a judgment sum of \$16,874.09 being the aggregate of the various sums derived from the orders made by Member Monaghan in the substantive decision.

[8] In regard to costs, Ms Patel seeks full indemnity costs in the total sum of \$37,722 in reliance on *Bradbury v. Westpac Banking Corporation* [2009] 3 NZLR 400. In the alternative, and based on the daily tariff approach together with a significant allowance for preparation time, an award of \$26,250 is sought.

[9] Ms Patel, through counsel, makes the observation that while the amounts sought seem high, they reflect the entirely unsubstantiated allegations of fraud made by the respondents against Ms Patel.

[10] Also claimed are the Authority's filing fee of \$71.56 together with a further sum of \$143.75 being the cost of the process server in serving the claim on the respondents.

## **The response**

[11] Counsel for the respondents maintains that the costs sought by the applicant are unreasonable, not in accordance with principle, and not supported by evidence of the actual costs incurred.

[12] Moreover, it is contended that the respondents acted to focus the hearing by, amongst other things, conceding that the dismissal of the applicant was procedurally flawed.

## **Discussion**

[13] The law on the fixing of costs in the Authority is well settled and need not be recited again here. Suffice it to say that the principles enunciated in the leading cases all refer to costs following the event, to approval of the daily tariff approach frequently used in the Authority but also to the final decision being activated by special circumstances such as the existence of *Calderbank* letters. The Authority makes its costs decisions on a case by case basis, but those decisions must be activated by principle.

[14] There are a number of significant differences between these parties which I need to comment and make findings on. First, having perused the Authority's file and carefully studied the substantive determination issued by Member Monaghan, I do not accept that the respondents made an early admission that the dismissal of Ms Patel was flawed. Indeed, it seems that quite the reverse was the case, as the briefs of evidence filed by the respondents and the factual findings made by the presiding Member tend to confirm.

[15] Next, contrary to the allegation made by the respondents in their costs submissions, Ms Patel did in fact provide a breakdown of the costs she had incurred in prosecuting her claim before the Authority. Those costs are sufficiently detailed for the Authority's purposes and provide all the information that could reasonably be required.

[16] Most significantly of all though, is the fact that the respondents have chosen not to address head on the claim for full indemnity costs other than to contend that the costs claimed are unreasonable. They claim that the respondents' allegations inter alia that the employment agreement sent to Immigration New Zealand was dishonestly

obtained was an honest one that they were entitled to advance. But plainly, there is a difference between an ordinary defence of position which is held to be unsuccessful and a defence that involves allegations of fraud that are found to be completely baseless, as was the case here. Submissions for the respondents appear to overlook the law on full indemnity costs, which, not unnaturally, Ms Patel chooses to rely upon.

[17] Ms Patel seeks to rely on the Court of Appeal decision in *Bradbury* because that judgement sets out the basis on which indemnity costs can be awarded and she says the categories of case where indemnity costs can apply includes the present situation.

[18] In *Bradbury*, after a careful analysis of the law on indemnity costs both here and in overseas jurisdictions, 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.

[19] The present case I put into the second category, that is an irrelevant allegation of fraud. This was, or ought to have been, a straightforward personal grievance claim dealt with on general principles. But rather than treating it like that, the respondents chose to introduce 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.

[20] Put another way, the process by which this case was advanced by the respondents brought it squarely within another category of case identified in *Bradbury* namely French J's "hopeless case." His Honour, now Chief Justice of Australia was giving judgement in *J Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA Branch) (No2) (1993) 46 IR 301* when he said: *It is sufficient, in my opinion, to enliven the discretion to award (indemnity) costs that, for whatever reason, a party persists in what should on a proper consideration be seen to be a hopeless case.*

[21] I am satisfied that *Bradbury* applies in the present case and accordingly indemnity costs ought to be awarded.

**Determination**

[22] There will be an order for full indemnity costs against the respondents in the sum of \$37,722 together with reimbursement of the Authority's filing fee and reimbursement of the cost of a process server in serving the claim, those two amounts aggregating to a sum of \$215.31.

James Crichton  
Member of the Employment Relations Authority