

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 210
3025075

BETWEEN KAILASH SHARMA
Applicant

A N D PROGRESSIVE ENTERPRISES
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Christopher Eggleston, Counsel for Applicant
Kylie Dunn and Jamie Crosbie, Counsel for Respondent

Investigation Meeting: Determined on the papers

Submissions Received: 1 June 2018 from Applicant
15 June 2018 from Respondent

Date of Determination: 2 July 2018

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

The respondent, Progressive Enterprises Limited (Progressive) is ordered to contribute \$11,500 towards the costs of the applicant, Mr Kailash Sharma, and to reimburse disbursements totalling, \$1,232.14, both within 14 days of the date of this Determination.

The Substantive Determination

[1] In a written Determination of the Authority, issued on 21 May 2018¹ (now dated 25 June 2018), the Authority determined that Mr Kailash Sharma had been unjustifiably dismissed from his employment by Progressive.

¹ [2018] NZERA Auckland 162

[2] Mr Sharma was reinstated to the position of Manager, RaPiD Print at Progressive, based in Auckland, on a permanent basis, pursuant to s 123(1)(a) of the Employment Relations Act 2000 (the Act).

[3] Compensation of \$20,000 was awarded to Mr Sharma for humiliation, loss of dignity and injury to feelings in respect of his unjustifiable dismissal pursuant to s.123(1)(c)(i) of the Act.

[4] No discrete unjustified disadvantage claim was established.

[5] Costs were reserved.

Authority's power to award costs

[6] The Authority's power to award costs against a party to another is set out in clause 15 of Schedule 2 of the Act. The Authority is bound by the principles set out in *PBO Limited v Da Cruz*² when setting costs awards. I am not going to repeat the principles as they are well established.

Applicant's submissions

[7] Mr Sharma's total costs in respect of the investigation meeting amounted to \$37,133.73 including discounted time of \$9,730 together with disbursements of \$1,232.14. Counsel for Mr Sharma is seeking to recover the entire amount of costs and disbursements on an indemnity basis.

[8] In addition, Counsel for Mr Sharma seeks the costs of preparing the costs memorandum totalling \$1,207.50 including GST. The total claim for costs and disbursements is \$39,573.37. The Authority has been provided with copies of invoices and receipts in support of the claim for indemnity costs.

[9] Alternatively, the applicant seeks an uplift in the Authority's notional daily tariff for the two day investigation. The applicant seeks a further two days costs based on the Authority's notional daily tariff to reflect the additional preparation time required, including in respect of the interim injunction proceedings. In total, the applicant seeks legal costs claimed at the notional daily tariff amounting \$18,482.47

² [2005] 1 ERNZ 808

including GST plus “costs on costs” of \$1,207.50 for the preparation of the costs memorandum.

Respondent’s submissions

[10] Counsel for Progressive submits that indemnity costs are not appropriate. It also opposes any uplift in the daily tariff for a two day hearing in the Authority. Progressive submits that the daily rate for the 2 day investigation meeting totalling \$8,000 should be discounted by \$1000 to take into account Mr Sharma’s unsuccessful claim of unjustified disadvantage. It is of the view that an award of no more than \$7,000 should be made by the Authority.

Indemnity costs

[11] Counsel for Mr Sharma submits that while it is usual for costs to be awarded in line with the daily tariff, it is possible in exceptional circumstances for costs to be awarded on an indemnity basis. Counsel submits that exceptional circumstances exist in this case which warrant an award for indemnity costs.

[12] Both Counsel refer to the Court of Appeal decision in *Bradbury v Westpac Banking Corporation*³ which considered indemnity costs.

[13] Although *Bradbury* involved commercial litigation under the High Court costs provisions, the Court of Appeal’s decision provides guidelines for the Authority when considering an indemnity costs application.

[14] The Court in *Bradbury* listed the following non-exhaustive categories in which indemnity costs have been ordered:

- (a) A party making allegations of fraud, knowing them to be false;
 - (b) Particular misconduct that causes loss of time to the Court and to other parties;
 - (c) Commencing or continuing proceedings for some ulterior motive;
 - (d) Doing so in wilful disregard of known facts or clearly established law;
- or

³ [2009] NZCA 234, [2009] 3 NZLR 400

- (e) Making allegations which ought never to have been made or unduly prolonging a case by making groundless contentions.

[15] Counsel for Mr Sharma points to findings in the Authority's Determination including Mr Schreiner's invalid authority to undertake the disciplinary investigation into allegations of serious misconduct by Mr Sharma and to dismiss Mr Sharma, in support of his submission that indemnity costs should be awarded. These failures rendered the decisions made by Mr Schreiner void and unjustified.

[16] Counsel for Progressive submits that Progressive's conduct did not amount to "exceptionally bad behaviour" and therefore the principles applicable to indemnity costs do not apply in this instance. It is submitted on behalf of Progressive that indemnity costs "are exceptional and require exceptionally bad behaviour".

[17] Judge Inglis in *Johnston v The Fletcher Construction Company Limited*⁴ states that: "Indemnity costs generally require exceptionally bad behaviour. Increased costs may be appropriate in cases where, for example, a party has pursued an argument without merit."

[18] I do not consider that any of the categories in *Bradbury* apply in this particular instance. I do not accept counsel for the applicant's submission that Progressive's defence of Mr Sharma's claim in the Authority was a "hopeless case". In *Bradbury*, the Court of Appeal described a "hopeless case" as one in which allegations are made in wilful disregard of known facts or clearly established law or which should never have been made, or unduly prolonging a case by groundless contentions.

[19] Progressive failed to justify its dismissal of Mr Sharma. One aspect of that failure related to the invalidity of Mr Schreiner's authority to investigate and to make the decision that Mr Sharma's conduct amounted to serious misconduct for which he was to be dismissed. The failure in this regard, in my view, did not amount to a "hopeless case".

[20] However, as stated in the Authority's determination, it was a fundamental error which rendered the investigation and dismissal invalid. The Authority had to direct the production of further evidence on the issue which was time consuming and in my view increased hearing time in the Authority.

⁴ [2018] NZEmpC 18 at para [5]

Authority's notional daily tariff

[21] I consider that the Authority's usual notional daily tariff based approach to costs is appropriate in this case.

[22] I accept that it is appropriate for Progressive to make a contribution towards Mr Sharma's costs on the basis that costs follow the event. Although Mr Sharma was not wholly successful in his claims, he was successful in respect of his major claim of unjustified dismissal.

[23] The starting point in awarding costs in the Authority when an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day of an investigation meeting and \$3,500 for every subsequent day. The investigation meeting took place over two full days. The notional tariff for the two days amounts to \$8,000.

[24] Counsel for Mr Sharma seeks an uplift in the notional daily tariff by an additional two days. For four days, the notional daily tariff amounts to \$15,000. Counsel seeks the uplift on the grounds that there was extra cost involved in preparing an urgent application for Mr Sharma's urgent reinstatement. This is a relevant issue in terms of costs.

[25] The investigation meeting took two long days with a great deal of preparation for all concerned because there was considerable dispute between the parties. Further, the events between the parties took place over a considerable period of time which added to the complexities. There was an application for urgency filed in the Authority which required considerable work on behalf of Mr Sharma.

[26] Further evidence was produced during the course of the investigation which added to its length.

[27] I consider an uplift to the notional starting tariff of \$8,000 is warranted to adequately reflect the costs liability of Progressive towards Mr Sharma.

[28] Progressive is ordered to pay Mr Sharma the sum of \$11,500 towards his legal costs which is the equivalent of 3 days at the notional daily tariff.

Disbursements

[29] Disbursements claimed are for the filing fee, typing of transcript, photocopying and the hearing fee. These total \$1,232.14. I consider the disbursements to be reasonable and make an order that they are payable by Progressive.

Anna Fitzgibbon
Member of the Employment Relations Authority