

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 122
3025080

BETWEEN	URBAN TURBAN NEW ZEALAND LIMITED First Applicant
AND	BHUSHAN AROLKAR Second Applicant
AND	JASMINE AROLKAR Third Applicant
AND	SACHIN NAYAK Respondent

Member of Authority:	Rachel Larmer
Representatives:	Jasmine Arolkar, for all three Applicants Nathan Santesso, Advocate for Respondent
Investigation Meeting:	On the papers
Submissions Received:	06 April 2018 from Applicants No submissions from Respondent
Date of Determination:	19 April 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] *Substantive determination* – In a substantive determination dated 01 June 2017¹ Mr Nayak succeeded with the various claims he made against his former employer Urban Turban New Zealand Limited (Urban Turban).

¹ [2017] NZERA Auckland 160.

[2] *Award* – As a result of previous Authority proceedings Urban Turban was ordered to pay Mr Nayak wage arrears, penalties and unpaid statutory entitlements together with legal costs.

[3] *AEA 3016771* – Subsequent to the Authority determining Mr Nayak's substantive claims against Urban Turban Mr Nayak filed a new Statement of Problem (AEA 3016771) relating to non-payment of the amounts awarded by the Authority.

[4] *Withdrawal* - The Authority scheduled an investigation meeting for AEA 3016771 but before it could take place Mr Nayak advised the Authority that he was withdrawing all of his claims.

[5] *Record of Settlement* – The parties to AEA 3016771 together with Mr Bhushan Arolkar and his wife Mrs Jasmine Arolkar, who are both directors of Urban Turban, entered into a s.149 Record of Settlement which was signed off by a mediator from the Ministry of Business, Innovation and Employment on 10 July 2017 (the Record of Settlement).

[6] *AEA 3023971* – Mr Nayak brought an unsuccessful claim under AEA 3023971 that the Applicants in this matter had breached the Record of Settlement by failing to pay all of the money due to him.

[7] *Current claim* – The Applicants now claim that Mr Nayak breached the non-disparagement clause in their Record of Settlement during an interview he had with TVNZ about the exploitation of migrant workers. Mr Nayak denies disparaging any of the Applicants. He says he was careful to ensure he met his legal obligations by obtaining the questions he would be asked in advance of the interview and by responding in a way that was focused on himself.

[8] *TVNZ interview* – I have reviewed the TVNZ interview and am satisfied that the content of Mr Nayak's interview did not breach his Record of Settlement obligations. He did not name any of the Applicants. Mr Nayak spoke about his own circumstances which are a matter of public record, through the publically available Authority determinations. Mr Nayak expressed his personal views in a general way that was not disparaging of the Applicants.

[9] *Advocate's communications* – The Applicants have also expressed concern that Mr Santesso's email communications are disparaging and they want the Authority

to hold Mr Nayak responsible for them. Having reviewed Mr Santesso's communications it is clear that they are extremely inappropriate.

[10] *No awareness of Advocate's actions* - There is no evidence that Mr Nayak was aware of, encouraged, instructed or condoned the inappropriate language and comments his Advocate was making in communications with the Applicants.

[11] *Mr Nayak's position* - Mr Nayak has distanced himself from his Advocate's emails and states that he "*is disappointed with an in no way supports the abusive language which his advocate used in the emails.*"

[12] *No liability* – Mr Santesso was not a party to the Record of Settlement. Mr Nayak cannot be held liable for Mr Santesso's emails in the absence of instructions to Mr Santesso to make such inappropriate comments. I am therefore not satisfied that the Applicants have discharged their onus of establishing that Mr Nayak breached the Record of Settlement.

[13] *Recommendation* – Given Mr Nayak is now on notice about the inappropriate manner in which Mr Santesso has been communicating with the Applicants, Mr Nayak should take the necessary steps to ensure that his Advocate (who must follow Mr Nayak's instructions) does not continue to engage in inappropriate communications in future to avoid exposing Mr Nayak to possible further litigation.

[14] *Costs principles* – Mr Nayak as the successful party would normally be entitled to an award of costs in his favour. However costs are discretionary and I consider that the interests of justice require costs to lie where they fall in this particular case.

[15] *Reasoning for costs decision* - Mr Nayak's costs would have been minimal because he simply filed a Statement in Reply. I also consider that Mr Santesso's inappropriate actions contributed to the Applicants' decision to file these proceedings against Mr Nayak so it would be inappropriate for him to be effectively 'rewarded' for such conduct by receiving costs in respect of this matter.

Rachel Larmer
Member of the Employment Relations Authority