

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 148
3090453

BETWEEN KEVIN BARRETT
Applicant

AND NRS REFRIGERATION LTD
Respondent

3123575

BETWEEN NRS REFRIGERATION LTD
Applicant

AND KEVIN BARRETT
Respondent

Member of Authority: Philip Cheyne

Representatives: Paul Mathews, advocate for Kevin Barrett
Leanne Smith, advocate for NRS Refrigeration Ltd

Submissions Received: 23 February 2021 for Kevin Barrett
19 March 2021 for NRS Refrigeration Ltd

Date of Determination: 15 April 2021

COSTS DETERMINATION OF THE AUTHORITY

A. NRS Refrigeration Limited is to pay Kevin Barrett costs of \$4,571.56.

[1] In determination [2021] NZERA 56 I upheld personal grievance claims by Mr Barrett and dismissed the claims by his former employer, NRS Refrigeration Limited, for damages and to recover money paid to Mr Barrett as wages. Costs were reserved. I now have submissions from both parties. This determination resolves the issue of costs.

[2] There is an application for a compliance order to enforce the orders made in that determination. This determination does not deal with that application.

[3] The Authority's usual approach is that costs follow the event. I am referred to that principle for Mr Barrett. NRS Refrigeration submits that a costs award of \$4,500.00 would be appropriate. I take it that the company accepts that costs should follow the event. Mr Barrett succeeded with his claim and his defence, so is entitled to an order for costs.

[4] The Authority often assesses costs on a daily tariff basis, with an award of \$4,500.00 for the first day of an investigation meeting. Usually, costs also extend to an award to cover the lodgement fee and any meeting fees. There are good public policy reasons to apply a daily tariff approach as a matter of practice, not least of which is that it adds to certainty. The current investigation meeting took most of a full day and some steps needed to be taken after the meeting. Applying a daily tariff approach, there would be an order of \$4,500.00 and an additional \$71.56.

[5] For Mr Barrett, the submission is that there should be an uplift from \$4,500.00 to \$7,000.00. I consider the grounds advanced in turn.

[6] NRS Refrigeration "refused to attend mediation". Mediation is a voluntary process, subject to the Authority's power to direct parties to mediation. There were directions to mediation in this matter after it was lodged. The approach taken by NRS Refrigeration to mediation before and during these proceedings does not add anything of relevance to the current assessment of costs. The parties did not resolve their problems, so an investigation and determination by the Authority was required. There is no reason to look further than that.

[7] NRS Refrigeration in effect lodged amended statements in reply. I accept that the material was not concise or conveniently organised. The replies and NRS Refrigeration's own claim caused the meeting to take longer than would have been required to investigate Mr Barrett's personal grievance claim in light of company's first reply. If the investigation

had been limited to the initial problem and reply, it might have taken a half a day. Mr Barrett might have been entitled to half the daily tariff for the first day. The fact that the investigation took longer does not justify an uplift in costs beyond the full first day.

[8] Material was provided by NRS Refrigeration after the investigation meeting, much of it additional to the information I had required to be provided. Mr Barrett's representative questioned whether the material would be referred to me. At my request, he was told that nothing further was required from Mr Barrett, but if there was any relevant new information in the material which Mr Barrett might need an opportunity to respond to, an opportunity to respond would be given. I reviewed the material as part of working on the determination, but did not need any further response from Mr Barrett. The exchanges after the investigation meeting do not justify an uplift beyond the full first day.

[9] NRS Refrigeration lodged its claim on 3 November 2020. It had been directed on 30 July to promptly lodge its counter-claim, foreshadowed in its reply to Mr Barrett's claim. I have not been provided with detail of wasted time and costs caused by the delay. There are no grounds to find that by not lodging its claim promptly, NRS Refrigeration added in a material way to Mr Barrett's costs of pursuing his claim and presenting his defence, so as to justify an uplift beyond the full first day.

[10] There were a number of claims by NRS Refrigeration, but I do not agree that they were "hard to make out". The basis on which NRS Refrigeration argued its claim was sufficiently clear. The claims were encapsulated by five issues in the determination. None of the claims were upheld. Despite that, they were matters that NRS Refrigeration was entitled to raise for consideration and determination. Its failure to make out these issues is properly accounted for by costs following the event and the application of a daily tariff. There is no basis to justify an uplift beyond the full first day.

[11] NRS Refrigeration had legal advice initially, but was not represented by counsel during the proceedings in the Authority. An award of costs is not a punishment, so I need not consider whether being self-represented gave NRS Refrigeration an "excuse" for the points considered above. I make the assumption that NRS Refrigeration's defence and claim would have been more efficiently presented by counsel. Elements might not have been raised. An investigation meeting would have taken less time. Without those efficiencies, it took nearly a

full day. That is fully recognised by applying a daily tariff approach and does not justify an uplift beyond the full first day.

[12] I will apply the daily tariff approach to assessing costs, but will add the lodgement fee. There were no meeting fees.

[13] NRS Refrigeration says that its financial circumstances are such that it cannot meet a substantial award. There is a letter attached from an accountancy firm that expresses that view and says that a payment plan is warranted. The Authority has specific power when awarding remedies for a personal grievance, ordering arrears of wages, ordering the recovery of a penalty and when ordering compliance, to order payment by instalments if the financial position of the liable party requires it. The present matter is not the exercise of those statutory powers. I do not have detailed information about the company's financial position, or submissions about the Authority's power to order costs by instalment. The method by which NRS Refrigeration satisfies the present order for costs is better left to the parties to try and agree, at this stage.

Philip Cheyne
Member of the Employment Relations Authority