

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 775  
3175625

BETWEEN	SCOTT FOTHERGILL Applicant
AND	EV CHARGER SOLUTION LIMITED Respondent

Member of Authority:	Eleanor Robinson
Costs Submissions:	1 November and 19 December 2023 from the Applicant None from the Respondent
Determination:	21 December 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In a determination dated 19 October 2023 ([2023] NZERA 614) it was determined that the Applicant, Mr Scott Fothergill, was an employee and had been unjustifiably dismissed by the Respondent, EV Charger Solution Limited (EVC).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately, they have been unable to do so, and the Applicant is seeking a contribution to costs.

[3] The investigation meeting involved a half day investigation meeting.

[4] Mr Mathews on behalf of Mr Fothergill cites a contingency fee charge of \$5663.37 plus GST.

[5] Mr Fothergill is seeking a contribution to costs and submits for consideration a copy of a letter sent to EV Charger Solution on 28 July 2022 in which an offer to settle matters was made. The letter was headed: ‘Without Prejudice Save as to Costs’, a ‘Calderbank offer’, that is a “without prejudice save as to costs” offer<sup>1</sup>

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

[6] That offer of settlement offered less than Mr Fothergill was awarded by the Authority and was made well in advance of the investigation meeting.

### **Costs Award**

[7] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup> that costs are modest. Principles also include that costs are reasonable and that they normally follow the event.

[8] I see no reason for not applying these principles in this case. Mr Fothergill was the successful party in the matter.

[9] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing.

[10] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point.

[11] I consider it appropriate to give weight to the Calderbank Offer as a reason supporting an uplift in the tariff award.

[12] I determine that that starting point of \$2,250.00 should be uplifted to take into account the Calderbank Offer.

[13] Accordingly, EVC is ordered to pay Mr Fothergill the sum of \$3,000.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson  
Member of the Employment Relations Authority

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<sup>2</sup> [2005] 1 ERNZ 808