



New Zealand Employment Relations Authority Decisions

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JJ Niven Engineering Limited v Holdaway (Wellington) [2018] NZERA 2060; [2018] NZERA Wellington 60 (12 July 2018)

Last Updated: 20 July 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 61
3020113

BETWEEN CRAIG HINES Applicant

AND TK SECURITY LIMITED Respondent

Member of Authority: Michele Ryan

Representatives: Bede Laracy, Advocate for the Applicant

Jenny Murphy, Advocate for Respondent

Submissions Received: 4 July 2018 on behalf of the Applicant

18 June and 8 July 2018 on behalf of the Respondent

Determination: 13 July 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of a determination dated 6 June 2018 Mr Hines' claims were dismissed.¹

[2] The parties have now provided the Authority with submissions on the matter of costs.

[3] The respondent, TK Security Ltd, seeks a contribution of \$5,000 towards its costs to defend the claims, whereas Mr Hines submits costs should lie where they fall.

Principles

[4] The Authority may order any party to a matter to pay to any other party such costs and expenses, (including expenses of witnesses) as the Authority thinks

reasonable.² In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*³ the Employment

¹ *Hines v TK Security Ltd* [2018] NZERA Wellington 52

² Clause 15(a) of Schedule 2 of the Employment Relations Act.

Court set out a range of principles to guide the Authority in costs applications. These are so well established it is unnecessary to restate them in full, but I have referred to the relevant principles where applicable to this determination.

Determination

[5] Applying the principle that costs follow the event it is appropriate to award TK Security Ltd a contribution to its costs in this matter. At issue is the quantum.

[6] The Authority's starting point in an assessment of costs is to apply the notional daily tariff (currently set at \$4,500 per day⁴) and then consider whether there are any factors which warrant an uplift or reduction to the sum.

[7] The matter before the Authority was not complex. Notably both parties submitted the meeting lasted three quarters of a day however the Authority's contemporaneous notes record the investigation meeting concluded at 1.40pm. The investigation meeting occupied slightly over half a day. A pro-rated application of the daily tariff equates to an approximate sum of 3,000.

[8] TK Security Ltd refers to a "without prejudice" offer, made to Mr Hines to resolve costs after the substantive determination was issued. It seeks an uplift equal to the sum (or thereabouts) of costs incurred to draft costs submissions after the date on which the offer was made.

[9] I am not persuaded it is just to award costs on costs in the circumstances of this matter. The notional daily tariff generally encompasses all costs associated with the investigation of an employment relationship problem, including those incurred in preparing costs submissions. The Authority does not tend to make a separate award for costs corresponding to an application for costs unless there is good reason on a principled basis to do so.

[10] The "without prejudice" correspondence cannot be objectively regarded as a

'Calderbank' offer. There is nothing contained in that material which put the applicant on notice that the offer would be placed before the Authority if rejected. It was inappropriate of the respondent's representative to furnish the communication to

the Authority in these circumstances.

³ [\[2005\] NZEmpC 144](#); [\[2005\] ERNZ 808](#)

4. Where an investigation meeting lasts more than 1 day the daily rate is set at \$3,500 for subsequent days

[11] Even if the offer had been expressed in valid 'Calderbank' terms, it sought costs beyond what could be reasonably expected to be ordered by the Authority given the nature of the case and the length of the investigation. Acceptance of the offer would not have put Mr Hines in a better position whereby I would have been obliged to consider the matter. The "without prejudice" communication has no bearing on my assessment.

[12] Nor do I accept costs should lie where they fall. Mr Hines was represented by an experienced advocate. He can be taken to have accepted the risk of an award of costs against him if his claim was unsuccessful.

[13] Mr Hines says any order against him should allow for instalment payments at the rate of \$20 per week. I am unwilling to rely on that assertion. No evidence was produced regarding Mr Hine's financial position, or that his means are limited to such an extent the proposed instalment plan is the only method by which he could meet the liability.

[14] I have found no reason to increase or decrease the notional daily tariff pro-rated to the duration of the Authority's meeting.

Order

[15] I order Craig Hines to pay to TK Security Ltd a contribution in the sum of

\$3,000 within 28 days of this determination.

Michele Ryan

Member of the Employment Relations Authority