

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 354  
3024374

BETWEEN GRANT McKEAN  
Applicant  
AND HAVEN FALLS FUNERAL  
HOME LIMITED  
Respondent

Member of Authority: Nicola Craig  
Representatives: No appearance for the Applicant  
James Duckworth, Counsel for the Respondent  
Investigation Meeting: On the papers  
Submissions Received: 2 October 2018 from Respondent  
Date of Determination: 15 November 2018

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**COSTS DETERMINATION OF THE  
AUTHORITY**

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**A. Grant McKean is ordered to pay Haven Falls Funeral Home Limited the sum of \$1,600.00 as a contribution to its costs, within 28 days of the date of this determination.**

**Earlier determination**

[1] In an earlier determination of the Authority, I dismissed Grant McKean's claims against Haven Falls Funeral Home Limited (Haven Falls or the company) on the basis of his failure to attend the second investigation meeting, having also failed to follow timetables set by the Authority for the progression of the case.<sup>1</sup>

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<sup>1</sup> *Grant McKean v Haven Falls Funeral Home Ltd* [2018] NZERA Auckland 299

[2] Haven Falls subsequently applied to the Authority seeking costs. Mr McKean was given the opportunity to provide any submissions. He failed to do so, despite the Authority arranging for an officer to speak to him to ensure that he was informed of his entitlement to file submissions in reply to Haven Falls' costs application.

### **Submissions for Haven Falls**

[3] Haven Falls seeks the sum of \$4,857.20 including GST in costs. The company provided invoices from 9 July 2018 (\$1,257.20), 31 July 2018 (\$1,207.50) and 25 September 2018 (\$2,392.50), all inclusive of GST. They included the investigation meeting dates of 26 July 2018 and 20 September 2018.

[4] These costs were all incurred since the sending of a Calderbank offer. Haven Falls seeks payment of all costs incurred from that point but makes no claim for costs incurred prior to the offer letter being sent.

[5] The letter is dated 10 May 2018. The letter was sent by Haven Falls' representative to Mr McKean's then representative, following the failure to resolve matters at mediation.

[6] The letter includes a reference near the top to being without prejudice save as to costs, and in the content of the letter the representative confirms that the letter will be produced in the event that the matter proceeds to the Authority and costs are in issue. The letter includes a proposal to pay what I describe as a relatively modest sum to Mr McKean in full and final settlement of his claim, with the company withdrawing any claims it has against Mr McKean and both bearing their own costs.

[7] There was no time limit put on acceptance of the offer. The offer was made about 20 days before the case management conference which resulted in the first investigation meeting being set for 26 July 2018.

[8] Mr McKean's then representative emailed in response saying that she had spoken to her client and he rejected the offer.

[9] Haven Falls says that in view of the letter, its rejection and the subsequent actions by Mr McKean, is clear that ongoing costs have been incurred unnecessarily as a result of Mr McKean's default in complying with the directions provided. He also failed to show up at the 20 September 2018 meeting.

[10] In the event that the Authority is not minded to order the entire amount of costs sought then any contribution needs to be assessed in light of the time spent at the hearings, the Calderbank letter, and the conduct of Mr McKean.

### **Determination on costs**

[11] The Authority has the power to award costs derived from clause 15 of schedule 2 of the Employment Relations Act 2000. Principles guiding the Authority's approach to costs are set out in *PBO Limited (formally Rush Security Limited v Da Cruz*<sup>2</sup> and include:

- The discretion regarding costs is to be exercised in accordance with principle and not arbitrarily.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing the award.
- Awards will be modest.

[12] I consider that the circumstances are appropriate for an award of costs to be made to Haven Falls. As was set out in the earlier determination, Mr McKean failed to file witness statements as required by an earlier timetable in the lead-up to the investigation meeting on 26 July 2018. At that point Mr McKean said that he wished to instruct a lawyer. A timetable was agreed for the filing of witness statements in the lead-up to an agreed investigation meeting date of 20 September 2018. The investigation meeting time on 26 July 2018 was approximately three quarters of an hour.

[13] Mr McKean again failed to file witness statements as required by the second timetable and then did not attend the investigation meeting on 20 September 2018.

[14] A determination of costs is not designed to punish Mr McKean for his conduct. Haven Falls has been put to the expense of filing memoranda in response to Mr McKean's lack of communication and action, and attending two meetings.

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

[15] Balancing that is the fact that full preparation in terms of preparing and filing witness statements was not required from Haven Falls because Mr McKean failed to supply his own witness statements.

[16] I consider that the Calderbank offer should be taken into account in determining costs. It was provided well before the two investigation meeting dates, clearly indicates that it was without prejudice save as to costs, was for an amount which was more than the final position, given that Mr McKean has not received any award, and there was plenty of time for consideration of the offer.

[17] The combined time used for the investigation meetings was only around a quarter of a normal investigation meeting day, however, Haven Falls and its representative were put to the trouble of having to attend at the Authority's offices twice.

[18] Taking all the circumstances into account, an uplift to the notional daily tariff is appropriate. Mr McKean's conduct unnecessarily increased costs and he did not accept the Calderbank offer. Mr McKean is ordered to pay Haven Falls Funeral Home Limited the sum of \$1,600.00 as a contribution to its costs, within 28 days of the date of this determination.

**Nicola Craig**  
**Member of the Employment Relations Authority**