

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 182  
3018539

BETWEEN            PETER READER  
                                 Applicant

AND                    GRAYS TRANSPORT NZ  
                                 LIMITED  
                                 Respondent

Member of Authority:    Tania Tetitaha

Representatives:        M Revell for Applicant  
                                 C Davis for Respondent

Submissions received:    16 May 2018 from Applicant  
                                 None from Respondent

Determination:            08 June 2018

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**COSTS DETERMINATION**

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**A.     Grays Transport Limited is ordered to pay Peter Reader \$2,250 towards his legal costs.**

**Employment relationship problem**

[1]     The Authority in its substantive determinations dated 2 March and 3 May 2018<sup>1</sup> dismissed a personal grievance of unjustified dismissal and counterclaim, ordered payment of wage arrears and ordered a penalty be paid to the Crown.

[2]     The applicant now applies for costs given his success in respect of two out of three applications. The respondent was self-represented by its director.

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<sup>1</sup>     *Reader v Grays Transport Ltd* [2018] NZERA Auckland 75 & 138.

### **Starting point for costs in the Authority**

[3] The Authority has adopted a notional daily tariff based approach to costs.<sup>2</sup> One day hearing matters lodged in the Authority after 1 August 2016 is subject to the increased daily tariff of \$4,500.<sup>3</sup>

[4] The management of this matter to hearing and completion was expedited by both parties. They were able to accept a one day hearing within 5 weeks of the case management conference and agree the issues for hearing and facts leading to the employment relationship problem. Both also accepted they could undertake the hearing without filing briefs of evidence in advance.

[5] All evidence was taken orally at hearing. Mr Reader gave evidence via audio visual link from Wellington. Mr Davis and one other witness gave evidence by telephone. The majority of cross-examination was undertaken by the Authority Member.

[6] The hearing time required was slightly over half a day including delivery of an oral determination setting out interim findings of fact and dismissing the personal grievance. Additional submissions were directed due to a possible minimum wage issue that had arisen that required a determination. A further determination was issued on the papers. The Authority calculated the wage arrears owed and awarded a penalty.

[7] In my assessment the appropriate starting point for costs in this matter is half of the daily hearing tariff or \$2,250.

### **Reasonableness of fees**

[8] There is merit in commenting upon the fees charged for this matter given the above. The applicant has supplied an invoice for his representative's fees of \$8,419.79. There is no evidence of payment of the invoice in full by Mr Reader.

[9] From the invoice itself it appears the applicant's representatives are charging \$350 per hour. As noted by the Authority previously, this is far in excess of what would be reasonable costs for representatives whom are not practising lawyers.<sup>4</sup> By

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<sup>2</sup> *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16].

<sup>3</sup> Practice Note 2 Costs in the Employment Relations Authority para.4.

<sup>4</sup> *MacDonald v TKR Properties Ltd* [2017] NZERA Auckland 240 at [13].

comparison the legal aid payable for this matter would have amounted to \$2,531 for an employment advocate.<sup>5</sup>

[10] There are matters included in the invoice that would not normally be reimbursed by a costs award. This includes items such as travel to Auckland, attendances at mediation and preparation of a statutory demand notice (post hearing). It also does not separate out the disbursements from the representatives fees charged.

### **Proportionality**

[11] The Authority's daily notional tariff is based upon an expectation that all parties manage the legal costs of their cases proportionate to the expected awards.<sup>6</sup> Proportionality is a factor lawyers must take into account when determining the reasonableness of their fees charged.<sup>7</sup> Other jurisdictions reduce or refuse costs where "the property or interests at stake in the proceeding were of exceptionally low value".<sup>8</sup>

[12] Cases of this nature should be conducted in ways that are proportionate to the likely awards. Where the property or interests at stake are of exceptionally low value, reduced or refusal of costs may be appropriate. Increased costs should not be expected.

[13] The fees charged to Mr Reader amount to 75% of his only remedy of wage arrears. This in the context of the parties being warned about the likelihood of any penalty being awarded to the Crown prior to the determination.

### **"Calderbank offers"**

[14] The applicant refers to two Calderbank offers. It is obvious these are not "Calderbank offers" within the legal meaning of the term. They are not marked "without prejudice except as to costs". One is in fact marked "Calderbank offer" but that does not make it so. Both offers are "on the record" settlement offers only.

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<sup>5</sup> Legal Aid Civil (Employment) Fixed Fees Schedule  
<https://www.justice.govt.nz/assets/Documents/Publications/LA-Employment-Fixed-Fees-Schedules.pdf>.

<sup>6</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, 819 at [47].

<sup>7</sup> Rule 9.1(e) Lawyers and Conveyances Act (Lawyers Conduct and Client Care) Rules 2008.

<sup>8</sup> HCR 14.7(b) High Court Rules 2016.

[15] The first offer dated 2 June 2017 seeks wages of two weeks, unquantified holiday pay of 8% including public holidays, sick leave and annual leave, payment of compensation of \$2,500 under s123 and \$750 plus GST for legal fees. Given the personal grievance was unsuccessful in its entirety, there is no basis for payment under s123. Further the holiday pay is unquantified. There was a reasonable basis for the respondent to reject unquantified settlement offers as they are not clear about the terms of payment.

[16] The second offer is undated but refers to it being open for acceptance until 12 pm 20 December 2017. The offer seeks “compensation” under s123 of the Employment Relations Act 2000 (Act) for matters that do not fall within that section. It seeks the payment of \$3,500 under s123(1)(c)(i) “towards compensation for failing to pay Peter on 29 March 2017 his outstanding entitlements and contribution towards his legal fees which now include the application to the Authority.” Section 123(1)(c)(i) is compensation for a personal grievance, not legal fees. Further failure to pay the applicant “his entitlements” was not a personal grievance that was before the Authority. That became an application for a penalty. This was not contained in the statement of problem the applicant had filed.

[17] In addition the offer sought payment of \$3,882.93 net for holiday leave calculated as 8% of his earnings from 30/5/16 – 19/03/17 and \$1,991.28 net for unpaid wages from 20-29 March 2017. He also would not seek to recover any public holiday entitlements.

[18] As can be seen from the Determination<sup>9</sup> the above calculations of his minimum statutory entitlements were incorrect. Further no s149 settlement offer could have been signed off by a mediator that had the effect of forgoing any minimum statutory entitlements such as the alternative public holidays he was eventually awarded. If the respondent had signed a settlement offer that did so, it would not have any statutory protection against the applicant applying at a later stage to recover his public holiday entitlements. The respondent was therefore acting reasonably in its rejection of this offer as well.

[19] Both Calderbanks do not meet the legal tests for settlement offers that may be taken into account in costs and I set them to one side.

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<sup>9</sup> *Reader v Grays Transport Ltd* [2018] NZERA Auckland 138 at [10]-[13].

[20] There are no matters requiring any further adjustment in the costs awarded.

**Outcome**

[21] Grays Transport Limited is ordered to pay Peter Reader \$2,250 towards his legal costs.

**TG Tetitaha**  
**Member of the Employment Relations Authority**