IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 129
3220319

	BETWEEN	SOUTHERN MECHANICAL SERVICES LIMITED Applicant
	AND	MICHAEL JOHN DEAN Respondent
Member of Authority:	Antoinette Baker	
Representatives:	Katherine McDonald, counsel for the Applicant Rex Chapman, counsel for the Respondent	
Submissions received:	22 December 2023 from Respondent 23 January 2024 from Applicant	
Determination:	5 March 2024	

COSTS DETERMINATION OF THE AUTHORITY

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[1] This is a costs application by Mr Dean against his former employer, the Applicant (SMS) after it withdrew its claim against Mr Dean. The withdrawal occurred after Mr Dean lodged a Statement in Reply and the parties were then directed to mediation[1] which did not resolve matters. Mr Dean seeks 'indemnity costs' of $1,658.00 and $420.00 for bringing this application, a total of $2,078.00.

[1] Employment Relations Act 2000, s159.

[2] SMS says that costs should not be considered at all given the matter was withdrawn and the file was closed, or that if costs are to be considered they should lie where they fall or if not that they should not be indemnity costs.

The Authority's investigation

[3] Upon receiving this application, SMS was given time to respond in writing which it did through its counsel. The matter is now being dealt with on the papers.

Should the application be considered?

[4] An applicant can withdraw their claim in the Authority at any time[2]. The Authority has the power to order costs to any party as the Authority thinks reasonable.[3] Accordingly, I will consider this costs application.

Costs principles

[5] A party should receive a reasonable contribution to costs incurred in achieving a successful result. Costs are discretionary, modest, and are not a mechanism to punish the other party. Some cases may require costs to lie where they fall.[4]

[6] The Authority uses a notional daily tariff [5] as the starting point for assessing costs. The tariff is based on the length of the investigation meeting held in each matter and in part this is arrived at by considering likely preparation necessary for an investigation meeting. This tariff may then be adjusted upwards or downwards according to the circumstances of each case considering things like a liable party's means to pay costs, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs.[6]

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[2] Employment Relations Act 2000, schedule 2, clause 14.
[3] Employment Relations Act 2000, schedule 2, clause 15.
[4] As above and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.
[5] The current tariff applied for a one-day Authority investigation meeting is $4,500.00 for the first day and $3,500.00 for each additional day: https://www.era.govt.nz/determinations/awarding-costs-remedies.
[6] As above at 1.

Should costs be awarded and if so to what extent?

[7] As noted above, costs are modest in this jurisdiction and generally awarded to the successful party. In this matter nothing was progressed to a stage where evidence was provided and tested in an investigation process which would enable any consideration of a 'successful' party.

[8] For Mr Dean, my attention is drawn to another Authority determination[7] where costs were awarded to a party when the other withdrew their substantive claim. Costs of $750.00 were awarded at a stage before evidence was exchanged but after two phone conferences and an amended Statement in Reply. Correspondence between counsel was considered a robust exchange for a 'significant problem' but was of no assistance to the Authority's investigation.

[9] The Authority process here did not continue beyond the initiating documents, there were no phone conference calls or amendments lodged, nothing scheduled to occur. The parties did not return to the Authority after they were directed to mediation. The only step taken by Mr Dean in the Authority proceedings was to instruct his counsel to lodge a Statement in Reply albeit delayed from the 14 days he was required to do so. These circumstances do not support awarding costs based on the Authority's starting point of the tariff approach. To do so would be inconsistent with other Authority orders for costs including the example provided by Mr Dean and referred to above at [8].

[10] Accordingly, I decline to order costs. I accept the submission for SMS that costs should lie where they fall in the substantive matter that was withdrawn and in this application.

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[7] *MacDonald Industries Limited v Simon Beswick* [2023] NZERA 176.

The 'Calderbank' letter

[11] While I decline to order costs, I will deal with the matter of the 'Calderbank'[8] letter for the sake of completion.

[12] The Employment Court[9] has observed that while 'Calderbank' offers are 'front and centre' for the Court when considering costs, the Authority's discretion is broader and sits within the context of a jurisdiction 'intended to be low level, costs effective, readily accessible and non-technical'. The Authority's power to award costs also does not have an express requirement to consider Calderbank letters as with the Employment Court's comparative provision.[10]

[13] Before Mr Dean lodged a Statement in Reply and a day after he was served with the Authority claim, Mr Dean instructed his counsel to send a letter to counsel for SMS on a 'without prejudice except as to costs' basis. Mr Dean said in that letter that in exchange for SMS withdrawing the claims in the Authority he would not pursue costs and would not counterclaim against SMS for allegedly breaching good faith in relation to a dispute during his notice period. As I understand it this offer was not accepted.

[14] It is submitted for SMS that the Calderbank letter did not provide any amount to consider and just referred to 'full indemnity' costs. I further observe that this letter was sent within a day of Mr Dean receiving SMS's claim in the Authority. To award an uplift to the tariff based on this type of offer made even before the offeree has met the requirement to file a Statement in Reply would seem inconsistent with the Authority's processes being accessible.

[15] As well as the above reservation I accept the submission for SMS that there are none of the usual hallmarks here that would be considered in relation to an uplift from the tariff such as unnecessary delay (Mr Dean himself delayed lodging a Statement in Reply) or

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[8] A Calderbank offer is an offer made by one party to settle the claim on terms. The offer is marked "without prejudice save as to costs". The purpose is to not only to attempt to settle a claim but is reserving the right to bring the offer to the Court's (or in this case the Authority's) attention if the claim is not settled.
[9] *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].
[10] Employment Court Regulations 2000, regulation 68.

bringing a claim without merit. While I am not able to assess how the proceedings would have eventually played to an outcome, on the face of it this did not appear to be a claim in the category of being without merit. The initiating documents shows the parties were in dispute as to the facts in several key areas.

[16] Accordingly, while I have not found this an appropriate matter to award costs to Mr Dean based on the tariff, had I found otherwise I am unlikely to have considered it appropriate to uplift from the tariff.

[17] The claim is dismissed. Costs are to lie where they fall in the substantive matter that was withdrawn by SMS and in this application.

Antoinette Baker
Member of the Employment Relations Authority