

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2024] NZERA 158
3210020

BETWEEN ALAN JAMES STRINGER
 Applicant

AND DAVID DRYDEN MCBRIDE
 Respondent

Member of Authority: Antoinette Baker

Representatives: Thomas Nation, Emily Rennell for the Applicant
 Respondent in person

Submissions: 20 February 2024 from the Applicant

Determination: 19 March 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] I issued a determination on 2 February 2024 (my determination)¹ and ordered the respondent, Mr McBride to pay his former employee, the applicant, Mr Stringer \$250.00 gross as arrears for a final day of pay; \$9,470.00 gross as unpaid holiday pay at the end of employment; and \$4,000.00 compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act) based on a finding of disadvantage in employment.

[2] The parties were asked to resolve costs between themselves. Costs have not been resolved. Mr Stringer has now asked for an award of costs by way of submissions. I have nothing from Mr McBride about what he says about this application. He has not responded in reply within the timetable directed in my determination. I will now consider Mr Stringer's application.

¹ *Stringer v McBride* [2024] NZERA 59.

Costs in the Authority

[3] 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.²

[4] The Authority uses a notional daily tariff adjusting this up or down as appropriate depending on the case. Such an adjustment may take into consideration 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. The current tariff applied for a one-day Authority investigation meeting is \$4,500.00 with subsequent days at \$3,500.00. This amount is considered a starting point for assessing a reasonable contribution to the legal costs incurred by a party preparing for and taking part in an investigation meeting but not including preparation and attendance at mediation.³

[5] I find the starting point for a contribution to Mr Stringer's costs is \$4,500.00. The investigation meeting continued into the second half of the day.

[6] Mr Stringer seeks an uplift to the tariff based on having made two 'without prejudice save as to costs' offers⁴ to settle which he submits had they been accepted by Mr McBride would have avoided the necessity for Mr Stringer to then incur the legal costs he did in relation to preparation for and attendance at the Authority investigation meeting. Those costs total \$10,745.85.

[7] I note that Mr Stringer has also provided an invoice for \$1,435.65 relating to the cost of an advocate to mainly assist him with mediation. However, as noted above the Authority does not generally include this stage in its approach to costs applications.

² Employment Relations Act 2000, Schedule 2, clause 15 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.

³ <https://www.era.govt.nz/determinations/awarding-costs-remedies/>.

⁴ Also called 'Calderbank' offers being an offer made by one party, normally a respondent, to settle the claim on terms. The offer is marked 'without prejudice save as to costs'. The purpose of a Calderbank offer is to not only attempt to settle a claim but by using the stated words the offering party 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.

Should there be an uplift to costs?

[8] The Employment Court⁵ 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’. However, the Authority may consider Calderbank offers.

[9] Mr Stringer made a first offer to settle before he instructed his legal representative to lodge a Statement of Problem in the Authority. That offer was to settle matters for \$4,750.00 gross for holiday pay and a contribution to his costs at \$2,048.39 plus GST.

[10] I find that this was a reasonable offer for Mr Stringer to make. At that stage Mr Stringer wanted his holiday pay after working for Mr Stringer for nearly 13 years. My determination awarded almost double for this statutory entitlement. Unlike compensatory payments which may be harder to predict, statutory entitlements can be calculated and paid if an employer obtains advice and reliable guidance. Mr Stringer points me to my determination where I found Mr McBride did not appear to do this or if he did he did not follow that advice and continued to argue in particular that 20 days of annual leave should be deducted.

[11] Mr Stringer then lodged a Statement of Problem in the Authority. This followed with attendance at a phone conference call and the preparation and lodging of evidence. Mr Stringer then made a second Calderbank offer just days prior to the investigation meeting. The second Calderbank offered to settle matters for a payment of \$4,250.00 gross for holiday pay, compensation of \$5,000.00, and a contribution towards costs of \$5,500.00 plus GST.

[12] I note that the second Calderbank offer to settle the holiday pay was less than half the holiday pay I eventually ordered but more than the compensation ordered for the associated disadvantage claim. Costs in the second Calderbank exceeded the tariff level of costs in the Authority for what had been expected to be no more than a one-day meeting.

⁵ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

[13] It is submitted for Mr Stringer that he should have an uplift to the tariff resulting in an order of \$10,354.28. This would be inconsistent with the Authority's overall approach to costs as something that is modest and not punitive. Mr McBride has already been ordered to pay compensation relating to his continued erroneous stance about holiday pay.

[14] I find an uplift of \$1,500.00 is appropriate based primarily on the first Calderbank letter which if accepted would have avoided the unnecessary continued escalation of costs.

[15] In summary, David Dryden McBride is to pay Alan James Stringer \$6,000.00 as a contribution to his costs in this matter.

Antoinette Baker
Member of the Employment Relations Authority