IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 23
3165841

	BETWEEN	SARAH TINDALL Applicant
	AND	WINTERSET PROPRIETARY LIMITED Respondent

Member of Authority:	Antoinette Baker
Representatives:	Ruth Pettengell, for the Applicant Fiona McMillan, counsel for the Respondent
Submissions received:	1 November 2023 from Applicant 15 November 2023 from Respondent
Determination:	18 January 2024

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 18 October 2023,[1] I found that the respondent (Winterset) had breached a number of employment standards in relation to Ms Tindall's employment including the lack of a written employment agreement, accurate employment records, deductions without the required consent from wages and unpaid holiday pay and potentially minimum wage payments. I ordered remedial steps be taken to pay back the likely deductions taken from wages and a methodology to reconcile and pay to Ms Tindall her holiday and minimum wage entitlements.

[1] *Tindall v Winterset Proprietary Limited* [2023] NZERA 608.

[2] I dismissed Ms Tindall's claims that she had been constructively dismissed, unjustly disadvantaged in her employment and worked longer hours than she had been paid while living adjacent to or on the site of her workplace. Ms Tindall's application for penalties against Winterset for multiple breaches of employment standards were lodged in the Authority outside of the 12-month statutory timeframe to do so[2] and were withdrawn on her behalf at the investigation meeting.

[3] Ms Tindall submits that given her mixed success she is prepared to absorb her costs and seeks to have costs lie where they fall. Winterset in response submits that the mixed success was such that it should be paid a contribution to its costs being the full tariff set by the Authority for the three-day investigation meeting held which is $11,500.00. In making this submission it has attached invoices for the legal costs it has been charged. The costs are not clearly identified as to what they have entailed except to show 'stages' of the process. By the time the parties had attended an unsuccessful mediation and preliminary conference calls in the Authority process Winterset had incurred a total of $16,583.00 plus GST in legal costs. At that point Winterset offered to settle all matters with Ms Tindall in a Calderbank letter for a total of $50,000.00. Ms Tindall rejected this offer. Winterset says this rejected offer should be taken into account in awarding it $11,500.00 as the more successful party because $50,000.00 would have been in excess of what Ms Tindall achieved as a result of my determination. This submission was qualified by an acknowledgement that the amount paid to Ms Tindall had yet to be quantified but was unlikely to exceed the settlement offer due to the amount of hours Ms Tindall likely worked in her employment. I accept this presumption as likely.

[4] Winterset also says that Ms Tindall was largely unsuccessful with the claims that she brought and that they required considerable time to understand and defend because of the way they were put forward. I note the voluminous amount of material it presented to counter the claims of the long hours worked, a claim eventually found not to be supported by Ms Tindall's own inconsistent and insufficient evidence.

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[2] Employment Relations Act 2000, s135(5).

[5] The Authority has the discretionary power to award costs.[3] The approach adopted by the Authority[4] includes that a party should receive a reasonable contribution to costs incurred in achieving a successful result. Costs in the Authority are discretionary, modest, and are not a mechanism to punish the other party. Some cases may require costs to lie where they fall.

[6] The Authority uses a tariff approach of $4,500.00 for a day investigation meeting and $3,500 for each subsequent day. From this the approach adjustments may be made up or down if this is appropriate to do. Part of that exercise takes into account letters making offers to settle[5] that if accepted would have provided the offeree a better outcome than the one they ultimately received.

[7] The Employment Court has commented on the 'chilling effect' that a strict approach to these offers would have on this jurisdiction.[6] It preferred the practice in the Authority of adjusting the daily tariff by taking such offers into consideration.[7] I note further that unlike the Employment Court which must consider such offers when considering costs[8], the Authority is not required to do so. [9]

[8] Applying these principles Ms Tindall is entitled to be awarded costs based on her amount of success. The starting point is the Authority's daily tariff which totals $11,500.00 for a three-day investigation meeting. Winterset by wanting to be awarded this amount, effectively discounts Ms Tindall $23,000.00 from the usual tariff starting point. While Winterset refers to having to spend time trying to defend the extensive claim relating to hours worked more than what it paid Ms Tindall, much of that problem would not have existed had Winterset as an employer kept accurate employment documentation and records. In part Ms Tindall's lack of

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[3] Employment Relations Act 2000, Schedule 2, clause 15.
[4] https://www.era.govt.nz/determinations/awarding-costs-remedies/
[5] Referred to as 'Calderbank' offers. This is an offer made by one party, normally a respondent, to settle a claim on terms. The offer is marked 'without prejudice save as to costs.' The purpose of this type of offer is not only to attempt to settle a claim but by using the stated without prejudice words it reserves the right to bring the offer to the Court's (or in this case the Authority's) attention if at a later date costs are to be assessed.
[6] *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].
[7] Above at [98].
[8] Employment Court Regulations 2000, Regulation 68.
[9] Employment Relations Act 2000, Schedule 2, clause 15.

success in her wage arrears claim was due to this situation albeit her inconsistent and insufficient evidence equally did not serve her well.

[9] Winterset submits that in matters of mixed success, it is appropriate to stand back and look at things 'in the round.' [10] However, the Employment Court in that case also confirmed that any success is success and approved the tariff as the starting point for the Authority with the ability to consider an upward or downward adjustment from this.

[10] Accordingly, standing back from the above I find this is an appropriate case to accept Ms Tindall's submission that costs should lie where they fall.

Antoinette Baker
Member of the Employment Relations Authority

[10] *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.