

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 321
5536429

BETWEEN

DON MILHAM
Applicant

AND

THE CHIEF EXECUTIVE OF
THE WAIKATO INSTITUTE
OF TECHNOLOGY
Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Scott for Applicant
Sam Hood for Respondent

Submissions received: 26 August and 15 September 2016 from Applicant
9 September 2016 from Respondent

Determination: 21 September 2016

**QUANTUM ON LOST WAGES AND COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The Chief Executive of the Waikato Institute of Technology is ordered to pay to Dr Milham \$88,219.20 gross as lost wages under section 123(1)(b) of the Employment Relations Act 2000 plus interest at 5% per annum within 14 days of the date of this determination.**
- B. The Chief Executive of the Waikato Institute of Technology is ordered to pay to Dr Milham the sum of \$3,000 as a contribution to his costs within 14 days of the date of this determination.**

[1] In a determination dated 29 July 2016¹ I held one or more conditions of Dr Milham's employment had been affected to his disadvantage by an unjustifiable

¹ [2015] NZERA Auckland 259.

action and that he had been unjustifiably dismissed from his employment with the Chief Executive of the Waikato Institute of Technology (Wintec).

[2] I ordered Wintec to pay remedies to Dr Milham including remedies for lost wages. I ordered Wintec to calculate the quantum of the lost wages but reserved leave for the parties to return to the Authority if there was a dispute about the quantum. I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence.

[3] The parties have been unable to agree on the quantum of the lost wages or costs and have asked the Authority to determine these matters for them.

Lost wages

[4] In my determination dated 29 July 2016 I ordered Wintec to pay to Dr Milham lost wages for the period 9 May 2015 to 29 July 2016. There is no dispute that the lost wages for this period amounts to \$112,920.58 gross.

[5] In its statement in reply lodged in the Authority on 25 January 2016 Wintec states that Dr Milham received a payment of \$34,964.50 net being redundancy compensation paid to Dr Milham in accordance with the employment agreement between the parties. I have received evidence that shows Dr Milham was paid \$24,701.38 gross by way of redundancy compensation.

[6] The issue for determination is whether the payment of redundancy compensation should reduce the calculation for the wages lost by Dr Milham as a result of his unjustified dismissal.

[7] I have carefully considered the submissions of each party and have concluded that the redundancy compensation paid to Dr Milham was a benefit obtained as a result of a mistaken belief by Wintec that it had correctly terminated Dr Milham's employment by reason of redundancy. Dr Milham only received the redundancy payment because of the mistaken belief by Wintec.

[8] Wintec is entitled to credit for making a payment which it was not in law required to make. The financial payment to Dr Milham at the end of his employment reduced the financial impact of his dismissal on him and it should be taken into account in calculating the lost wages.

[9] The Chief Executive of the Waikato Institute of Technology is ordered to pay to Dr Milham \$88,219.20 gross as lost wages under section 123(1)(b) of the Employment Relations Act 2000 within 14 days of the date of this determination.

KiwiSaver contributions

[10] In submissions relating to the lost wages and costs issues Dr Milham, for the first time, raises a claim for the reimbursement of kiwisaver contributions. Submissions are not the time to be raising new claims and as I have heard no evidence in support of this claim I will be taking it no further.

Interest

[11] Dr Milham seeks interest on the lost wages award. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908, which is currently 5% per annum.²

[12] I consider it reasonable and fair that Dr Milham is paid interest on the lost wages ordered in paragraph [9] above from the date of termination of his employment with Wintec at 5% per annum until the date of this determination.

Costs

[13] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event.

[14] The Employment Court has held that the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.³ As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁴ awards in the Authority will be modest taking into account conduct which increases costs unnecessarily.

[15] In *Stevens v Hapag Lloyd*⁵ the Employment Court reiterated that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical.⁶

² Judicature (Prescribed Rate of Interest) Order 2011.

³ *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

⁴ (2006) 7 NZELC 98,128; [\[2005\] ERNZ 808](#); (2005) 3 NZELR 1 (EMC).

⁵ [2015] NZEmpC 28.

⁶ *Ibid* at [94].

[16] The Authority applies a starting point of a notional daily tariff for quantifying costs and may uplift where there is conduct which increases costs unnecessarily.

[17] The Authority will take into account, when dealing with the issue of costs, any offers made by the parties to settle matters. As stated by the Court of Appeal⁷:

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.⁸

[18] The Employment Court in *Mattingly v Strata Title Management Limited*⁹ held:

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a “steely approach” ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court’s observation in *Da Cruz* that Authority awards will be “modest”. What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.¹⁰

[19] The parties exchanged a number of calderbank offers and counter-offers to settle from 24 July 2015. The final offer was made by Dr Milham on 4 March 2016. Dr Milham offered to settle both of his personal grievances with the payment of:

- a) compensation of \$10,000;
- b) legal fees of \$17,000 including GST;
- c) lost wages of \$30,557.00 net; and
- d) a reference.

[20] This offer was rejected by Wintec. In submissions Wintec says the offer was rejected because Wintec is subject to strict oversight in respect of settlements paid to former employees and this constrains its ability to enter into settlements of significance.

⁷ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

⁸ Ibid at [18].

⁹ [\[2014\] NZEmpC 15](#); [\[2014\] ERNZ 1](#).

¹⁰ Ibid at [27].

[21] Taking into account Dr Milham's success the offer of 4 March 2016 was reasonable. I find the rejection of the calderbank offer by Wintec was unreasonable. Dr Milham achieved higher orders from the Authority than was offered to him and this warrants consideration of an up-lift in costs.

[22] The investigation meeting took two days. Applying the daily tariff would see the award of a contribution in the order of \$7,000. Dr Milham seeks uplift to full indemnity costs to reflect the unreasonable rejection of the calderbank offer by Wintec.

[23] Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.¹¹ I am not satisfied the conduct of this case falls into that category.

[24] Taking into account the unreasonable rejection of the calderbank offer, I consider it appropriate that there be an uplift in costs from \$3,500 per day to \$5,000 per day and order Wintec to contribute to Mr Milham's costs by paying \$10,000.

[25] Dr Milham seeks GST on the costs order. Costs between parties should be awarded on a GST neutral basis. This is because an unsuccessful party making a contribution to costs is not paying for a service provided to it by the successful party.¹²

[26] Wintec has already paid the sum of \$7,000 as a contribution to Dr Milham's costs. Taking that amount into account, the Chief Executive of the Waikato Institute of Technology is ordered to pay to Dr Milham a further sum of \$3,000 as a contribution to his costs within 14 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority

¹¹ *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

¹² *Lean Meats Oamaru Limited v New Zealand Meat Workers and Related Trades Union Incorporated* [2015] NZEmpC 227 at [8].