

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 387
3027191

BETWEEN

DENNIS HICKS
Applicant

AND

GREAT LAKE ALUMINIUM
& GLASS LIMITED
TRADING AS VISTALITE
TAUPO
Respondent

Member of Authority: Nicola Craig

Representatives: Alex Kersjes for the Applicant
Steve Punter for the Respondent

Investigation Meeting: On the papers

Submissions Received: 29 October 2018 from the Applicant
12 November 2018 from the Respondent

Date of determination: 5 December 2018

COSTS DETERMINATION OF THE AUTHORITY

- A. Great Lakes Aluminium & Glass Ltd trading as Vistalite Taupo is ordered to pay Dennis Hicks the sum of \$3,500.00 as a contribution to his costs and \$71.56 for the filing fee, within 28 days of the date of this determination.**

Substantive determination

[1] In an earlier determination of the Authority I found that:

- (a) Dennis Hicks was an employee of Great Lakes Aluminium & Glass Ltd trading as Vistalite Taupo (Vistalite or the company);
- (b) Mr Hicks was unjustifiably dismissed by Vistalite;
- (c) Vistalite was to pay Mr Hicks \$4,000 as compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000 (the Act); and
- (d) Vistalite was to pay Mr Hicks \$1,039.50 gross as wages and \$83.16 gross as holiday pay.¹

[2] The parties were invited to resolve the issue of costs between themselves. They have been unable to do so and submissions on costs were received from both parties.

Submissions for Mr Hicks

[3] Mr Hicks seeks an award of costs above the notional daily tariff of \$4,500. An uplift to \$7,000 is sought on several grounds outlined below.

[4] An invoice from Mr Kersjes was filed for \$9,290.52, including GST and disbursements. The invoice set out blocks of time, such as 2.60 or 4.20 hours, but does not specify when those hours were incurred. There was a short description of the work undertaken in each block. The invoice is said not to include costs relating to mediation and for prior to that.

[5] The first basis put forward for an uplift is a Calderbank offer made on Mr Hicks's behalf. An email of 18 July 2018 from Mr Hick's representative to Vistalite's representative, headed "Without Prejudice Save as to Costs", includes an offer for a payment of \$4,000 under s 123(1)(c)(i) of the Act and a contribution of \$2,500 plus GST to costs.

[6] The email was sent at 3.12pm on Wednesday 18 July and was expressed to expire on Friday 20 July, presumably at the close of business. The investigation meeting was set for Monday 23 July 2018. No evidence was filed regarding any response to the offer.

¹ *Dennis Hicks v Great Lake Aluminium & Glass Ltd trading as Vistalite Taupo* [2018] NZERA Auckland 327

[7] The second basis put forward for an uplift is issues which arose regarding the evidence of Ms M. These were referred to in the earlier determination.² Mr Kersjes submitted that the issues around calling and dealing with the evidence of Ms M unnecessarily increased costs.

[8] Another issue said to have caused unnecessary wasted time and thus costs was the filing of without prejudice communications.

[9] The costs of preparing the costs application are sought due to Mr Hick's offer made, following the substantive determination, to resolve costs. An email of 23 October 2018 seeks \$6,500 plus GST, described as a small uplift over the daily tariff.

Submissions for Vistalite

[10] Vistalite does not accept that this was a simple or clear cut case which it had no prospect of success on.

[11] The company asserts that Ms M was a key witness and it was reasonable for it to pursue getting her evidence heard.

[12] Vistalite says that the Calderbank offer was not substantially greater than the awards which Mr Hicks received. Also, that costs could have been avoided if Mr Hicks had raised this issue internally with Vistalite whilst he was still there, in keeping with the spirit of the Act.

[13] Vistalite says that one of the reasons for the notional daily tariff system is to stop representatives from attempting to seek inflated costs awards. It is suggested that the charge out rate in the invoice of \$250.00 per hour plus GST is more commensurate with a lawyer than an advocate. The company submits that the hours claimed seem out of proportion to the matter.

[14] The company seeks to have costs lie where they fall.

Costs award

[15] The assumption for Mr Hicks seems to be that a whole day's notional daily tariff is the starting point. However, even with a lunch break, the hearing finished

² Above n 1 at [6]

before 3pm. On that basis the starting point should be two thirds the tariff, namely \$3,000.

[16] I accept that the Calderbank offer of 18 July 2018 should be taken into account to justify some uplift. The offer provided a couple of days of reflection time and was transparent, in that it was explicitly made on a without prejudice save as to costs and Calderbank basis.³

[17] There are I do not consider that the uplift should be large. The offer was made very shortly before the investigation meeting and so a substantial portion of costs would have already been incurred at that point. Although not entirely clear, it appears that two thirds of the time costs in the invoice were incurred prior to that point. Also, the amount which Vistalite would have had to pay under that offer, namely \$6,500 plus GST on part of that, was more than the award totalling \$5122.66, albeit with no costs component. I consider that an uplift of \$500 is appropriate.

[18] The timing and difficulties with serving Ms M do not justify an uplift to the award to Mr Hicks. Some time was taken by Vistalite's representative to pursue Ms M's attendance. I accept that Ms M was a significant witness in terms of Vistalite's case and do not consider that the company should be punished for its ultimately unsuccessful pursuit of her evidence.

[19] The issue of the filing of portions of without prejudice communications was a modest one and is not unusual in the Authority context. Some time for preliminary matters such as that is built into the preparation time allowed in the notional daily tariff. I do not consider that an uplift is justified on that basis.

[20] Costs are sought regarding the preparation of the costs application, in light of Mr Hick's offer to agree to costs of \$6,500. As stated recently in *Hines v Eastland Port Ltd*⁴ applications for costs on costs are relatively rare, but may be awarded. For example, in situations where there are complex and time consuming costs issues, an application may be considered.

[21] A number of issues were raised by the parties in their costs submissions, but I do not consider those issues to be particularly complex. Neither party filed more than three pages of costs submissions. The offer to accept \$6,500 in costs is disregarded as

³ *Ogilvie & Mather (NZ) Ltd v Darroch* [1993] 1 ERNZ 808

⁴ *Hines v Eastland Port Ltd* [2018] NZEmpC 111 at [38]

being substantially more than the Authority considers appropriate in this case. I refrain from making an uplift on the basis of the costs submissions.

[22] In conclusion I order Great Lake Aluminium & Glass Ltd trading as Vistalite Taupo to pay Dennis Hicks the sum of \$3,500.00 as a contribution to his costs within 28 days of the date of this determination.

[23] Disbursements in a global amount of \$328.71 were claimed and described as “including ERA filing fee, printing, binding, stationary, general, travel”. No breakdown of the \$328.71 was provided. The travel component was said to be Taupo travel only. On what basis that was claimed was not specified.

[24] Vistalite should have to pay the filing fee and I order it to pay \$71.56 within 28 days of the date of this determination. However, I am not satisfied regarding the other aspects of the disbursements for which no breakdown is provided. No award is made for those.

Nicola Craig

Member of the Employment Relations Authority