

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 516
3054812

BETWEEN	AMBROSE SMITH Applicant
AND	THE ELECTRICAL TRAINING COMPANY LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Simon Greening for Applicant Natalie Tabb for Respondent
Investigation meeting:	On the papers before the Authority
Submissions received:	12 August 2019 from Applicant 26 August 2019 from Respondent
Determination:	2 September 2019

COSTS DETERMINATION OF THE AUTHORITY

- A. The Electrical Training Company Limited is ordered to pay to Mr Smith the sum of \$2,250 as a contribution toward costs within 28 days of the date of this determination.**

[1] In a determination dated 17 July 2019 I held that Mr Smith had been unjustifiably dismissed but declined to order any remedies as a result of his contributory conduct.¹

¹ *Smith v The Electrical Training Company Limited* [2019] NZERA 420.

[2] I reserved costs and invited the parties to resolve the issue between them. The parties have been unable to resolve the matter and Mr Smith has lodged a costs memorandum seeking a determination of the issue.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks' reasonable.² The principles applying to costs are well settled and do not require repeating.³

[4] An assessment of costs in the Authority will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.⁴ The investigation meeting took half a day so the starting point is \$2,250.

[5] The Authority will take into account any offers made by the parties to settle matters:⁵

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.

[6] Mr Smith lodged his statement of problem with the Authority on 21 February 2019. At that time he was seeking reinstatement. By the time the investigation meeting took place Mr Smith was no longer seeking reinstatement and that claim was withdrawn.

[7] On 27 March The Electrical Training Company Limited (ETCO) made a Calderbank offer to resolve Mr Smith's employment relationship problems. The offer recognised the importance of his apprenticeship to him and offered to provide training to the value of \$5,014 without charge so that he could complete his apprenticeship training. The training included:

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

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

⁴ Practice Note 2, Costs in the Employment Relations Authority.

⁵ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

- One week theory prep course in June (40 hours)
- One week regulation prep course (semester two)
- Aspeq theory exam
- Aspeq regulation exam
- Aspeq regulation exam
- Semester one night classes (approximately 15 classes)
- Semester two night classes (approximately 19 classes)
- One on one tutoring (5 x 1 hour sessions)

[8] In its offer ETCO advised Mr Smith that the electrical apprenticeship courses he was completing were being phased out and a new course implemented. ETCO advised that if he wished to complete his apprenticeship Mr Smith should do so promptly or face trying to transfer to a new course which would not easily align with the existing course.

[9] The offer was available for acceptance until 5 April 2019. In submissions Mr Smith says the Calderbank offer was reasonably rejected as it did not address costs.

[10] The Calderbank offer did not address the costs already incurred by Mr Smith and neither did it address his claims for monetary remedies. Given those shortcomings I have concluded Mr Smith's rejection of the Calderbank offer was reasonable.

[11] ETCO submits there was a mixed measure of success by both parties. It says that although Mr Smith was successful in his claim that he had been unjustifiably dismissed his claim for remedies was not successful.

[12] The situation of mixed success has been examined by the Court in *Coomer v JA McCallum and Son Limited*.⁶ Ultimately I must stand back and look at things in the round.⁷

[13] Having done so Mr Smith must be considered the successful party. His key claim was that he had been unjustifiably dismissed and he was entirely successful in that claim.

⁶ *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

⁷ *Ibid* at [43].

[14] The Electrical Training Company Limited is ordered to pay to Mr Smith the sum of \$2,250 as a contribution toward costs within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority