

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 231  
3068432

BETWEEN

MARK SINTON  
Applicant

AND

COATESVILLE MOTORS  
2013 LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Paul Mathews, advocate for Applicant  
Paul McBride, counsel for Respondent

Submissions received: 2 June 2020 from Applicant  
20 May and 2 June 2020 from Respondent

Determination: 17 June 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. Mr Sinton is ordered to pay to Coatesville Motors 2013 Limited the sum of \$2,250 as a contribution toward costs within 28 days of the date of this determination.**

[1] In a determination dated 24 April 2020 I declined Mr Sinton's application for arrears of wages and upheld one of four counter-claims made by Coatesville Motors 2013 Limited.<sup>1</sup>

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<sup>1</sup> *Sinton v Coatesville Motors 2013 Limited* [2020] NZERA 166.

[2] I reserved costs and invited the parties to resolve the issue between them indicating that I had formed a preliminary view that costs should lie where they fall. The parties have been unable to resolve the matter and they have lodged submissions seeking a determination of the issue of costs.

[3] Having considered carefully the submissions made by the parties I have concluded this is an appropriate case for costs to be awarded.

[4] 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.<sup>2</sup> The principles applying to costs are well settled and do not require repeating.<sup>3</sup>

[5] 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.<sup>4</sup> The investigation meeting was conducted by telephone on 20 April 2020 and took about one hour. The starting point is therefore \$750.00.

### **Progression of Mr Sinton's claims**

[6] Mr Sinton lodged a statement of problem in the Authority on 25 July 2019. Mr Sinton claimed one or more conditions of his employment were affected to his disadvantage by unjustified actions of Coatesville Motors, that he was owed arrears of wages for time worked outside his ordinary hours of work, that Coatesville Motors had made an unlawful deduction from his final pay and that his resignation was in fact, a dismissal. Mr Sinton also sought penalties against Coatesville Motors for a failure to provide him with an employment agreement.

[7] In its statement in reply lodged on 12 August 2019 Coatesville Motors denied all of Mr Sinton's claims and made a number of counter-claims against him seeking compliance orders and damages.

[8] A case management call with the parties was convened on 30 August 2019. A previous call scheduled for 27 August had been abandoned because the applicant failed

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<sup>2</sup> Employment Relations Act 2000, Schedule 2, clause 15.

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

<sup>4</sup> Practice Note 2, Costs in the Employment Relations Authority.

to attend. During the 30 August call the issues for investigation and determination were clarified and both parties were directed to lodge amended statements to address shortcomings in the initial statements. The investigation meeting was scheduled for 29 November 2019.

[9] On 22 November 2019 Mr Sinton advised the Authority he was withdrawing all of his claims except the claim that Coatesville Motors had made an unlawful deduction from his final pay.

[10] Because the issues had been considerably narrowed the parties were advised of a proposal that the outstanding claims be determined on the papers without the need for an investigation meeting and that the investigation meeting scheduled for 29 November be adjourned.

[11] At the same time Mr Sinton was directed to lodge and serve an amended statement of problem clearly identifying the remaining issue for investigation and determination.

[12] Mr Sinton agreed with the proposal while Coatesville Motors strongly objected. After carefully considering all communications from the parties I adjourned the investigation meeting.

[13] Given the significant reduction in Mr Sinton's claims I exercised my discretion under s 159 of the Act and directed the parties to attend further mediation and attempt in good faith to resolve the remaining issues between them. Mediation was not successful.

### **Calderbank offers**

[14] The Authority will take into account any offers made by the parties to settle matters.<sup>5</sup> If the Applicant does not beat the offer, there should be a steely response as that would be in the broader public interest.<sup>6</sup>

[15] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:<sup>7</sup>

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<sup>5</sup> *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

<sup>6</sup> *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172, (2004) 17 PRNZ 16 (CA) at [53].

<sup>7</sup> Above n 5 at [18]-[20].

It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. ... The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[16] These comments also apply with respect to Calderbank offers made before an Authority investigation.<sup>8</sup>

[17] The parties lodged their amended statements of problem and in reply on 3 and 10 September respectively. On 19 September Coatesville Motors wrote to Mr Sinton offering to pay \$2,000 in full settlement of his employment relationship problems with no order as to costs. The offer remained open for a week. This offer was made before Mr Sinton's witness statements were due to be filed in the Authority on 11 October 2019.

[18] Mr Sinton rejected the offer the following day and made a counter-offer to settle matters by way of payment of \$6,000 under s 123(1)(c)(i) of the Act plus a contribution to his costs of \$3,000 plus GST. This offer was rejected by Coatesville Motors.

[19] On 14 November Mr Sinton made a further offer to settle matters by way of a payment of \$5,500 plus GST. This offer was declined but on 20 November Coatesville Motors offered not to seek costs against Mr Sinton or Mr Mathews personally in exchange for a withdrawal of all of Mr Sinton's claims in the Authority by 22 November. This offer was rejected although Mr Sinton did proceed with withdraw all but his claim relating to the alleged unlawful deduction.

[20] I have concluded Mr Sinton's rejection of both calderbank offers was reasonable despite the withdrawal of his substantive claims and his failure at having his unlawful deduction claim upheld. This is because neither calderbank offer from Coatesville Motors addressed the issue of the counter-claims against Mr Sinton. In its offers Coatesville Motors addressed the issue of costs but remained silent on whether the counter-claims against Mr Sinton would be withdrawn.

[21] Coatesville Motors' rejection of Mr Sinton's offer was likewise reasonable given its success at defending Mr Sinton's remaining claim and its success in having one of its four counter-claims upheld.

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<sup>8</sup> *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [109]; *Spillman v Tandam Skydiving* [2018] NZEmpC 32 at [37].

[22] There will be no uplift in costs to reflect the rejection of the calderbank offers.

### **Wasted costs**

[23] Coatesville Motors seeks an uplift in costs to account for wasted costs.

[24] Wasted costs usually address two situations:<sup>9</sup>

- a) where expenses have been incurred for work that will have no further benefit to the case of the party claiming those costs; or
- b) where the work will be duplicated to prepare for a trial in future.

[25] In this case Mr Sinton withdrew all but one claim three days before the scheduled investigation meeting. Mr Sinton's claims against Coatesville Motors were not insignificant. He was claiming a total of \$36,000 under s 123(1)(c)(i) of the Act, an unquantified sum for arrears of wages, and penalties. All of these issues had to be addressed in the statements in reply and the witness statements lodged by Coatesville Motors.

[26] The Authority cannot use costs as a punishment, or an expression of disapproval of Mr Sinton's conduct, conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award.

[27] I am satisfied that this is a case where the daily tariff should be increased to recognise the work undertaken by Coatesville Motors in preparation for the one day investigation meeting including the preparation of witness statements and submissions which were to be dealt with on the day. I consider an increase of \$1,500 is appropriate.

### **Costs against representative**

[28] In its costs submissions Coatesville Motors has applied to have Mr Mathews personally joined as a party to the costs determination and for costs to be awarded against him personally. Such orders are made only in extraordinary circumstances.<sup>10</sup>

[29] Coatesville Motors says Mr Mathews, acting in his capacity as Mr Sinton's representative, did not act with competence and was put on notice this application

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<sup>9</sup> *Cooper v Phoenix Publishing Limited* [2020] NZEmpC 12 at [6].

<sup>10</sup> *Blue Water Hotel Ltd v VBS* [2019] NZEmpC 24 at [20].

would be made. Coatesville Motors submitted that another representative acting properly, dispassionately and competently would have substantially reduced the level of costs to which it was put.

[30] In his submissions Mr Mathews disputes the allegations about his conduct. He states he acted under the instructions of his client at all times.

[31] The Authority's investigative process is intended to be driven by the Authority member, rather than the parties themselves. I am satisfied there were no extraordinary features of the litigation in this case which elevated Mr Mathews role beyond his role as an advocate for Mr Sinton. Accordingly Coatesville Motors' application is declined.

### **Conclusion**

[32] Mr Sinton is ordered to pay to Coatesville Motors 2013 Limited the sum of \$2,250 as a contribution toward Coatesville Motors costs within 28 days of the date of this determination.

Vicki Campbell  
Member of the Employment Relations Authority