

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 233
3136304

BETWEEN

THEO ZINK
Applicant

AND

THE BOARD OF TRUSTEES OF
SOUTHLAND BOYS' HIGH
SCHOOL
Respondent

Member of Authority: Philip Cheyne

Representatives: Peter Cranney, counsel for the Applicant
Janet Copeland, counsel for the Respondent

Submissions Received: 18 March 2022 from the Applicant
10 February 2022 from the Respondent

Date of Determination: 2 June 2022

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Theo Zink sought a determination from the Authority about his entitlement to public holidays and to annual leave in his employment by the Board of Trustees of Southland Boys'

High School (SBHS). For the reasons given in the earlier determination,¹ Mr Zink's claims were dismissed.

[2] Costs were reserved. I now have costs submissions from counsel. This determination resolves that issue.

Discussion

[3] An uplift in costs to \$3,375.00 is sought. I am referred the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*,² the Authority's practice note and an Employment Court case.³

[4] The respondent through counsel sent Mr Zink an offer headed "WITHOUT PREJUDICE EXCEPT AS TO COSTS" offering payment of the disputed holidays in full and final settlement on a no admission of liability basis, in the interests of saving legal costs. Mr Zink replied with thanks but considered it was best to have the matter resolved by the Authority.

[5] I agree with counsel that half a day based on the first day rate would be the starting point if the daily tariff approach was to be applied in this matter. The investigation meeting took approximately half a day.

[6] However, this is a case where there should be no award of costs. Mr Zink sought to have statutory rights to public holidays and annual leave finally determined. It had been a matter of some controversy previously. I agree with counsel for Mr Zink that the principles set out in *New Zealand Tramways Union (Wellington Branch) v Wellington City Transport*⁴ should be applied, given that the matter was in effect a dispute about how the Holidays Act 2003 provisions worked in the context of Mr Zink's employment agreement.

[7] The Authority's determination is also potentially applicable to other employees in the same situation, so has a wider benefit. The principles from *New Zealand Tramways Union* have been applied in similar situations.⁵

¹ *Zink v The Board of Trustees of Southland Boys' High School* [2022] NZERA 11.

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

³ *Carter Holt Harvey v Eastern Bays Independent Industrial Workers Union & Ors* [2011] NZEmpC 13.

⁴ *New Zealand Tramways Union (Wellington Branch) v Wellington City Transport* [2022] NZEmpC 151.

⁵ See for example *Conrad v Real Journeys Limited* ERA Christchurch CA 70A/09, 23 December 2009.

[8] The settlement offer for payment on a full and final settlement and no liability basis would not have operated to justify an uplift in costs in any event. Statutory rights could not be validly compromised in that way and it was not an effective *Calderbank* offer as it did not include an explanation about the consequences of declining it. At the time Mr Zink was not represented, so should not be treated as understanding the full implications of a without prejudice except as to costs offer.

[9] It is not necessary to deal with counsel's alternative submission about Mr Zink's ability to pay.

Conclusion

[10] There is no order for costs.

Philip Cheyne
Member of the Employment Relations Authority