

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 689  
3142422

BETWEEN PAUL HINES  
Applicant

AND KNCC LIMITED  
Respondent

3192459

BETWEEN KNCC LIMITED  
Applicant

AND PAUL HINES  
Respondent

Member of Authority: Sarah Blick

Representatives: Kate Henry, counsel for the applicant  
Elden Baek and Eugene McLaren, for the respondent

Investigation Meeting: On the papers

Determination: 22 December 2022

---

**DETERMINATION OF THE AUTHORITY**

---

[1] The Authority issued a determination on 8 September 2022 which found the applicant Mr Hines was unjustifiably dismissed by the respondent KNCC Limited (KNCC). It awarded compensation, reimbursement of lost remuneration, arrears of wages, interest and a penalty.<sup>1</sup> In relation to the orders for lost wages, the Authority was not in a position to specify amounts awarded but provided guidance to the parties on how they should be calculated.

---

<sup>1</sup> *Paul Hines and KNCC Limited* [2022] NZERA 447.

[2] On 30 September 2022 KNCC filed an application to reopen the Authority's investigation, which Mr Hines opposes.

[3] On 11 October 2022 Mr Hines filed a memorandum asking the Authority to issue a further determination confirming the calculations of remuneration ordered in my determination. Despite being given the opportunity to respond to that memorandum, KNCC have declined to do so.

[4] In addition, the parties have been unable to resolve the issue of costs between themselves, and Mr Hines has filed an application for costs. KNCC did not file any reply to the application in accordance with the Authority's timetabling, nor has it sought leave to do so out of time.

[5] This determination deals with all matters raised – the application for reopening, confirmation of calculations and costs.

[6] The Authority proposed determining these matters "on the papers", which Mr Hines consents to. KNCC did not respond to the Authority's proposal. I now determine them on the papers.

### **Application to reopen investigation**

#### *Grounds for reopening*

[7] KNCC has applied to have my investigation reopened. The grounds of the application are described in the application for reopening as follows:

...Even though there might have been some procedural shortfalls while KNCC was communicating with [Mr Hines], the essential point is that everything was discussed and followed up based on good faith as we did try to sort out the issues with him properly/openly first rather than just notifying anything to him. As stated earlier, there certainly were concerns arisen from his poor performance compared to what had been initially expected from him as an experienced site manager. After mutually agreeing with the end of employment, which was not unilaterally forced by KNCC, his saying that he suffered from injury to his feelings later was not something we could accept based on the "good faith". We think there should have been actual evidence presented that can prove he did suffer from the happening directly, otherwise it would be unfair to KNCC to just accept the result. KNCC also had to suffer from the situation, which would not have happened if Paul was performing according to our expectations. Thus, we believe this investigation needs to be reopened to reconsider more of our good faith communications with him. We believe that should also be regarded when a determination is made...

[8] KNCC was given the opportunity to file affidavit evidence and submissions in support of its application for reopening. It has not done so in accordance with the Authority's timetabling directions. I therefore consider the application based on the information I have received.

### *Grounds of opposition*

[9] Mr Hines opposes the application on the basis no new evidence is presented and there has been no miscarriage of justice. He asks the Authority to dismiss the application pursuant to clause 12A, Schedule 2 of the Employment Relations Act 2000 (the Act) on the basis it is a vexatious claim.

### *Applicable law*

[10] Under clause 4, Schedule 2 of the Act the Authority may order an investigation to be reopened upon such terms as it thinks reasonable. This discretion is exercised according to principle. The jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered or providing a backdoor method by which unsuccessful litigants can seek to re-argue their case.

[11] Some special or unusual circumstance must be found to exist to warrant a reopening, such as fresh or new evidence that could not with reasonable diligence have been discovered prior to the investigation meeting, which appears to be conclusive; or some other special or unusual circumstance particular to the case.

[12] Further, the mere possibility of a miscarriage of justice is not a sufficient ground for granting a reopening. The threshold test is whether the party seeking the reopening can establish there would be an actual miscarriage of justice or at least a real or substantial risk of a miscarriage of justice if the determination was allowed to stand. Of equal weight as a factor in the balance is certainty in litigation. This is to ensure successful litigants receive their normal right to enjoy the fruits of judgments in their favour.<sup>2</sup> For the decision-maker on a reopening application the overriding consideration must be the interests of justice balanced against other relevant factors such as the importance of finality in litigation.

---

<sup>2</sup> *Davis v Commissioner of Police* [2015] NZEmpC 38 [30 March 2015] at [12]-[14] and *Idea Services Limited v Barker* [2013] NZEmpC 24 at [36]-[37] and [42], *Ports of Auckland Limited v NZ Waterfront Workers Union* [1994] 1 ERNZ 604 at 607, *Mukkamala v Singh* [2020] NZERA193.

[13] I note an apparent misapprehension of the facts or relevant law will not warrant a reopening where the misapprehension is attributable solely to the neglect or default of the party seeking the rehearing.<sup>3</sup>

#### *Assessment*

[14] There is nothing to suggest fresh evidence has become available that was not available at the time of the substantive investigation meeting. KNCC was represented ably by counsel who filed its statement in reply, represented KNCC at the investigation meeting and filed closing written submissions. KNCC had the opportunity to present its evidence in witness statements and other written documentation, question its own witnesses at the investigation meeting and cross-examine Mr Hines. It did each of those things.

[15] I reiterate here that I carefully evaluated the evidence as to how reasonable, plausible and probable it was. Where the evidence between witnesses was not consistent, I made findings based on the balance of probabilities as to which version was more likely than not. My evaluation and consideration of the evidence was assisted by the documents provided by the parties.

[16] I conclude KNCC is simply dissatisfied with the outcome of my investigation. Given that, the appropriate course for it to take was to challenge the substantive determination. I am not aware of them having done so.

[17] Accordingly, the application to re-open my investigation is dismissed.

#### **Monetary orders in earlier determination**

[18] For the purposes of the investigation meeting, Mr Hines provided me with a schedule of loss identifying only net amounts relating to his financial losses. In my determination I identified the calculations for amounts payable to Mr Hines only.<sup>4</sup>

[19] KNCC has made no attempt to dispute Mr Hines' calculations filed with his memorandum on 11 October 2022, despite having the opportunity to do so. I have considered and accept Mr Hines' calculations as correct.

---

<sup>3</sup> *Autodesk Inc v Dyason* (No 2) (1993) HCA 6, (1993) 173 CLR 300 at 303 cited with approval in *Idea Services*, above n 2, at [37].

<sup>4</sup> Above n1, at [94].

## **Confirmation of calculations and orders**

[20] I order KNCC Limited to immediately pay Paul Hines the following amounts:

- a. \$3,115.12 - being lost wages from 12 April 2021 to 20 April 2021 inclusive;
- b. \$236.74 - being contributions to KiwiSaver at the rate of 3 percent of Mr Hines' gross base salary from 27 March 2021 to 20 April 2021 inclusive;
- c. \$631.33 - being annual holiday pay at the rate of 8 percent of Mr Hines' gross base salary from 27 March 2021 to 20 April 2021 inclusive;
- d. \$4,776.51 - being two weeks' wages at his gross base salary rate from 27 March 2021 to 11 April 2021 inclusive.
- e. Interest on the amount calculated at d. above, calculated from 27 March 2021 until the date payment is made in full.

[21] I otherwise confirm the orders in my earlier determination. Those orders were that KNCC Limited is to pay to Paul Hines compensation of \$15,000 pursuant to s 123(1)(c)(i) of the Act. It was also ordered to pay a penalty of \$3,000 - 50 percent of that penalty is to be paid into the Authority's bank account, to be forwarded to the Crown Bank Account, and the other 50 percent is to be paid to Paul Hines. These amounts are also outstanding and should be paid immediately.

## **Costs**

[22] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act. The power is discretionary with its use governed by principles.<sup>5</sup> These include that costs will usually follow the event and the discretion is exercised in accordance with principle and not arbitrarily, considering equity and good conscience. When considering costs, the starting point is the Authority's daily tariff is \$4,500 for the first day of an investigation meeting.

[23] In addition, costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

---

<sup>5</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

*Mr Hines' is the successful party*

[24] Although I dismissed one penalty claim for a breach of s 4(1A)(c) of the Act, Mr Hines was successful in his other claims. Costs should follow the event here, and Mr Hines is entitled to a contribution towards his costs.

*Mr Hines' costs submissions*

[25] Mr Hines seeks a costs award of \$8,500, which includes \$4,500 being the daily tariff amount for a one-day investigation meeting, with an uplift of \$4,000. Mr Hines seeks an uplift on the basis KNCC:

- a. unreasonably rejected a Calderbank offer;
- b. increased costs by its actions;
- c. failed to engage with him in his attempt to agree costs.

*Calderbank offer*

[26] Mr Hines has provided a copy of a “without prejudice offer save as to costs” offer to settle this matter dated 25 June 2021. In exchange for a sum of \$20,000 (comprising \$13,500 under s 123(1)(c)(i) of the Act and \$6,500 plus GST as a contribution towards legal fees) Mr Hines offered to waive his claims against KNCC. Mr Hines advised the offer was made on a Calderbank basis and the reasons he would likely succeed in his claims. At the time KNCC had legal representation. I find the offer was a valid and reasonable Calderbank offer. Mr Hines gave KNCC seven days to accept it and says KNCC did not respond to the offer of settlement.

[27] The settlement sum offered was substantially less than the sums I awarded Mr Hines. The offer was made a sufficient time before the investigation meeting and if accepted, Mr Hines would have avoided additional costs. I accept Mr Hines has incurred significantly more legal fees as a result of KNCC’s rejection of his reasonable settlement offer. KNCC’s rejection of the offer (or failure to respond to it) was unreasonable in the circumstances. I agree the offer should be taken into consideration in my costs assessment.

*Whether KNCC's actions increased costs*

[28] Mr Hines says KNCC pursued three arguments justifying the termination of his employment – redundancy, poor performance and medical incapacity. He also says

KNCC argued his employment was terminated during a valid probationary period and that his employment was terminated by mutual agreement. Mr Hines says the multitude of arguments KNCC pursued resulted in additional costs as each argument had to be addressed in his witness statements and submissions. KNCC's arguments that employment ended by mutual agreement, a valid probationary period, or by way of justified dismissal were all rejected. I also take this into consideration in my assessment.

*Failure to engage in costs discussions*

[29] Mr Hines says KNCC failed to provide a substantive response to his proposal for costs. On 12 September 2022 counsel for Mr Hines wrote to KNCC proposing it pay the amount now sought - \$8,500 plus the Authority filing fee. Mr Hines says KNCC did put forward a counter proposal to that offer.

[30] Counsel refers to another Authority determination in which a \$6,500 uplift in costs was awarded.<sup>6</sup> While factually different, that matter involved the rejection of a Calderbank offer and other unreasonable conduct including the employer pursuing a multitude of arguments which were not accepted by the Authority.

*Costs assessment and order*

[31] Mr Hines is entitled to a substantial uplift due to the Calderbank offer and KNCC's conduct in course of this matter. I do not, however, consider the level of uplift warranted in the *Bennien and Carevets Hamilton Limited* determination is warranted here.

[32] I order KNCC Limited to pay Paul Hines \$8,500 as a contribution towards his costs and \$71.56, being the Authority's filing fee, within 21 days of the date of this determination.

Sarah Blick  
Member of the Employment Relations Authority

---

<sup>6</sup> *Bennien and Carevets Hamilton Limited* [2021] NZERA 502.