

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 595
3172148

BETWEEN

MARK BAREHAM
Applicant

AND

METRO ADMIN PAY
SERVICES LIMITED (IN
LIQUIDATION)
Respondent

Member of Authority: Sarah Blick

Representatives: Mark Bareham, in person
Rob Towner, counsel for the respondent

Investigation meeting: On the papers

Submissions and information received: 19 and 25 September 2023 from the applicant
20, 25 and 26 September 2023 from the respondent

Determination: 12 October 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 30 August 2023 finding Mark Bareham was entitled to arrears of wages of \$8,207.78, together with interest on that amount from 28 November 2021. Metro Admin Pay Services Limited's (Metro) counterclaim for damages was dismissed. The issue of costs was reserved for the parties to attempt to resolve between themselves. The parties have been unable to resolve costs and Mr Bareham now seeks costs.

Costs principles

[2] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000. The power is discretionary with its use governed by principles.¹ These include that costs will usually follow the event; costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award; it is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable; 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, which is \$4,500 for a one-day investigation meeting.

[3] Mr Bareham prepared and lodged his own statement of problem in the Authority on 19 May 2022. Thereafter, between 14 June 2022 and 31 October 2022 he engaged counsel. Mr Bareham has provided invoices for legal services totalling \$9,370.20 for that period. Services included drafting a statement in reply to Metro's counterclaim; preparation for and attendance at mediation; attendance at an Authority case management conference; and drafting Calderbank offers.

[4] Mr Bareham has provided the Authority with email correspondence between his counsel and Metro's counsel which includes four Calderbank offers. The first is one from Metro dated 22 July 2022 in which it offered a payment of \$3,000 plus GST as a contribution to Mr Bareham's legal costs to resolve all matters. The email asserted Mr Bareham's legal claim would fail in all respects and Metro's counterclaim would succeed. It was stated Metro was committed to "strenuously defend Mr Bareham's counterclaim and to prosecute its counterclaim" if the matter was not resolved by agreement.

[5] Mr Bareham's counsel responded by rejecting this offer, and made a counter offer on 26 July 2022 proposing Metro pay \$29,321.53 in unpaid wages and other amounts and \$3,000 plus GST in costs. Counsel made clear the consequences of non-acceptance, and stated the offer remained open until 28 July 2022. Metro responded two hours after the offer was made, rejecting it. It made no counter offer.

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

[6] A few months later, on 10 October 2022 Mr Bareham's counsel again wrote to Metro making a further offer to resolve "in the interest of avoiding protracted litigation". The offer was the full and final settlement of all claims the parties had against each other, upon Metro's payment of \$10,000 including unpaid wages and other amounts. The offer was open until 14 October 2022. The correspondence indicates Metro did not respond until 18 October 2022, rejecting the offer.

[7] On 26 October 2022 Mr Bareham's counsel again wrote to Metro, making a third offer to resolve on the basis Metro pay \$6,000 in full and final settlement of all claims. The offer was open until 2 November 2022. Again, Metro rejected this offer saying it was unacceptable and that it would pursue its counterclaim.

[8] The Authority's investigation meeting was held on 9 March 2023 at which Mr Bareham represented himself. He had prepared his own witness statement prior to the meeting and closing submissions after the meeting.

[9] Mr Bareham appears to now be seeking full recovery of his legal costs.

[10] Metro says a fair and reasonable costs award to Mr Bareham would be no more than \$1,200, representing slightly over a quarter of the daily tariff. This is on the basis Mr Bareham did not incur any further legal costs after 31 October 2022, with his counsel's involvement being minimal prior to that. Metro further says Mr Bareham did not lodge any documents in support of his arrears claim which it says resulted in the investigation meeting taking longer than it otherwise would have.

Costs assessment

[11] Although all of the arrears Mr Bareham sought were not awarded, he was successful in his application and Metro's counterclaim was wholly unsuccessful. As the successful party he is entitled to a contribution to his costs. However, this is not a case where an order for indemnity or full costs should be made, as Metro's actions fall far short of the kind of bad behaviour needed to warrant such an order.

[12] Accordingly, the Authority assesses costs based on the daily tariff. The investigation meeting took one day and would have attracted the daily tariff of \$4,500 had Mr Bareham been represented by counsel.

[13] I do not accept Metro's starting point as appropriate, nor do I agree any additional time taken at the investigation meeting in relation to the arrears claim ought to be reflected in costs. It was ultimately Metro's obligation to keep and produce wage and time and holiday and leave records, which it did, and which were relied on by the Authority in its assessment of the arrears owing.

[14] Taking into account that Mr Bareham prepared his own witness statement and submissions and was not represented at the investigation meeting, I find an appropriate starting point is \$2,500.

[15] It is appropriate then to consider Mr Bareham's efforts at resolution by way of the Calderbank offers. All were made well prior to the investigation meeting with reasonable time given to Metro to consider them. They were valid Calderbank offers. The latter two offers were very reasonable; with the second offer not being much higher than what the Authority awarded, and the third offer being about one third less than what the Authority awarded. The latter two offers support a substantial uplift in the tariff award. Taking the above matters into account, Mr Bareham should be awarded the full daily tariff of \$4,500 in costs.

Outcome

[16] Metro Admin Pay Services Limited is ordered to pay \$4,500 in costs to Mark Bareham within 14 days of the date of this determination.

Sarah Blick
Member of the Employment Relations Authority