

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA  
TAIMAHI ŌTAUTAHI ROHE**

[2024] NZERA 156  
3150426

BETWEEN

SIMRAN KAUR  
Applicant

AND

SURF 'N' TURF HOSPITALITY  
LIMITED  
Respondent

Member of Authority: Antoinette Baker

Representatives: Applicant in person  
Simon Graham, counsel for the Respondent

Submissions received: 23 February 2024 from the Applicant  
11 March 2024 from the Respondent

Determination: 18 March 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] I issued a determination on 7 February 2024 finding that the respondent (SNT) was to pay Ms Kaur a total of \$7,486.63 gross for wage and holiday pay arrears due to its failure to pay her the rate of pay agreed, and its failure to offer and pay her the hours of work agreed. Ms Kaur was unsuccessful in her other claims that she did not receive statutory breaks and that she was owed accommodation costs. I found her associated grievances were raised outside the 90-day time frame<sup>1</sup> and did not determine these claims.

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<sup>1</sup> Employment Relations Act 2000, s114.

[2] The parties were asked to resolve costs between themselves. Costs have not been resolved. Ms Kaur has now asked for an award of costs. She has done this in the same request that her husband, Mr Amandeep Singh, has also signed in relation to the determination I issued for his claim heard at the same time.<sup>2</sup> The costs application includes invoices totalling \$13,800.00 from the legal representative for Ms Kaur and her husband. Those costs relate to advice and preparation including a statement of problem and attendance at two conference calls. The representative confirmed they no longer had instructions before any evidence was prepared and lodged for Ms Kaur's claim.

[3] A party should receive a reasonable contribution to costs incurred in achieving a successful result. Costs are discretionary, modest, and are not a mechanism to punish the other party. Some cases may require costs to lie where they fall.<sup>3</sup>

[4] The Authority uses a notional daily tariff adjusting this up or down as appropriate depending on the case. Such an adjustment may take into consideration a liable party's means to pay costs, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs.<sup>4</sup>

[5] The current tariff applied for a one-day Authority investigation meeting is \$4,500.00. This amount is considered a starting point for assessing a reasonable contribution to the legal costs incurred by a party preparing for and taking part in an investigation meeting but generally not including preparation and attendance at mediation.<sup>5</sup>

[6] When considering the tariff starting point here I note that the Authority takes into account in setting that tariff reasonable preparation for an investigation meeting. The tariff is quantified on the length of the investigation meeting being \$4,500.00 for the first full day and \$3,500.00 for subsequent days thereafter. Half days may be awarded consistent with that

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<sup>2</sup> *Amandeep Singh v Surf 'N Turf Hospitality Limited* [2024] NZERA 68.

<sup>3</sup> Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.

<sup>4</sup> As above.

<sup>5</sup> <https://www.era.govt.nz/determinations/awarding-costs-remedies/>.

timeframe. Ms Kaur attended on her own behalf a half day investigation meeting in relation to her claim. That would attract \$2,250.00 on the tariff had she continued her legal representation attending because the assumption would have been that this assistance incurred costs for preparation and attendance including the preparation of evidence and considering the evidence from the other party as preparation.

[7] None of these steps were taken here by the representative that Ms Kaur previously instructed. That person no longer acted for Ms Kaur by the time evidence was to be lodged and served. I find that the legal costs relating as they did only to a stage before any evidence was prepared and lodged should attract a contribution of \$1,000.00 based on the tariff approach considering further that Ms Kaur's claim was dealt with only on the rescheduled meeting in a half day timeframe.

[8] While I note SNT's submission that because no meeting time occurred then actual costs should be considered. I am not satisfied this is consistent with the tariff approach used as explained above.

#### **Should there be an uplift to the starting point?**

[9] While brief, my understanding of Ms Kaur's costs submission (jointly with her husband) is that she has incurred combined legal costs of \$13,800.00 (inclusive of GST). On a crude reckoning this is \$6,900.00 for Ms Kaur. I note SNT's submission that some of these costs related to the mediation process, something the Authority does not consider in relation to costs' applications.<sup>6</sup> Ms Kaur says that her incurred legal costs would reduce the award she has received. While that may be so, it is on its own, not a reason for me to increase the award from the tariff approach. The costs Ms Kaur has incurred are to a large extent between her and her previous representative.

[10] I do not accept there should be an uplift to the starting point of \$1,000.00.

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<sup>6</sup> <https://www.era.govt.nz/determinations/awarding-costs-remedies/>.

### **Should there be a reduction to the starting point?**

[11] SNT says there should be a reduction in the amount awarded against the tariff for the following reasons:

- a. That Ms Kaur unreasonably did not accept offers made to settle this matter (when she was represented) and that this was impeded by her unrealistic claims including legal costs that at the time were double what is now before me as combined costs invoiced for herself and her husband, a total of \$12,000.00 plus GST.
- b. That SNT successfully defended some of the claims.
- c. That Ms Kaur originally joined the director of SNT and then withdrew this.
- d. That Ms Kaur unnecessarily delayed the proceedings when she did not appear when the investigation meeting was scheduled without having notified the Authority beforehand about this causing a further meeting to be rescheduled.

### *Settlement offers*

[12] SNT made two settlement offers to Ms Kaur, both in the category of ‘without prejudice except as to costs’, known as ‘Calderbank’ offers.<sup>7</sup>

[13] The Employment Court<sup>8</sup> has observed that while ‘Calderbank’ offers are ‘front and centre’ for the Court when considering costs, the Authority’s discretion is broader and sits within the context of a jurisdiction ‘intended to be low level, costs effective, readily accessible and non-technical’.

[14] While SNT submits that the Employment Court has also referred to ‘the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties

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<sup>7</sup> A Calderbank offer is an offer made by one party, normally a respondent, to settle the claim on terms. The offer is marked ‘without prejudice save as to costs’. The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court’s (or in this case the Authority’s) attention if the claim is not settled.

<sup>8</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

were permitted to ignore without prejudice letter without costs being impacted'<sup>9</sup>, that jurisdiction has a specific regulatory obligation to consider offers made to settle when exercising its discretion to make orders for costs<sup>10</sup>. The Authority's equivalent provision does not contain that specific reference.<sup>11</sup>

[15] SNT submits that Ms Kaur's unrealistic stance that she wanted remedies in excess of the Calderbank offers made, including significant costs for that stage, impeded any chance of settlement. However, neither of the offers were more than what Ms Kaur was eventually awarded. Consequently, I do not find this supports a reduction in the award made.

#### *Mixed success*

[16] SNT submits there should be a reduction in the tariff due to mixed success. I do not agree.

[17] The issue of mixed success has been considered as to costs in the Authority by the Employment Court.<sup>12</sup> The Court decided that any success for an applicant is sufficient success for the purpose of costs, and it does not matter that an applicant may have lost a significantly larger or more complex claim if it was successful with any claim. When considering the situation where an applicant was unsuccessful in part of their claim that took much of the investigation meeting, the Court said that 'success, limited as it was, could not have been achieved without lodging a claim in the Authority.'

[18] While Ms Kaur was not successful in her claims about the lack of statutory breaks, and her grievances were out of time, she was successful in showing she was entitled to not insignificant remedies for breach of her hourly rate and contractual hours not offered and paid to her.

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<sup>9</sup> *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [18] referring to application in a prior Employment Court context.

<sup>10</sup> Employment Court Regulations 2000, Regulation 68.

<sup>11</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>12</sup> *Coomer v JA McCallum & Son Ltd* [2017] NZEmpC 156 at [43].

[19] Standing back and considering the above, I find it is not appropriate to reduce the starting point of \$1,000.00 on a 'mixed success' basis.

*Withdrawal of Mr Zandbergen as second respondent*

[20] I am not satisfied that the withdrawal of Mr Zandbergen as second respondent at the first phone conference justifies a reduction. This was well in advance of any evidence being filed and attendance at the second mediation.

*Unnecessary delays*

[21] SNT has noted that Ms Kaur did not attend the first scheduled investigation meeting at all and to hear her matter it was necessary to then reschedule a meeting at a later date albeit in Christchurch with the option of attendance by AVL. The matter was originally set down for three days in Timaru. This involved counsel for SNT to travel from Christchurch. Ms Kaur engaged by email with the Authority after her representative stopped acting for her. This related to her providing evidence when prompted by the Authority. When she did not appear on the first day, the Authority contacted her, and Mr Singh. It was Mr Singh who responded. Mr Singh explained that Ms Kaur had gone to India for a bereavement and later at the Authority's request provided airline ticket evidence that showed this was in June 2023. Ms Kaur's eventual explanation to me was the same, that she had to go to India for a family bereavement. I had no explanation why she had not contacted the Authority, and or SNT, to explain she could not attend the scheduled meeting. This would have been the reasonable thing to do. It would have avoided the rescheduling of the meeting to a further date to enable her claim to be heard. This would have avoided unnecessary delay and likely some unnecessary cost to SNT.

[22] SNT submits that because of this situation, Ms Kaur should be ordered to pay SNT \$4,500.00 in costs because of this situation. It bases this on the first day tariff. I have no other

information to assist me in relation to this claim for costs to SNT. I accept there would have been a cost to SNT to re organise to attend Ms Kaur's investigation meeting later albeit in Christchurch without travelling to Timaru. However, counsel was already in Timaru for Mr Singh's claim which proceeded albeit delayed by a day. I am not satisfied it is appropriate given the modest costs award already awarded to reverse matters and have Ms Kaur pay SNT significantly more towards its costs. I find a reduction of \$200.00 is appropriate to account for the unnecessary rescheduling when Ms Kaur could reasonably have had the time to inform the Authority that she needed an adjournment for compassionate reasons.

### **Summary**

[23] Surf 'N Turf Hospitality Limited is to pay Ms Kaur \$800.00 as a contribution to her costs.

[24] It is noted that the respondent is about to be removed from the New Zealand Companies Office Register (NZCO) subject to any creditor contacting the Companies Office to notify of any interest. It will be for Ms Kaur to take note of this situation and communicate directly with the NZCO in relation to any outstanding money owed in this determination and my substantive determination.

Antoinette Baker  
Member of the Employment Relations Authority