

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2024] NZERA 157
3153103

BETWEEN

AMANDEEP SINGH
Applicant

AND

SURF 'N' TURF HOSPITALITY
LIMITED
Respondent

Member of Authority: Antoinette Baker

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

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

Determination: 18 March 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] I issued a determination on 7 February 2024 finding that the respondent (SNT) was to pay Mr Singh \$11,400.00 in compensation under s 103(1)(c)(i) of the Employment Relations Act 2000 (the Act) for unjustified dismissal through a redundancy that I did not find was genuine. I reduced that award by 5% for Mr Singh's contribution to the grievance. Mr Singh was unsuccessful in his other claims that he did not receive statutory breaks, was not offered and paid his alleged contractual hours and that he was owed three months for his family accommodation costs.

[2] The parties were asked to resolve costs between themselves. Costs have not been resolved. Mr Singh has now asked for an award of costs. He has done this in the same request that his wife, Ms Simran Kaur, has also signed in relation to the determination I issued for her claim heard at the same time.¹ The costs application includes invoices totalling a combined \$13,800.00 from the legal representative for Mr Singh and Ms Kaur. 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 Mr Singh'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.²

[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.³

[5] The current tariff applied for a one-day Authority investigation meeting is \$4,500.00 and \$3,500.00 for subsequent days thereafter. 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.⁴

¹ *Simran Kaur v Surf 'N Turf Hospitality Limited* [2024] NZERA 69.

² 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.

³ As above.

⁴ <https://www.era.govt.nz/determinations/awarding-costs-remedies/>.

[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. Mr Singh attended on his own behalf for one and a half investigation meeting days, the subsequent half day held primarily to hear his wife's claim. Therefore, a day's investigation meeting would ordinarily attract \$4,500.00 for a single first day on the tariff had Mr Singh continued to engage legal representation. This would have been based on the 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 by the representative that Mr Singh previously instructed. That person no longer acted for Mr Singh 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 \$2,000.00 based on the tariff approach considering that Mr Singh's claim was dealt with (approximately) on a single day.

[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 Mr Singh's costs submission (jointly with his wife) is that he has incurred combined legal costs of \$13,800.00 (inclusive of GST) which on a crude reckoning are \$6,900.00 for Mr Singh. 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. Mr Singh says that his incurred legal costs would reduce the award he 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 Mr Singh has incurred are to a large extent between him and his previous representative.

[10] I do not accept there should be an uplift above the starting point of \$2,000.00.

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 Mr Singh unreasonably did not accept an offer made to settle this matter (when he was represented) and that this was impeded by his unrealistic claims including legal costs that at the time were double what is now before me as combined costs invoiced for Mr Singh and his wife, a total of \$12,000.00 plus GST.
- b. That SNT successfully defended some of the claims.
- c. That Mr Singh originally joined the director of SNT and then withdrew this.
- d. That Mr Singh unnecessarily delayed the proceedings when he did not appear when the investigation meeting was scheduled without having notified the Authority beforehand about this causing a while day's delay in the start for the meeting in Timaru.

Settlement offer

[12] SNT made a settlement offer to Mr Singh after a mediation in July 2022 on the bases of 'without prejudice except as to costs', known also as a 'Calderbank' offer.⁵

[13] The Employment Court⁶ has observed that while 'Calderbank' offers are 'front and centre' for the Court when considering costs, the Authority's discretion is broader and sits

⁵ 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.

⁶ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

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 were permitted to ignore without prejudice letter without costs being impacted’,⁷ that jurisdiction has a specific regulatory obligation to consider offers made to settle when exercising its discretion to make orders for costs.⁸ The Authority’s equivalent provision does not contain that specific reference.⁹

[15] SNT submits that Mr Singh’s unrealistic stance that he wanted remedies well in excess of the Calderbank offers made, including significant costs for that stage, impeded any chance of settlement. However, I note that the offer for compensation to Mr Singh was \$7,500.00 under s103(1)(c)(i) of the Act, less than the \$11,400.00 compensation awarded to Mr Singh in my substantive determination. Consequently, I am not satisfied there should be a reduction in the starting point of \$2,000.00 for reason of the Calderbank letter.

Mixed success

[16] SNT submits there should be a reduction in the tariff due to mixed success.

[17] The issue of mixed success has been considered as to costs in the Authority by the Employment Court.¹⁰ 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

⁷ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [18] referring to application in a prior Employment Court context.

⁸ Employment Court Regulations 2000, Regulation 68.

⁹ Employment Relations Act 2000, Schedule 2, clause 15.

¹⁰ *Coomer v JA McCallum & Son Ltd* [2017] NZEmpC 156 at [43].

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 Mr Singh was not successful in his claims about contractual entitlements and the lack of statutory breaks, he was successful in his grievance and has already been penalised for his contribution to that grievance in a reduction to the substantive compensation award.

[19] Standing back and considering the above, I find it is not appropriate to reduce the starting point of \$2,000.00 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 delay

[21] SNT has noted that Mr Singh did not attend the first day of the scheduled investigation meeting in Timaru set down for three days to hear both Mr Singh and Ms Kaur’s claims. Mr Singh engaged by email with the Authority after his representative stopped acting for him. This related to providing evidence when prompted by the Authority. When he did not appear on the first day the Authority contacted him. He explained his wife had gone to India for a bereavement and or that he did not know about the investigation meeting date, or that he thought it was to start the following day or that his previous representative had not told him. To mitigate the lost efficiency of an investigation already set down in a place that relied on travel for all, the Authority gave Mr Singh the opportunity to travel up to Timaru from Invercargill to attend the meeting the next day which he did.

[22] SNT says that in the circumstances Mr Singh should pay a day at the tariff (\$4,500.00) being the day lost on the first scheduled day. I have no material to support this cost. I accept there would have been a cost to SNT for having its legal counsel spend a whole day in Timaru although likely some mitigation could have occurred with other work to do remotely. The second day was always going to be required and would likely have already been prepared for. Most of Mr Singh's matter was dealt with on that second day when he attended. Based on this I find a reduction of \$400.00 is appropriate.

[23] It is noted that SNT is about to be removed from the New Zealand Companies Office Register (NZCO) subject to any creditor contacting the Companies Office to notify of an interest. It will be for Mr Singh to take note of this situation and communicate with the NZCO in relation to any outstanding money owed to him by SNT in this determination and my substantive determination.

Summary

[24] Surf 'N Turf Hospitality Limited is to pay Amandeep Singh \$1,600.00 as a contribution to his costs.

Antoinette Baker
Member of the Employment Relations Authority