

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 726
3176987

BETWEEN	LINDSEY ANNE GRIFFITHS Applicant
AND	BOOST PROMOTIONS LIMITED First Respondent
AND	RICHARD KULUZ Second Respondent

Member of Authority:	Claire English
Representatives:	Johanna Drayton and Annah Casey-Solly, counsel for the Applicant Bridget Smith, counsel for the Respondents
Investigation Meeting:	On the papers
Submissions received:	Up to 8 November 2024 from Applicant Up to 22 November 2024 from Respondent
Determination:	5 December 2024

COSTS DETERMINATION OF THE AUTHORITY

Substantive Determination

[1] On 27 June 2024, the Authority issued a determination in this matter¹, finding that Ms Lindsey Griffiths was unjustifiably dismissed and making awards in her favour of annual leave and unworked public holidays, as well as an award of \$20,000 as compensation for hurt and humiliation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Parties were able to revert back to the Authority if there were difficulties calculating certain entitlements.

¹ [2024] NZERA 384

[2] The parties were encouraged to resolve any issue of costs between them, and the Authority made reference to its usual practice of applying the daily tariff to determine costs.

[3] The parties have not been able to resolve the issue of costs or quantum between themselves and have filed memoranda accordingly. For completeness, I note that this costs determination deals with the issue of costs in relation to the substantive hearing of this matter only.

Calculation of Holidays Act Entitlements

[4] The parties disagree about the correct calculation of annual leave and unworked public holidays properly owing to Ms Griffiths.

[5] The parties agree about the following:

- a. Ms Griffiths' gross earnings for the period of her employment with the respondent (Boost) amounts to \$37,041.00;
- b. In the relevant period being 1 January 2022 until 31 March 2022, Ms Griffiths was entitled to 4 public holidays, being 3 and 4 January, Wellington Anniversary Day, and Waitangi Day;
- c. As Ms Griffiths was remunerated on a commission-only basis, the calculation for average daily pay set out in s 9A of the Holidays Act 2003 should be used.

Applicant's view of Holidays Act entitlements

[6] When calculating the number of whole or part days on which Ms Griffiths worked for the purposes of this calculation, it is submitted for Ms Griffiths that she worked a total of 60 days in the relevant period. This means that when Ms Griffiths' gross earnings of \$37,041.00 are divided by the 60 days during which she earned these gross earnings, her average daily pay is \$617.35.

[7] The four public holidays she is owed are therefore calculated at the rate of \$617.35 x 4 being \$2,469.40 gross.

[8] It is further submitted for Ms Griffiths that she should also be paid 8% of her gross earnings in accordance with s 23 of the Holidays Act 2003, being \$2,963.28 gross.

Respondent's view of Holidays Act entitlements

[9] Boost submits that the number of whole or part days on which Ms Griffiths' worked for the purposes of this calculation is 64 days. This is because the four public holidays should be included in the number of days during which Ms Griffiths earned her gross earnings. Using this figure, gross earnings of \$37,041.00 are divided by 64, making her average daily pay \$578.77.

[10] The four public holidays Ms Griffiths is owed are therefore calculated at the rate of \$578.77 x 4 being \$2,315.06 gross.

[11] In addition, Boost submits that the sum of \$2,315.06 which should have been paid in respect of the four unworked public holidays should also be added on to her gross earnings for the purposes of calculating annual leave due at the termination of her employment. This means that her gross pay for this purpose would be \$37,041 + \$2,315.06 being \$39,356.06.

[12] In accordance with s 23 of the Holidays Act 2003, Ms Griffiths would therefore be entitled to 8% of \$39,356.06, equating to \$3,148.48.

[13] This is slightly more than the amount calculated for holiday pay on behalf of Ms Griffiths, which amounts to \$2,963.28 gross.

Analysis

[14] Overall, the approach adopted by Boost recognises that Ms Griffiths should have received payment for the four identified statutory holidays, and proceeds on that basis. In my view this is correct. I note that Boost's calculations result in an overall payment to Ms Griffiths that is more than the calculations put forward on behalf of Ms Griffiths. Orders are made that Ms Griffiths is to be paid accordingly.

Kiwisaver

[15] Submissions for Ms Griffiths as to the correct calculation of arrears also referred to payment for Kiwisaver entitlements at the rate of 3% of gross earnings. It is submitted for Ms Griffiths that, having been declared an employee, employer contributions to Kiwisaver should be payable. The request that Ms Griffiths be paid a sum in respect of Kiwisaver entitlements was not raised in the statement of problem, amended statement of problem, or amended list of remedies presented at the

investigation meeting itself, but was raised for the first time in costs submissions some time after the substantive determination had been issued.

[16] The respondents submit that this is an additional claim raised after the investigation meeting took place and that as such, it cannot be raised now. The respondents also submit that no evidence was called in support of this claim.

[17] My view is that it is not proper to allow an additional claim for remedies to be raised not only after the investigation meeting has occurred, but after the issuing of the substantive determination. The respondent has not had a proper opportunity to respond to the claim, and the matter was not canvassed at the investigation meeting, meaning that there is insufficient evidence to support the claim. For all these reasons, the claim is dismissed. No orders are made.

Costs

[18] Ms Griffiths seeks to recover at least the tariff costs for a 2-day hearing, with submissions stating that “she should be awarded above tariff” on the grounds that “the fruits of her success should not be diminished on the grounds of a paltry costs award”.

[19] The respondents state that costs should lie where they fall. This is on the grounds that:

- a. Both parties had a measure of success, in that the applicant succeeded in one of her claims, while the respondents successfully defended 12 other claims; and
- b. The respondents made a Calderbank offer to the applicant to settle matters for the sum of \$30,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000, meaning that the applicant would have received more had she accepted this offer, as well as avoiding further legal costs.

[20] In response to the issue of the Calderbank offer, it is submitted for Ms Griffiths that this should not result in any deduction as the offer made “was only minimally more than the outcome quantum (without factoring in costs)”.

Principles

[21] The power of the Authority to award costs is contained in clause 15 of schedule 2 of the Act. The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*² as confirmed in *Fagotti v Acme and Co Limited*.³ The principle set out in the above cases is that costs are to be modest, not to be used as a punishment, and that costs usually follow the event.

[22] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.⁴ The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it.

Analysis

[23] The Investigation meeting in this matter was for two days and was held in person. Both parties attended together with their respective counsel, together with witnesses.

[24] Ms Griffiths was the successful party, as she succeeded in claim of unjustified dismissal and was awarded remedies as a result. Costs therefore follow this event.

[25] I do not accept the submissions on behalf of the respondent that what it describes as Ms Griffiths' mixed success is sufficient to dis-entitle her from a costs award. As the court has found, mixed success is success. Therefore, my view is that the correct starting point for an assessment of costs is in favour of Ms Griffiths, at the tariff rate for a 2-day investigation meeting, that is a total of \$8,000.00.

[26] I must now turn to the impact of the Calderbank offer, and the submissions on behalf of Ms Griffiths that even though she rejected a valid Calderbank offer that was more than the Authority award, no discount should occur because the offer was only "minimally more" than the outcome in the Authority, and in fact an uplift is warranted.

² [2005] 1 ERNZ 808.

³ [2015] NZEmpC 135 at 114.

⁴ For further information about the factors considered in assessing costs, see: [Practice Direction of the Employment Relations Authority](#)

[27] While the Authority does award uplifts in certain circumstances, such uplifts are commonly modest, and are likely to occur in circumstances where a party's behaviour has increased costs, as described in the Authority's practice note⁵. No conduct of the sort occurred here, and in fairness, none is suggested. The circumstances are simply not those which would justify an uplift to the daily tariff.

[28] In addition, I must take into account the impact of the Calderbank offer. Again, the Authority will often order a modest decrease to costs awarded in circumstances where there is a valid Calderbank offer. In this case, the Authority awarded \$20,000 as compensation for hurt and humiliation (excluding costs and Holidays Act entitlements), and the Calderbank offer was for \$30,000. This is more than the amount awarded by the Authority. Even if I take into account the higher amount suggested on behalf of Ms Griffiths as to holiday entitlements, the sum offered is still somewhat more than the total amounts awarded.

[29] All of this suggests that a modest discount on account of the Calderbank offer could be applied, with the emphasis on the word "modest".

[30] However, when balancing the parties' positions, I am of the view that there would be an artificiality in deviating from the daily tariff in a small way in either direction. Accordingly, costs are awarded in favour of Ms Griffiths at the daily tariff.

Orders

[31] I order Boost Promotions Limited to pay to Ms Griffiths within 28 days of the date of this determination:

- a. The sum of \$2,315.06 gross in respect of public holiday pay;
- b. The sum of \$3,148.48 gross in respect of holiday pay; and
- c. The sum of \$8,000 as a contribution to costs.

Claire English
Member of the Employment Relations Authority

⁵ Ibid, [Practice Direction of the Employment Relations Authority](#)

