

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 31
5438164/5439227

BETWEEN NEVILLE CRAIG BRENNAN
Applicant

A N D AFOS LIMITED
First Respondent

A N D ANN ROSEMARY SHARPE
Second Respondent

A N D RICHARD BRUCE SHARPE
Third Respondent

Member of Authority: Rachel Larmer

Representatives: Tim Oldfield, Counsel for the Applicant
Parvez Akbar, Counsel for the Respondents

Investigation Meeting: On the papers

Submissions Received: 09 October 2017 from Applicant
27 October 2017 from Respondents
06 November 2017 from Applicant

Date of Determination: 31 January 2018

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mr Brennan as the successful party in respect of his wage arrears proceedings now seeks a costs order in his favour.

[2] Mr Brennan says that up until August 2017 he incurred legal costs in excess of \$82,000 which included \$7,848.12 disbursements, which predominantly relate to the engagement of an expert to calculate the remedies he was awarded.

[3] Mr Brennan says these costs were reasonably incurred because of the length and complexity of the matter and the amount of money at stake. He also notes that he recovered in excess of \$237,000 as a result of his successful legal claims against his former employer.

Applicant's claim

[4] Mr Brennan seeks costs as follows;

- a. \$3,574.93 indemnity costs for the respondents' unsuccessful counterclaims;
- b. Costs for the substantive claims he succeeded on based on a daily tariff rate of \$22,750;
- c. \$7705 to reimburse the costs he incurred in relation to the expert's report;
- d. \$1,750 costs for this costs application;
- e. \$143.12 to reimburse a \$71.56 filing fee for this matter plus a \$71.56 filing fee for a compliance order application he filed on 04 February 2016 under AEA 5607006, which was withdrawn on 10 February 2016.

[5] Mr Brennan says that if the Authority adopts a daily tariff based approach to costs the tariff should be uplifted from \$3,500 per day to \$22,750 per day due to the following factors:

- (a) The extraordinary nature of the investigation and its complexity, including the difficulty ascertaining the quantum of remedies and the significant amount of those remedies;
- (b) The respondents' dispute of claims and defences that were without merit;
- (c) The respondents' conduct, which unnecessarily increased costs;
- (d) The Authority's comment in its 04 September 2017 determination that it is open to considering whether indemnity costs are appropriate in respect of the Respondents' unsuccessful counterclaims and Mr Brennan's successful dismissal application under clause 12A Second Schedule Employment Relations Act 2000 (the Act).

[6] Mr Oldfield says that while the costs reimbursement Mr Brennan is seeking is significant in terms of the level of costs awarded by the Authority, it is in fact modest and reasonable when the history of these proceedings is examined.

Respondents' position

[7] The respondents say that indemnity costs are not appropriate. They claim that the length of this matter cannot be attributed to any of their actions, and instead say that it was the applicant and not who made the matter more lengthy and complex than it should have been.

[8] The respondents claim that the applicant was unrealistic about his claims and they refer to the changing amount of total commission arrears he has claimed. The respondents claim that the applicant has failed to provide a breakdown of his own calculations or to make an effort to verify the respondents' calculations which they say has resulted in them (the respondents) incurring unnecessary legal costs.

[9] The respondents' position is that if Mr Brennan had not been unrealistic about his claims then the Authority investigation could have been avoided altogether.

[10] The respondents say that there is no basis for the increase in the daily tariff that Mr Brennan seeks if his indemnity costs claim does not succeed.

[11] The respondents say that the notional daily tariff of \$3,500 per day should be applied to this matter but that the notional daily tariff rate should be reduced by half.

[12] The respondents say that costs should be approached on the basis that this matter has simply involved only four days of investigation meeting time, meaning the notional starting point for assessing costs is \$14,000.

[13] The respondents further say that the notional starting tariff needs to be reduced by half to reflect what they claim is the unnecessary costs Mr Brennan's conduct caused them to incur.

[14] The respondents further say that a costs award should only apply to the first respondent and that it should be no more than \$7,000 in total because they say that no disbursements should be awarded.

[15] The respondents say that any costs order made by the Authority should include an order that any costs awarded be paid by instalments of \$1,000 per month.

History of the matter

[16] This is a long running matter which has required extensive time and resources from the parties and Authority on an on-going basis for more than three years.

[17] There have been numerous telephone conferences – some of which were lengthy, extensive written communications have been exchanged both between the parties and with the Authority. To give some idea of the scope of this matter I have nine A4 ring binders of documentation plus a full archive box of additional files and documentation.

[18] The substantive determination involved 18 discrete legal claims which required determination and some of these claims also involved multiple sub-issues. The subsequent determination quantifying remedies involved multiple issues which took many months to resolve. The respondents' unsuccessful counterclaim involved 8 discrete issues to be determined.

[19] Throughout the entire matter there were ongoing disputes between the parties and ongoing issues regarding documentation.

[20] There was a four day substantive investigation meeting, predominantly on the issue of liability. The substantive determination was issued on 21 January 2016. The final determination quantifying Mr Brennan's remedies was issued on 04 September 2017. It is important to note that there was extensive ongoing work done by the parties and the Authority in the intervening period between these two determinations.

[21] The Authority has issued nine separate determinations in respect of these proceedings. This costs determination is the tenth determination.

[22] This cannot be viewed as a normal or standard Authority investigation in any way. I agree with Mr Oldfield that this has been a lengthy and complex case which has required far more time and resources than most other Authority claims do.

Issues

[23] The following issues are to be determined:

- (a) Should Mr Brennan be awarded indemnity costs?
- (b) If not, how should the notional daily tariff be applied?
- (c) Should the notional daily tariff be adjusted?
- (d) What, if any, disbursements should Mr Brennan be awarded?
- (e) What, if any, costs should the respondents be awarded?
- (f) What, if any, costs should be awarded for this costs application?
- (g) Should the Authority order that any costs awarded are to be paid by instalments?

Should Mr Brennan be awarded indemnity costs?

[24] The Court of Appeal in *Bradbury v Westbank Banking Corp*¹ identified a number of non-exhaustive categories for which indemnity costs may be appropriate.

[25] Although *Bradbury* involved commercial litigation under the High Court cost provisions, the Court of Appeal's decision provides guidelines for the Authority when considering an indemnity costs application.

[26] I consider that the following categories identified by the Court of Appeal in *Bradbury* are potentially applicable to this case:

- (a) The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
- (b) Doing so in wilful disregard of known facts;
- (c) Making allegations which ought never to have to been made or unduly prolonging a case by groundless contentions.

[27] Notwithstanding my view that this matter does appear to fall within three categories associated with a possible indemnity costs award, I nevertheless prefer to adopt the Authority's usual notional daily tariff-based approach to costs.

¹ [2009] NZCA 234

[28] I consider that the notional daily tariff can be adjusted to do justice to the parties by reflecting the particular circumstances of this case in a way that is consistent with the Authority's usual costs practice.

[29] For those reasons I decline to award indemnity costs. I will however be guided by the actual costs Mr Brennan incurred in respect of the unsuccessful counterclaims filed by the first respondent when considering factors relevant to assessing what if any adjustments are necessary to the notional daily tariff.

How should the notional daily tariff be applied?

[30] Although costs principles in the Authority are so well known I do not need to set them all out again here, I specifically acknowledge that the Authority's costs discretion must be exercised on a principled basis and that costs cannot be used to punish or signal disapproval of a party.

[31] Bearing in mind well established costs principles, I consider that the most appropriate way of addressing costs in this case is to examine each of the Authority's nine determinations.

[32] I start by determining a notional starting tariff for assessing costs in respect of each separate determination then go on to consider whether the notional starting tariff for each separate determination should be adjusted.

[33] This approach allows me to apportion costs fairly at each point of this lengthy matter which I believe will enable the fairest assessment of costs to be undertaken given the complexities of this matter.

[34] The notional starting daily tariff I am using is \$3,500 because that was the tariff that applied at the time this matter was filed with the Authority. As an aside, I note that the notional daily tariff is currently \$4,500 per day for the first day then \$3,500 for subsequent investigation meeting days.

[35] However this new increased daily tariff does not apply to these proceedings which all pre-dated the increase.

First determination

[36] The first determination was issued on 30 June 2015. This involved an application by Mr Brennan under clause 12A of the Second Schedule of the Employment Relations Act 2000 (the Act) to dismiss the first respondent's counterclaims on the basis that they were frivolous and/or vexatious because they had no prospect of succeeding.

[37] I find that the notional starting point for assessing costs in respect of that matter is 0.50 of the notional starting tariff, namely \$1,750.

Second determination

[38] The second determination was issued on 27 July 2015. It involved an application by Mr Brennan to exclude the evidence of the respondent's chartered accountant.

[39] This was a very simple matter which was dealt with on the papers and which did not involve any difficult legal or evidential issues. I therefore consider that the notional starting point for assessing costs in respect of this matter should be 0.25 of the notional daily tariff, namely \$875.

Third determination

[40] The third determination was issued by the Authority on 01 December 2015. This was a consent determination regarding a partial payment of holiday pay entitlement arrears and partial payment of commission arrears.

[41] Costs in respect of this matter were reserved pending the resolution of the substantive matter. This was another straightforward matter so I assess the notional starting tariff for assessing costs to be 0.25 of the notional daily tariff, namely \$875.

Fourth determination

[42] The fourth determination was issued on 21 January 2016. This was a substantive determination which involved four long full days of investigation meeting time. The notional starting point for assessing costs in respect of that matter is four days multiplied by the then applicable notional daily tariff of \$3,500, namely \$14,000.

Fifth determination

[43] The fifth determination was issued on 11 August 2016. It involved a determination regarding issues that had arisen between the parties regarding the calculation of the liabilities determined by the Authority in its substantive determination.

[44] I consider that the appropriate notional starting tariff for this matter should be 0.5 of the notional daily tariff, namely \$1,750.

Sixth determination

[45] The sixth determination was issued on 12 December 2016. This involved two telephone conferences during which evidence put forward by the parties was tested and the parties' lawyers had an opportunity to provide the Authority with submissions.

[46] This involved a dispute between the parties about whether the respondents were attempting to recover alleged overpaid commission which the Authority had previously determined they were unable to do.

[47] I assess the notional starting tariff for costs in respect of that matter to be 0.50 of the notional daily tariff, namely \$1,750.

Seventh determination

[48] The seventh determination was issued on 16 June 2017. This involved a dispute between the parties over the content of the expert's report regarding the quantification of the remedies awarded by the Authority. The respondents raised issues with the expert's methodology and with the final figures contained in the expert report.

[49] I consider that the notional starting tariff in respect of this matter should be 0.75 of the notional daily tariff, namely \$2,625 due to the issues, submissions and review of evidence involved.

Eighth determination

[50] The eighth determination was issued on 21 July 2017. It involved a dispute between the parties regarding the calculations used by the expert and disputes over the various liabilities addressed by the expert in his report.

[51] I consider the notional starting tariff for assessing costs in respect of this matter should be 0.25 of the notional daily tariff, namely \$875.

Ninth determination

[52] The ninth determination was issued on 04 September 2017. This quantified the outstanding remedies awarded to Mr Brennan in respect of each claim he had succeeded on.

[53] Although the matter was dealt with on the papers, I consider the extent of work involved by all means that this should be treated as 0.50 of the notional daily tariff, namely \$1,750.

Should the notional daily tariff be adjusted for any of these matters?

[54] *30 June 2015 determination* – This matter related to Mr Brennan's application to dismiss the first respondents multiple counterclaims.

[55] It required determination of eight issues. The first respondent succeeded on one issue so one other sub issue did not require determination due to that success. Mr Brennan succeeded on the remaining six issues.

[56] I find that the notional starting tariff of \$1,750 needs to be decreased by \$250 to reflect the first respondent's success on the holiday pay overpayment counterclaim remaining as a live issue to be determined.

[57] Mr Brennan did not succeed in his application to dismiss the first respondent's holiday pay overpayment counterclaim as being frivolous or vexatious because it required investigation due to the material conflicts in the evidence that needed to be tested in order to determine the disputed material facts.

[58] However all of the other counterclaims made by the first respondent were entirely without merit because they had no prospect of success. I consider that should

have been obvious to the first respondent from the outset. These were all dismissed for being frivolous and vexatious.

[59] I find that the reduced starting tariff of \$1,500 (based on the reduction of \$250 referred to above) must be significantly increased to reflect the fact that the first respondent's counterclaim involved arguments that were clearly not tenable and which were unsupported by the law and their own facts.

[60] The first respondent was put on notice from the outset about the legal and evidential difficulties their counterclaims faced and they were clearly warned that there would likely be adverse costs consequences if their counterclaims did not succeed. The risk of an award of indemnity costs was identified in an early telephone conference with the parties.

[61] I find that Mr Brennan was put to unnecessary additional time and costs of attending a telephone conference, engaging in communications with the respondents and with the Authority over counterclaim issues and in filing a predominantly successful application to dismiss almost all of the counterclaims on the grounds they were frivolous and vexatious.

[62] Mr Brennan has provided evidence (supported by invoices) to show that his legal costs on this issue were in excess of \$3,500.

[63] I find that the tariff of \$1,500 should be doubled to reflect the unnecessary additional costs Mr Brennan had to unnecessarily incur because of the way in which the first respondent elected to pursue its counterclaims against him.

[64] The first respondent is ordered to pay Mr Brennan \$3,000 towards his actual legal costs in respect of the counterclaim determination.

[65] *27 July 2015* - The notional starting point for assessing costs in respect of the 27 July 2015 determination was \$875. Mr Brennan as the unsuccessful party is not entitled to costs in respect of this application to strike out the evidence from the first respondents' accountant.

[66] The first respondent, as the successful party, is entitled to an award of costs from Mr Brennan. I consider that the costs awarded should be as per the notional daily tariff, which in this case is \$875.

[67] Accordingly Mr Brennan is ordered to pay the first respondent \$875 towards its legal costs on the strike out application.

[68] *01 December 2015 determination* – This was a consent determination to which I find the notional starting tariff should apply.

[69] Accordingly the first respondent is ordered to pay Mr Brennan \$875 towards his actual costs in respect of the consent determination in his favour.

[70] *Substantive determination on 21 January 2016* - This involved a four day substantive investigation meeting so the notional starting tariff for assessing costs is \$14,000.

[71] The costs liability of the second and third respondents has been separately assessed as distinct from the first respondent's costs liability to reflect their individual culpability.

[72] I consider that the penalties aspect of the substantive investigation should be set at 0.5 days of investigation meeting time. That time then needs to be split equally between the second and third respondents.

[73] I do not consider the notional tariff for the penalty portion of the substantive investigation meeting, needs to be adjusted.

[74] I therefore order the second and third respondents to each pay Mr Brennan \$875 towards his costs in respect of the substantive determination.

[75] That leave situation where the first respondent is liable for 3.5 days out of the 4 days of investigation meeting time. That means the notional starting point for assessing the first respondent's costs liability on the substantive matter is \$12,250 (being \$3,500 notional tariff x 3.5 days).

[76] I now consider whether that notional starting tariff should be adjusted.

[77] I do not accept the first respondent's argument that the notional daily tariff should be reduced.

[78] It is not correct that Mr Brennan has taken an approach that has unnecessarily extended the investigation meeting. I consider the length of hearing was related to

documentation and evidential issues which I consider the respondents bear responsibility for.

[79] I do not accept Mr Akbar's submission that the investigation meeting should not have taken more than two days, and that the fact that it took four days can be attributed to Mr Brennan's failure to engage with the respondents.

[80] I find that the investigation meeting took so long because there was considerable dispute, which I note extended past the substantive investigation and which also adversely impacted on the quantification of remedies, regarding relevant documentation.

[81] The first respondent as the employer should have had or been able to provide accurate records to address Mr Brennan's claims. Their failure to do so is solely their fault and not Mr Brennan's.

[82] Documentation clarity, categorisation of clients and identification of the commission actually due and then paid took extensive time to resolve as it was the subject of many disputes between the parties. There were multiple versions of client lists produced at different times, and an on-going lack of clarity about what commissions had or had not been paid and when.

[83] I do not accept the respondents' criticism of Mr Brennan's information or initial calculations associated with his claims, because he made it clear that the information he was providing was based on the limited information he had available to him. He had expected his employer to keep accurate records.

[84] It is understandable that Mr Brennan's claim had to change in light of the continuing additional disclosures of information from the respondents, and in light of concessions that were ultimately made during the Authority's substantive investigation meeting.

[85] I consider it significant that the respondents with all of the resources available to them could not provide accurate calculations based on documentation that they themselves had created or generated from their online system.

[86] I do not see how Mr Brennan can be criticised for changing calculations when he was effectively reliant on the respondents' ever changing information. I note that this was a situation where the respondents' own calculations also keep changing.

[87] This is not a case of Mr Brennan delaying the investigation or causing the respondents' legal costs to be unnecessarily increased. Quite the contrary.

[88] Rather it is an example of why employers are required by law to keep accurate wage and time records so that this sort of situation doesn't occur. Mr Brennan has had to expend considerable time and resources to recover his statutory and contractual entitlements.

[89] This has been caused in my view because the first respondent failed to meet its contractual and statutory obligations by failing to have the necessary (and correct) information about Mr Brennan's remuneration readily available.

[90] That omission meant that it was very challenging, given the way the commission arrangements were implemented, for him and others, including the parties, counsel, and the Authority, to calculate what Mr Brennan had actually been paid, so that could then be compared that to what he should have been paid.

[91] I also consider that the manner in which the respondents conducted themselves unnecessarily extended the amount of time required to resolve Mr Brennan's claim. Every issue was disputed and extensively argued about.

[92] The limited matters that were eventually agreed on only occurred after evidence relating to them had been thoroughly tested and in some cases after the Authority had provided strong indications or determinations to the parties.

[93] I consider that responsibility for the complexity and length of this matter lies with the respondents, not Mr Brennan.

[94] I do not consider it appropriate that Mr Brennan (who succeeded in respect of most of the evidential issues in dispute) should have to bear the considerable burden of the additional and in my view unnecessary legal expenses associated in responding to the manner in which the respondents conducted their case.

[95] I consider that the first respondent took an unrealistic view of its own evidence which unnecessarily increased the length of the investigation and thus Mr Brennan's legal costs.

[96] I do not accept Mr Akbar's criticism of Mr Brennan's actions in relation to the quantification and determination of remedies. This is something that the first respondent should have been able to address in-house. It had all of the source documentation and in my view the Authority had made it clear what was required in terms of the discrete calculations that needed to be made.

[97] Notwithstanding that, the first respondent's own accountant did not correctly quantify or calculate the amounts owed to Mr Brennan. I consider that a significant failure given that the first respondent held all of the relevant documentation.

[98] Mr Brennan's approach was that he was unable to dispute the first respondent's underlying source documentation so he based what he was owed on the originating collation of information which the first respondent exclusively had access to.

[99] It would have been prohibitive from a time and cost basis for Mr Brennan to have investigated further to determine whether the first respondent had accurately compiled the source documentation which it said was the basis of all of his subsequent entitlements.

[100] I do not accept Mr Akbar's submission that Mr Brennan was somehow blameworthy in terms of unnecessarily increasing the respondent's costs because the amounts he claimed decreased from the first statement of problem that was filed compared to what he was ultimately awarded in the final remedies determination.

[101] This change was understandable in the light of the serious questions that were raised regarding the documentation. These documents were subject to numerous findings by the Authority both during the substantive investigation and following it. These in turn impacted on the ultimate liability calculations so I am not surprised that Mr Brennan's arrears calculation changed as the case evolved.

[102] Mr Akbar's submission that the investigation of this matter was made extraordinary by Mr Brennan's alleged "*continuous and blatant refusal to provide a*

breakdown of his calculations and at the least to make an effort to verify the respondent's calculations” is not accepted.

[103] I find that Mr Brennan was not unrealistic about his claims and he was responsive from the very outset and during the Authority's investigation to the information that the respondents were providing.

[104] I am further satisfied that Mr Brennan did provide the respondents with information about his calculations so that they had an opportunity to address that in light of their assertions that his calculations were incorrect.

[105] I find that this is a case where the first respondent has conducted itself in such a way that it has unnecessarily increased Mr Brennan's legal costs. I therefore consider it appropriate to reflect that in the costs that Mr Brennan is awarded.

[106] I consider that failure to do that would not only be out of line with normal costs assessments but is also against the public interest because it would encourage employers to not comply with their minimum code legislation obligations on the basis that they could subsequently resolve any disputes years down the track after putting an employee to extensive unnecessary lengthy litigation and legal costs.

[107] I am quite clear that the length of hearing and the amount of legal costs Mr Brennan incurred arose from the first respondent's actions and not from the manner in which Mr Brennan conducted his case.

[108] I consider that the notional daily tariff needs to be increased to reflect the additional legal costs that Mr Brennan was put to as a result of the manner in which the first respondent elected to run its case.

[109] I consider that the notional starting tariff of \$12,250 (being \$14,000 less the \$1,750 (being \$875 each) which the second and third respondents have been ordered to pay) should be multiplied by 2 to adequately reflect the costs liability of the first respondent towards Mr Brennan.

[110] Accordingly the first respondent is ordered to pay Mr Brennan \$24,500 towards his legal costs for the four day substantive investigation.

[111] *11 August 2016 determination* – This involved disputes between the parties about calculation issues. The notional starting tariff is \$1,750 which I find does not need to be adjusted.

[112] The first respondent is ordered to pay Mr Brennan \$1,750 towards his legal costs for this matter.

[113] *12 December 2016 determination* – This involved the first respondent's unsuccessful attempt to reduce its overall commission arrears liability by removing alleged commission overpayments which the Authority had previously determined were not to reduce the amount of commission arrears Mr Brennan had awarded.

[114] The alleged commission overpayment claim pre-dating 01 May 2009 had been dismissed in accordance with the 30 June 2015 determination. Any subsequent alleged commission overpayment arrears relating to the respondents' counterclaim was withdrawn during the substantive investigation due to a lack of evidence to support such a claim.

[115] Mr Brennan therefore succeeded in his claim to the Authority that the respondents were attempting a "*back door*" recovery of commission overpayments in circumstances where they were not legally entitled to do so.

[116] I consider that the notional starting tariff of \$1,750 does not need to be adjusted in respect of this matter.

[117] *16 June 2017 determination* – This involved Mr Brennan seeking an award of remedies as per the expert's report while the respondents disputed the expert's report.

[118] The various issues raised by the parties regarding the methodology and the final figures set out in the expert report were determined predominantly in favour of Mr Brennan, who I view as the successful party in respect of this application.

[119] The notional starting point in respect of this matter was assessed as 0.75 of a one day investigation meeting, therefore \$2,625. I do not consider the notional starting tariff needs to be adjusted.

[120] Although the respondents argue that there is some ambiguity regarding the substantive determination in relation to the actual period for which the 10%

commission reduction was to apply, this was a matter which was discussed extensively during the substantive investigation meeting.

[121] For that reason it should have been clear to all who were at the substantive investigation meeting that the reduction was to apply for a 12 month period and not 13 month period as the respondent seem to suggest in its subsequent interactions with the Authority in respect of this matter.

[122] The first respondent is ordered to pay Mr Brennan \$2,625 towards his legal costs for the 16 June 2017 determination.

[123] *21 July 2017 determination* – This had a notional starting point of 0.50 of a full day investigation - \$875.

[124] I consider that the notional starting tariff needs to be reduced by \$250 to reflect the respondents' success on the sick leave issue, because Mr Brennan made it clear at the substantive investigation meeting that he is not claiming sick leave arrears.

[125] The bereavement leave representations made to the Authority during the substantive investigation meeting by the second and third respondents on behalf of the first respondent acknowledged that Mr Brennan had suffered a qualifying bereavement on the dates he was claiming, so was legally entitled to have been paid bereavement leave.

[126] The respondents recognised Mr Brennan had not been paid any bereavement leave so they agreed to remedy that.

[127] Bereavement leave had not been addressed in the substantive determination on the basis of the representations given by the respondents during the substantive investigation meeting that it accepted liability and would be paying Mr Brennan for the unpaid bereavement leave.

[128] However, it appears the respondents' must have resiled from that position because the bereavement leave arrears subsequently became a live issue, which was then determined in Mr Brennan's favour.

[129] There was also an issue resolved in Mr Brennan's favour regarding holiday pay arrears. The respondents unsuccessfully argued that the consent determination extinguished all public holiday entitlement arrears claims.

[130] That is not the case. This was another issue that was discussed and agreed upon at the substantive investigation. All parties recognised that the Authority's findings on commission arrears liability would potentially affect the amounts that Mr Brennan should have been paid for his statutory public holiday entitlements under HA03.

[131] I consider that this matter involved the respondents raising disputes about issues that they had already accepted liability for and had voluntarily agreed to pay (i.e. without an Authority determination) during the substantive investigation meeting.

[132] I therefore consider that the notional starting tariff should be increased by 0.5 (\$875) to reflect the unnecessary expense that Mr Brennan was put to by being required to address the bereavement pay and public holiday entitlements arrears as a result of the respondents changing their agreed position.

[133] The first respondent is ordered to pay Mr Brennan \$2,375 (\$1,750 notional starting tariff less \$250 for respondents' sick leave pay issue success plus \$875 uplift to tariff due to respondents conduct unnecessarily increasing costs) in respect of this matter.

[134] *04 September 2017 determination* – The notional starting tariff for this was fixed at 0.50 of a day - \$1,750.

[135] I do not consider that there are any factors that warrant adjustment being made to that notional starting tariff. Accordingly, the first respondent is ordered to pay Mr Brennan \$1,750 in respect of this matter.

What, if any, costs, should the respondents be awarded?

[136] Mr Brennan is ordered to pay the first respondent \$875 for his unsuccessful strike out of the accountant's evidence application which was determined on 27 July 2015.

What, if any, disbursements should Mr Brennan be awarded?

[137] Mr Brennan is entitled to be reimbursed \$71.56 for his filing fee in respect of this matter.

[138] Mr Brennan also claims reimbursement of his \$71.56 filing fee in matter AEA 5607006 which was an application for a compliance order in respect of the Authority's substantive determination issued on 21 January 2016.

[139] He filed this compliance order application on 04 February 2016. Mr Brennan was subsequently paid the amounts sought, so he withdrew his application on 10 February 2016.

[140] I decline to order reimbursement of Mr Brennan's filing fee for that matter because I consider his proceedings were premature. The letter of demand was sent on 22 January 2016 which was still within the challenge period for the substantive determination.

[141] On 02 February 2016 the respondents replied to Mr Brennan's 22 January 2016 demand that there were working on the request and expected to have a response the next day.

[142] On 03 February 2016 the first respondent experience an unexpected medical event, which her counsel informed Mr Brennan's counsel about. The following day Mr Brennan issued compliance proceedings. A few days later he received the amounts he had demanded.

[143] I do not consider compliance proceedings were necessary or appropriate at the time they were filed so do not consider it appropriate for the respondents to reimburse Mr Brennan's filing fee for his compliance application.

[144] Mr Brennan is entitled to be reimbursed for all of the disbursements he expended in engaging the expert witness. It was reasonable and indeed necessary for an independent expert to be engaged given the ongoing disputes between the parties regarding the calculation of Mr Brennan's remedies.

[145] The parties were tens of thousands of dollars apart in their calculations so the engagement of an expert was crucial to finally resolving this matter.

[146] I do not accept the respondents' submission that if Mr Brennan had "*provided his workings*" regarding his quantification of his arrears then an expert would not have needed to have been engaged. Mr Brennan did provide his quantification which the first respondent rejected.

[147] The first respondent had its own in-house accountant but despite that, still was unable to calculate Mr Brennan's arrears entitlements correctly. That is why an expert was necessary.

[148] The expert calculated Mr Brennan was owed approximately \$40,000 more than what the first respondent had calculated was owing. This is a significant difference which justifies the engagement of the expert.

[149] I consider that this expert only had to be engaged because the first respondent failed to calculate Mr Brennan's entitlements correctly and continued to argue over issues that, in the Authority's view, had already been resolved or had been previously addressed in the Authority's substantive determination or at the substantive investigation meeting or through subsequent engagement with the parties.

[150] The applicant says that the total costs he incurred in respect of engaging the expert was \$7,705. The first respondent is ordered to reimburse Mr Brennan that full amount.

What if any costs should be awarded for this costs application?

[151] Mr Brennan seeks a further 0.50 of the notional daily tariff for preparing these costs submissions. He says he made a costs proposal to the first respondent which was never responded to.

[152] I consider it appropriate to determine costs at the rate of 0.25 of the daily tariff for this costs determination. This amount is to be equally shared among all three respondents.

[153] The first respondent, second respondent and third respondent are each ordered to pay Mr Brennan \$291.66 for this successful costs application.

Payment by instalments

[154] The respondents submitted that costs be paid to Mr Brennan by way of instalments but they have failed to provide any affidavit evidence or detailed explanation to support such a submission. It accordingly does not succeed.

[155] It is however open to Mr Brennan and the respondents to agree between themselves that their costs liability may be paid by way of instalments. They parties may also seek free mediation assistance to support them to reach a satisfactory arrangement.

[156] However, at this stage there is insufficient evidence before the Authority to enable an order regarding instalments to be made.

Outcome

[157] Mr Brennan is ordered to pay total costs to the first respondent of \$875 for the 27 July 2015 determination.

[158] Mr Brennan is awarded total overall costs in this determination of \$40,666.64 from all three respondents combined plus \$7,776.56 disbursements from the first respondent only.

[159] The liability for paying the total costs and disbursements which Mr Brennan has been awarded is allocated between the three respondents as follows;

- a. The first respondent is ordered to pay Mr Brennan a total of \$38,333.32 towards his actual legal costs for all of the determinations issued on this matter – (excluding the 27 July 2015 determination for which Mr Brennan owes the first respondent costs) – including this costs application;
- b. The first respondent is ordered to pay Mr Brennan \$7,776.56 to reimburse him for his actual disbursements (being \$71.56 for his filing fee for this claim plus \$7,705 to reimburse his share of the expert fees);
- c. The second respondent is ordered to pay Mr Brennan \$1,166.66 (being \$875 for the penalty component of the substantive investigation plus \$291.66 towards this costs application);
- d. The third respondent is ordered to pay Mr Brennan \$1,166.66 (being \$875 for the penalty component of the substantive determination plus \$291.66 for this costs determination).

Orders

[160] Within 30 days of the date of this determination;

- a. The first respondent is ordered to pay Mr Brennan \$45,234.88 (being \$38,333.32 towards his total legal costs plus \$7,776.56 to reimburse his disbursements less \$875 Mr Brennan has been ordered to pay the first respondent for the 27 July 2015 determination);
- b. The second respondent is ordered to pay Mr Brennan \$1,166.66 (being \$875 for the penalty component of the substantive determination plus \$291.66 for costs on this determination);
- c. The third respondent is ordered to pay Mr Brennan \$1,166.66 (being \$875 for the penalty component of the substantive determination plus \$291.66 for costs on this determination).

Rachel Larmer
Member of the Employment Relations Authority