

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 337  
3215019

BETWEEN            GELBERT HORN  
                                 Applicant

AND                    KINETICS GROUP LIMITED  
                                 Respondent

Member of Authority:    Antoinette Baker

Representatives:        Paul Mathews, for the Applicant  
                                 Lisa Oakley, for the Respondent

Submissions received:    24 May 2024 from Applicant  
                                 5 June 2024 from Respondent

Determination:            7 June 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     On 2 May 2024, I determined that the respondent (KG) was to pay \$4,000.00 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) to the applicant, Mr Horn<sup>1</sup> (my determination). This was the result of Mr Horn's successful grievance claim that he had been unfairly disadvantaged in his employment as a result of KG's actions relating to a suspension during his employment.

[2]     The parties were asked to resolve costs between themselves. Costs have not been resolved. Mr Horn has now applied for an award of costs claiming \$5,130.00 plus the filing

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<sup>1</sup> *Horn v Kinetics Group Limited* [2024] NZERA 256.

fee of \$71.55. This is based on the first day tariff of \$4,500.00<sup>2</sup> and an additional \$630.00 of costs that (it is submitted) are not covered by the tariff. KG filed submissions in relation to costs claiming it should be paid costs of \$15,000.00. It refers to the second of two Calderbank letters<sup>3</sup> that would have left Mr Horn better off had it been accepted at the time and as a result would have avoided the subsequent costs incurred by KG to defend the claim.

[3] The Authority has the discretion to award a reasonable contribution to costs to a successful party.<sup>4</sup>

[4] The Authority uses a notional daily tariff as a starting point for assessing a reasonable contribution to the costs incurred by a successful party preparing for and taking part in an investigation meeting.<sup>5</sup> An adjustment to the starting point may occur based on 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>6</sup>

[5] As already noted above, the current tariff applied for a one-day Authority investigation meeting is \$4,500.00. The matter relating to Mr Horn's claim was heard during a one day investigation meeting. Mr Horn has been successful in his grievance claim. The starting point is therefore a costs contribution to him as the successful party at the tariff rate of \$4,500.00.

[6] Mr Horn seeks an uplift to the tariff based on costs incurred during the process associated with the suspension. I do not agree that this representation cost is not covered by the tariff. In a matter that relates to a successful grievance claim there have often been actual costs associated with representation during (say) meetings to discuss disciplinary matters. I do not find I should depart from the usual practice by adding these here as an uplift. However, I agree that it is reasonable that the filing fee of \$71.55 should be reimbursed to Mr Horn.

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<sup>2</sup> <https://www.era.govt.nz/determinations/awarding-costs-remedies/>.

<sup>3</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 up later in any costs application if the claim is not settled and proceeds to be determined.

<sup>4</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>5</sup> See above at note 2.

<sup>6</sup> As above.

**Is there to be an adjustment to the starting point because of Calderbank letters from KG to Mr Horn?**

[7] The Employment Court<sup>7</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”. I note further that while KG has submitted various approaches in the Employment Court to ‘Calderbank’ letters, that jurisdiction has a specific regulatory obligation to consider offers made to settle when exercising its discretion to make orders for costs<sup>8</sup>. That said, but considering this context, the Authority may still consider the rejection of a reasonable ‘Calderbank’ offer when considering an adjustment to the tariff.

*Calderbank Letter dated 13 April 2023*

[8] On 13 April 2023 KG wrote to Mr Horn’s representative (the first letter).

[9] The first letter included that KG did not believe Mr Horn had grounds for a personal grievance, that if he continued to pursue the matter KG would ‘counterclaim’ and look to recover costs including penalties for failing to act in good faith with breaches of confidentiality as to contribution. The latter I take to be in relation to s 124 of the Act where a successful claimant may have remedies reduced for a finding that they have contributed to the grievance. In my determination I did not find the remedy was to be reduced for this reason.

[10] KG offered the following settlement terms on a ‘without prejudice save as to costs’ basis with no admission to liability. This was expressed as being in return for Mr Horn withdrawing his grievance:

- a. \$1,250 (Plus GST) for representative costs to be paid to Mr Horn’s representative within 14 days on receipt of an invoice.

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<sup>7</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

<sup>8</sup> Employment Court Regulations 2000, Regulation 68.

- b. An apology from Mr Horn's two managers and acknowledgement that the managers wished to work with Mr Horn as a 'valued member' of the workplace team.
- c. Private and confidential sessions with an Employer Assisted Programme (EAP) of counselling or three sessions with 'a more experienced coach' [giving the name and contact].

[11] The above offer was left open for acceptance until 5.00pm on 28 April 2023. Mr Horn did not accept.

[12] I do not find this letter supports a downward adjustment to the above starting point. It offers compensation considerably less than what Mr Horn was eventually awarded and in exchange for him withdrawing his grievance for disadvantage which was a matter that Mr Horn was successful in claiming.

*Calderbank letter dated 8 June 2023*

[13] KG wrote to Mr Horn's representative on 8 June 2023 (the second letter). The terms again on a 'without prejudice save as to costs' basis with no liability accepted included:

In full and final settlement of all claims, [KG] proposes the following terms of settlement:

- a) \$5,000.00 under s 123 of the Employment Relations Act
- b) Private and Confidential
- c) Mutual Non-Disparagement

The offer was not accepted by Mr Horn.

[14] For KG it is submitted that this second letter was sent 'approximately six months *prior* to the Applicant [Mr Horn] lodging proceedings with the Authority' (my emphasis in italics added). Mr Horn lodged in the Authority on 22 February 2023. I can only take it that the reference in the submission is mistaken. Mr Horn will have incurred costs by the time of this second letter though not yet for provision of evidence or attendance at the investigation meeting.

[15] As with the first letter, KG includes that it did not believe Mr Horn had grounds for a personal grievance, that if he continued to pursue the matter KG would proceed with 'counterclaims and look to recover costs including penalties for failing to act in good faith with breaches of confidentiality as to contribution.' The difference in wording from the first letter is the plural 'counterclaims.'

[16] The second letter references 'your raising a constructive dismissal claim' which was not before the Authority in these proceedings. Consistent with this wording (and I note also the reference to 'counterclaims' above) it is submitted for Mr Horn that this second letter was offering to settle *all* matters including a 'constructive dismissal claim' and not just the grievance relating to the suspension that has been determined by the Authority. KG submits that the 'constructive dismissal' was never properly formulated and just referred to in an email. This submission appears inconsistent with the wording in the second letter which refers to 'and your raising a constructive dismissal claim.'

[17] It is submitted for Mr Horn (as I understand the submission) that because the second letter proposed settlement beyond just the 'suspension' grievance that this is a reason for me to disregard the effect of this \$5,000.00 offer to 'settle all claims'. I agree with that submission. I am not satisfied the \$5,000.00 took into account just the disadvantage claim regarding the suspension. That is what my determination ordered \$4,000.00 compensation for. That is what this costs application relates to.

[18] KG submits that costs should follow the event in this matter and transposes this to an award to KG for defending the claim saying that 'it deserves to have a contribution towards to the costs of defending a claim considering [Mr Horn] rejected two Calderbank offers, one of which [the second] was more substantial than the Determination awarded'. I find this approach misplaced. The first letter was considerably less in offer than what Mr Horn was awarded. The second letter proposed settlement for more than just the matter before the Authority. I further note that defending a claim is not the same as *successfully* defending a claim when sometimes this may result in an adjustment. KG submits that Mr Horn's claim was for compensation beyond what may have been realistic for the grievance he brought

forward. I take this to mean that he did not reasonably agree to settle this matter. However, the issues relating to the suspension were not complex. It related to a reasonably straight forward claim regarding the unfairness of a suspension in employment and I am satisfied that is what the parties prepared for. If anything, the additional witnesses prepared and heard from related to KG's own chosen evidence that linked to Mr Horn's alleged behaviour in telling people about his suspension. I did not find that led me to reduce the remedy awarded to him under s 124 of the At as I have already noted above.

[19] Considering the above I do not find that there is a reason to reduce the starting point of \$4,500.00 based on the usual tariff for a one day investigation meeting.

### **Summary**

[20] Kinetics Group Limited is to pay Gelbert Horn \$4,500.00 as a contribution to his costs together with \$71.55 as reimbursement of the Authority filing fee.

Antoinette Baker  
Member of the Employment Relations Authority