

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 477
3166201

BETWEEN THOMAS MASON
Applicant

AND SIGN-IT SIGNS LIMITED
Respondent

3180939

BETWEEN SIGN-IT SIGNS LIMITED
Applicant

AND THOMAS MASON
Respondent

Member of Authority: Philip Cheyne

Representatives: Lawrence Herzog, counsel for Thomas Mason
Naomh McAllister and Kristin MacDonald, counsel for Sign-It
Signs Limited

Investigation Meeting: On the papers

Submissions Received: 8 & 29 June 2023 for Mr Mason
22 June 2023 for Sign-It Signs Limited

Date of Determination: 25 August 2023

COSTS DETERMINATION OF THE AUTHORITY

The substantive determinations

[1] The separate applications were investigated together and a single determination was issued.¹ Costs were reserved.

¹ *Mason v Sign-IT Signs Limited* [2023] NZERA 272.

[2] Mr Mason was the applicant on file number 3166201. I found that Mr Mason was unjustifiably dismissed by Sign-It Signs Limited (Sign-It) and awarded \$8,000.00 compensation to settle that personal grievance. His separate personal grievance claim arising from a suspension on pay as part of Sign-It's investigation failed, as did his other claims.

[3] Sign-It was the applicant on file number 3180939. I found that Mr Mason had breached an express provision in his employment agreement. However, the claims for a penalty and a compliance order for the breach failed. Sign-It's other claims did not succeed.

[4] I now have the submissions from Mr Mason and Sign-It on costs. This determination resolves that issue.

Mr Mason's claim for costs

[5] Mr Mason says he was the successful party on both applications. On well-known principles, he seeks the application of the Authority's standard daily tariff for two days. Mr Mason also seeks an uplift of \$2,000.00 and a further \$1,201.76 to cover expenses – the lodgement fee, counsel and his flight costs and counsel's hotel costs. Appropriate receipts have been provided.

[6] The grounds for an uplift from the daily tariff amount are not set out.

[7] I am told that Mr Mason's costs exceed \$20,000.00. The claim is for a contribution to Mr Mason's actual legal costs.

Sign-It's claim for costs

[8] Sign-It's claim is based on its Calderbank settlement offer.

[9] It says that its offer, if it had been accepted, would have been more beneficial to Mr Mason than the success he achieved by taking the matter further. Mr Mason's decision to decline the offer should disentitle him to any costs and instead result in costs being awarded to Sign-It.

[10] Alternatively, Sign-It says that costs should lie where they fall, given that each party had a measure of success.

Mr Mason's reply

[11] Mr Mason disputes that the outcome was “mixed-success”.

[12] Mr Mason gave details of an earlier Calderbank offer that he had rejected. He says his rejection of the offers was reasonable in the circumstances and that the Authority should not depart from the principle that costs follow the event.

Analysis

[13] The Authority may order a party to pay to another party such costs and expenses as it thinks reasonable. Like all judicial discretions, it must be exercised in a principled manner. I am guided by the Authority's practice note:²

The daily tariff applied by the Authority is a starting point for assessing the successful party's entitlement to costs.

...

where a successful party's behaviour unnecessarily increased its costs, the Authority may reduce the daily tariff amount. Conversely, if an unsuccessful party turned down an effective settlement offer, the Authority may increase the costs above the daily tariff.

[14] Whether assessed on a separate application basis or a consolidated investigation meeting basis, Mr Mason was the successful party. His major personal grievance claim was upheld and he was awarded a remedy. Sign-It achieved a finding that Mr Mason had breached his employment agreement, but no further remedy was awarded. Sign-It in substance would have achieved that outcome without its separate application, given the requirement for the Authority to consider the extent to which an employee's action contributed in a blameworthy manner to the situation giving rise to a personal grievance.

[15] I accept that aspects of the problem on which Mr Mason did not succeed would have increased the investigation meeting time to some extent. However, lack of success on some grounds is not behaviour that has unnecessarily increased costs. Mr Mason's employment relationship problem was made out and in substance he defended the claims made against him. It is not appropriate to adjust the daily tariff by way of a time accounting approach as it would detract from treating him as the successful party.

² <https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf>

[16] There is no good reason to justify an uplift from the daily tariff figure.

[17] Mr Mason was entitled to instruct a representative of his choosing. However, costs associated with engaging out-of-town counsel are not usually recoverable. There is no reason to depart from that approach here. Similarly, Mr Mason moved away from the area where the employment was based. His costs to travel to the investigation meeting are not recoverable.

[18] Mr Mason would be entitled to costs of \$8,000.00 for two days plus \$71.56 for the lodgement fee, subject to considerations below.

[19] Sign-It offered to settle by paying Mr Mason \$3,000.00 compensation, a contribution to his costs of \$7,000.00 + GST, with both parties to withdraw their applications, to enter into a confidential full and final record of settlement but with the company otherwise reserving its right to pursue Mr Mason for breach of confidential information should any loss arise as a result of such breach.

[20] The offer was made on Wednesday 28 September 2022 and was open for acceptance until 5pm on Friday 30 September 2022.

[21] Directions had required Mr Mason to lodge and serve statements of evidence by 28 September 2022. The statements were apparently sent to counsel for Sign-It on 29 September 2022 and were lodged in the Authority later. The point for current purposes is that the offer was made reasonably late in the course of the proceedings.

[22] Assessed on a monetary basis alone, Mr Mason did not reject a reasonable Calderbank offer. Mr Mason will do better if regard is had to a prospective costs award in his favour.

[23] Counsel submits that Mr Mason was not well placed at the time he rejected Sign-It's offer to make a realistic assessment of the merit of Sign-It's defence to his claims or the merits of Sign-It's claims against him, as Sign-It had not lodged its statements of evidence. I disagree. There had been comprehensive exchanges between the representatives together with disclosure of most of the relevant material. Sign-It's intended evidence was well understood at the time Mr Mason needed to respond to the Calderbank offer.

[24] Counsel observes that it is unfortunate that Sign-It declined Mr Mason's early request to participate in mediation. Mr Mason had proposed mediation before the end of the

disciplinary investigation. The point is not material currently. Sign-It was entitled to proceed with a disciplinary process if it wished to do so.

[25] Sign-It by its Calderbank offer would have reserved a right to pursue Mr Mason for any unauthorised use, disclosure or communication of its confidential information, or any breach of his on-going obligations to Sign-It, should evidence come to light. Settlement on those terms would have been both more and less beneficial to Mr Mason than he achieved by proceeding to the investigation and determination of the proceedings. Mr Mason was found to have breached his employment agreement by sending a copy of a database to his ex-wife, a less beneficial outcome. However, Mr Mason was found not to have otherwise breached the relevant provision in his employment agreement, a more beneficial outcome. Mr Mason now might also have resort to a finality of litigation argument, in the event of later proceedings. That argument would not have been open if Mr Mason had accepted the Calderbank offer.

[26] Counsel for Sign-It refers to *Bluestar Print Group (NZ) Ltd v Mitchell*.³ In that case, the Court of Appeal said that a “steely approach” is required where litigants reject reasonable settlement offers. However, Mr Mason overall did somewhat better than he was offered as a settlement. The “steely approach” has no application here.

Summary

[27] Mr Mason was the successful party overall.

[28] Two days at the tariff is appropriate, plus \$71.56 for the lodgement fee.

[29] Sign-It Signs Limited is to pay Thomas Mason costs of \$8,071.56 within 28 days.

Philip Cheyne
Member of the Employment Relations Authority

³ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385.