

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 566
3181700

BETWEEN	JOHN McKENZIE Applicant
AND	TRANZURBAN WELLINGTON LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Alexandra Miller and Matthew Hague, counsel for the Applicant Mike Gould, counsel for the Respondent
Submissions Received:	7 July 2023 from the Applicant 20 July and 3 August 2023 from the Respondent
Date of Determination:	28 September 2023

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 12 June 2023 I issued a determination in which I concluded Mr McKenzie had a personal grievance having been both unjustifiably suspended and unjustifiably dismissed.¹

[2] Amidst the remedies Mr McKenzie was awarded lost wages but there was insufficient information to accurately quantify the amount. The parties were asked to try to agree the amount but leave was reserved for a return to the Authority should they be unable to do so. This they have now done.

¹ *McKenzie v Tranzurban Wellington Limited* [2023] NZERA 303

[3] Costs were also reserved and that shall also be dealt with here, with consideration of the issues being on the papers.

Wage award

[4] As already said Mr McKenzie was awarded lost wages with the starting point being 42 weeks from which \$18,948.15 could be deducted as a result of money earned during that period. There was a further deduction for contribution.

[5] Mr McKenzie, having used the services of a payroll consultant, is of the view he is entitled to \$33,121.68. It is said this is based on Mr McKenzie's average weekly earnings in the 52 weeks preceding his departure from the payroll multiplied by 42 (being the amount ordered). From that Mr McKenzie then deducts the \$18,948.15 followed by a further 10%.²

[6] The consultant's spreadsheet and the payslips upon which he relied were attached.

[7] Tranzurban takes issue with this and believes the amount owing is \$31,666.43. Tranzurban claims the difference arises for two reasons. The first is that it claims Mr McKenzie's calculations cover 54 weeks (27 pay periods), not 52 weeks. Secondly the period Mr McKenzie uses is 5 September 2020 to 18 September 2021 when the correct period would have been that ending on 13 October 2021. Tranzurban acknowledges its calculations are for the period 4 October 2020 to 3 October 2021 given the period 4 to 13 October 2021 was an incomplete pay period. That said it is submitted the calculation is closer but that is, any event, less significant than the inclusion of the additional pay period.

[8] A perusal of the spreadsheets provided by the parties leads me to conclude the points raised by Tranzurban are correct and its calculation is preferable.

[9] It follows I order the wages loss payable to Mr McKenzie pursuant to paragraph 63(a) of the original determination is \$31,666.43.

² Above n 1, at [62]

Costs

[10] As the successful party Mr McKenzie also seeks a contribution toward the costs he incurred pursuing his claim.

[11] The Authority's jurisdiction to order a contribution toward a party's costs is exercised by applying well-established principles.³ Those principles recognise that:

- a. a successful party should receive a contribution toward reasonably incurred costs and expenses;
- b. costs should generally be modest and may not be used to punish the substantive conduct of the unsuccessful party;
- c. the nature of a case may allow for an order that costs lie where they fall; and
- d. the Authority may use a notional daily tariff as its starting point. From there adjustment may occur either up or down depending on the circumstances of the case. Such adjustment may be to take account of settlement offers, particularly "calderbanks," the financial means of the liable party and whether or not a party unnecessarily increased the costs incurred by the other.

[12] The current tariff is \$4,500 for the first day and \$3,500 for each day thereafter. In this case the evidence was concluded in a day with a further hour for submissions the following day. The tariff would therefore be in the order of \$5,000 though Mr McKenzie has a different view.

[13] He uses as his starting point two full days and then submits an uplift of 50% is warranted on the grounds that he sent a Calderbank offer on 9 February under which he was willing to accept three months wages, \$15,000 pursuant to s123(1)(c)(i) of the Act and full costs to date. It is accepted the compensation awarded is less than that sought in the letter but submitted the offer should be considered in its totality and when that occurs the wage award exceeded the offer.

[14] By way of reply Tranzurban notes the investigation actually took a day and a quarter meaning a starting point of \$5,375. It is submitted that should be reduced, as

³ *Employment Relations Act 2000, Schedule 2, clause 15, Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 and www.era.govt.nz/assets/Uploads/practice-note-2.pdf

were the remedies, by Mr McKenzie's level of contribution. It is submitted there should be a further 10% reduction to address the preparation that had to occur in respect of the reinstatement claim which was withdrawn during the investigation.

[15] Thereafter a further \$1,500 should be deducted to recognise that there was an earlier investigation which took about a third of a day in which Tranzurban was wholly successful and for which costs were also reserved. That would leave a contribution of \$2,853.75 which Tranzurban submits would be appropriate.

[16] The reference to the earlier investigation refers to Mr McKenzie claim he be reinstated on an interim basis and which Tranzurban successfully defended.⁴ For that it is due costs and I consider the estimate of \$1500, being the tariff, appropriate.

[17] As already said I consider the starting point Tranzurban conceded a little high and will use \$5,000. I decline the invitation to reduce costs by the level of contribution as to do so would recognise substantive conduct in a costs setting and it has long been recognised that is inappropriate. Nor do I consider a reduction for work involved in addressing the reinstatement claim warranted. It does not appear to have added great cost with a more pertinent question being whether or not an earlier withdrawal might have assisted settlement attempts given Tranzurban's success with the interim reinstatement application. Unfortunately that question will remain unanswered. Deducting the \$1,500 leaves \$3,500.

[18] That leaves the issue of the Calderbank and whether or not it justifies an increase. The underlying principle of a Calderbank is that a rejected offer would have led to a more beneficial outcome for the party against whom costs are sought, thus putting the other party to costs that, albeit with the benefit of hindsight, could have been avoided.

It is here an issue arises in that I do not know what the Calderbank was worth as I do not know what 'costs to date' were. Indeed the submission suggests the invoice was never prepared given the offers rejection. It is difficult to take an incomplete Calderbank into consideration especially as the information before me suggests it failed to mention the reinstatement claim which until withdrawal was a significant issue.

⁴ *McKenzie v Tranzurban Wellington Limited* [2022] NZERA 448

Conclusion and orders

[19] For the above reasons I order that:

- a. Tranzurban pay Mr McKenzie the sum of \$31,666.43 (thirty-one thousand, six hundred and sixty six dollars and forty three cents being wages lost as a result of his grievances; and
- b. Mr McKenzie be paid a further \$3,500 (three thousand, five hundred dollar) as a contribution toward the costs he incurred.

Michael Loftus
Member of the Employment Relations Authority