

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 54
5639238

BETWEEN PETER RHODES
 Applicant

AND MODERN TRANSPORT
 ENGINEERS (2002) LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: John Dewar, Advocate for the Applicant
 Simon Scott, Counsel for the Respondent

Submissions: 17 February 2017 from Applicant and 27 February 2017
 from Respondent

Determination: 28 February 2017

COSTS DETERMINATION OF THE AUTHORITY

A. Within 28 days of the date of this determination Modern Transport Engineers (2002) Limited must pay Peter Rhodes \$4000 as a contribution towards his costs of representation.

[1] By determination issued on 23 November 2016 the Authority ordered Modern Transport Engineers (2002) Limited (MTE) to pay Peter Rhodes compensation of \$5000 as a remedy for unjustified actions by MTE when it dismissed him for medical incapacity earlier in 2016.¹ For reasons given in that determination MTE was not ordered to pay Mr Rhodes a further amount for lost wages.

[2] The determination reserved costs but encouraged the parties to resolve that issue themselves. It included an indication that, if asked to determine costs, the Authority's assessment would likely start at five-sevenths of its applicable daily tariff. The fraction reflected how long the investigation meeting took that day.

¹ *Rhodes v Modern Transport Engineers (2002) Limited* [2016] NZERA Auckland 385.

[3] A timetable was set to lodge memoranda on costs if the parties could not resolve that issue between them. Mr Rhodes sought leave to seek a costs determination outside that timetable. Leave to do so was granted for two reasons. Firstly, it appeared some still-unexplained technical or administrative glitch had resulted in his representative not receiving the determination issued on 23 November 2016. Secondly, it also emerged MTE had not complied with the Authority's order to pay the compensation within 28 days of the determination being issued. Payment on time would have alerted Mr Rhodes' representative to the existence of the determination he appeared not to have got. Given he did not know about the timetable, Mr Rhodes could not fairly be denied the opportunity to seek a costs award outside those dates.

[4] In a memorandum on costs subsequently lodged Mr Rhodes, through his representative, sought an order for a costs award of \$4654.30. This was said to be his actual costs of representation. The tariff award suggested by the Authority was \$3214.30 but Mr Rhodes submitted an uplift on that amount should be made because MTE had not accepted a settlement offer he made well before the Authority investigation. The offer, to settle for \$3500, was less than Mr Rhodes was later awarded so he was entitled to have the Authority consider an uplift on the tariff. He sought an order for what were said to be his full actual costs.

[5] In reply MTE submitted Mr Rhodes had failed to provide a breakdown of those costs so the Authority could not be sure they were reasonably incurred or did not include amounts for which costs would not normally be awarded, such as time spent by his representative attending mediation. MTE also submitted Mr Rhodes was effectively seeking indemnity costs, which were only properly awarded in exceptional circumstances.

[6] Both points of submission by MTE were correct.

[7] Firstly, the Authority's practice note on costs suggests Mr Rhodes' representative should have provided a copy of any invoice rendered by him to Mr Rhodes, showing fees and other expenses incurred, the time taken by the representative and the relevant hourly rate. Apart from a statement in his costs' memorandum that the costs sought "of course" excluded those incurred during the mediation part of the process, there was insufficient detail provided.

[8] Secondly, MTE's conduct of its response to Mr Rhodes' claim in the Authority did not meet the threshold of "exceptionally bad behaviour" that could have warranted an award for all his true costs. Rather MTE had responded to and participated in the investigation appropriately, even though it was unsuccessful in the end.

[9] Accordingly the tariff, adjusted for meeting length, was the appropriate starting point. There were no factors identified that required a downward adjustment of it. One factor did, however, support an upward adjustment.

[10] Shortly after mediation Mr Rhodes had made an offer to settle his claim for \$3500. The offer was made without prejudice save as to costs, that is as a "Calderbank" offer. It was made in writing on 27 July 2016 and was open for acceptance for a week. It was clear, complete and there was adequate time to consider it. MTE gave no response at the time. In its costs memorandum MTE accepted the Calderbank offer should be taken into account in considering the relevant costs principles.²

[11] Those principles normally require an uplift on the usual tariff, in the absence of any greater countervailing factors. Both parties could have been saved the cost of preparing for and attending the Authority investigation meeting if MTE had agreed to the settlement offer of \$3500. It was an amount significantly lower than the \$5000 the Authority later ordered be paid as compensation to Mr Rhodes. In those circumstances the appropriate uplift of the tariff was to \$4000. This costs outcome did not provide Mr Rhodes with an indemnity award for what were said to be his actual costs but was a significant increase on what would have been the expected award if made on a tariff basis only.

[12] The sum of \$4000 in costs must be paid to Mr Rhodes within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].