

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 327  
3172582

BETWEEN JARROD TURNER-MCMILLAN  
Applicant

AND CANTERBURY ALUMINIUM  
LIMITED  
Respondent

Member of Authority: Antoinette Baker

Representatives: Robert Morgan, advocate for the Applicant  
Andrew Marsh, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 19 June 2023 from the Applicant  
19 June 2023 from the Respondent

Date of Determination: 21 June 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] The respondent (CA) has applied for a contribution to its costs from Mr Turner-McMillan in relation to defending the application he brought claiming unjustified dismissal. In my determination dated 6 June 2023 (my determination) I dismissed Mr Turner-McMillan's application.

[2] The issue of costs was reserved, and I directed CA to file first in time if an award of costs was sought. Both representatives filed submissions on the same day.

[3] Clause 15 of Schedule 2 of the Act empowers the Authority to order costs to any party as the Authority thinks reasonable. A party should receive a reasonable contribution to costs

incurred in achieving a successful result. Costs are discretionary, modest, and are not a mechanism to punish the other party. Some cases may require costs to lie where they fall.<sup>1</sup>

[4] The Authority uses a notional daily tariff<sup>2</sup> as the starting point for assessing costs. The tariff is based on the length of the investigation meeting held in each matter and takes into account preparation. This tariff may then be adjusted upwards or downwards according to the circumstances of each case considering things like 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. I note that the final paragraph in my determination only refers to the daily tariff. However, I referenced the applicable link to the Authority Practice Note 2 dated 29 April 2022<sup>3</sup> and this includes reference to potential adjustment. This reference is also alerted to parties in the Directions of the Authority after the phone conference stage.

[5] CA submits that the Authority should consider an uplift from the usual tariff and order the 'actual and reasonable costs incurred' being \$10,350.00 because:

- a. Mr Turner-McMillan's 'principal claim' to be paid for the remaining 11 days of his employment was 'undoubtedly unjustified';
- b. there was no 'realistic prospect' of success as borne out by the Authority's Determination's findings which CA says were 'almost inevitable';
- c. a 'Calderbank' letter made before the provision of evidence occurred should be considered because Mr Turner-McMillan rejected CA's proposal that he avoid potential costs by withdrawing his claim because CA proposed there was 'no doubt' that his claim would be unsuccessful.

[6] Mr Turner-McMillan submits that he participated in the hearing by answering questions without causing any delays in the hearing time; that he continued with his case based on the 'knowledge of the daily tariff' the Authority uses; that the 'Calderbank' letter

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<sup>1</sup> Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.

<sup>2</sup> The current tariff applied for a one-day Authority investigation meeting is \$4,500.00 for the first day and \$3,500.00 for each additional day.

<sup>3</sup> <https://www.era.govt.nz/determinations/awarding-costs-remedies/>.

was 'simply to withdraw the claim and not face costs.' And that 'no other amount of financial incentive was offered.'

### **Assessment**

[7] I agree that the respondent should have an order for a contribution to its costs. The matter was heard across approximately 5 hours and 30 minutes. I find the starting point for a costs order should be three quarters of the first day tariff which is \$3,375.00.

[8] I will now consider whether an increase to \$10,350.00 or any part of this amount should be awarded.

#### *Mr Turner-McMillan's financial situation*

[9] I have nothing to show me that Mr Turner-McMillan would be unable to meet a costs award, so I do not take this into account.

#### *Was the claim without merit?*

[10] I do not accept CA's submission that Mr Turner-McMillan's claim was effectively without merit. While I found Mr Turner-McMillan an unreliable witness, the unsuccessful outcome of his claim has already addressed this. Mr Turner-McMillan was entitled to have the disputed facts of his claim tested and then considered in the investigation process. Mr Turner-McMillan's claim involved things that did not turn wholly on his reliability as a witness including the unusual situation whereby, he had been summarily dismissed during his notice period and whether CA had sufficiently investigated before deciding to dismiss. While Mr Turner-McMillan was unsuccessful in his claim these things at least were not unreasonable to have brought to be investigated.

[11] I do not find that Mr Turner-McMillan's claim was without merit for investigation to the extent that I should award an uplift to the tariff.

*Unnecessary costs*

[12] I have nothing to show me that CA was put to unnecessary costs beyond what the tariff already takes into consideration being hearing time and preparation. I accept that Mr Turner-McMillan did nothing apparent in the process of my investigation that appeared to unreasonably delay the proceedings. While there was a delay due to flights for Mr Turner-McMillan's advocate to attend, CA equally provided some evidence at a much later date than directed and one witness did not appear for CA. Both situations arguably had reasonable excuses and in the greater scheme of things likely balance each other out.

*Calderbank letter dated 7 June 2022*

[13] The letter dated 7 June 2022 was on a 'without prejudice save as to costs basis' and clearly set out CA's conclusion about Mr Turner-McMillan's likelihood of success after reviewing the by then provided Statement of Problem and attached documents. Those predictions ended up being reasonably consistent with the outcome of my determination.

[14] The Employment Court<sup>4</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". That case involved the Court considering as disproportionate an application for costs asking for an uplift of \$20,000.00 to the then one day Authority tariff of \$3,500.00.<sup>5</sup>

[15] Considering all the above I am not satisfied that an uplift is appropriate. This would seem inconsistent with the above approach at this level of jurisdiction. While I accept that the settlement offer provided a better outcome to Mr Turner-McMillan than what he later achieved, even if it was not a financial incentive as submitted for Mr Turner-McMillan, the matter was not overly complex, it was not in the realm of being frivolous or vexatious and

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<sup>4</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

<sup>5</sup> Compare also Employment Court Regulations 2000, Regulation 68 with Employment Relations Act 2000, Schedule 2, clause 15, the latter not specifying that 'Calderbank' letters have to be considered in the Authority's consideration of costs.

steps taken to prepare and then attend the investigation meeting as outlined in the invoices are generally taken into consideration in the tariff. I have already found above that there was merit in investigating Mr Turner-McMillan's claim. Accordingly, I find it appropriate to award costs at the tariff being three-quarter of a day's investigation time.

**Order**

[16] Jarrod Turner-McMillan is ordered to pay Canterbury Aluminium Limited the single sum of \$3,375.00 as a contribution to its costs.

Antoinette Baker  
Member of the Employment Relations Authority