

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 253
3059453

BETWEEN TOM WILLIAMS
Applicant

AND METALLIC SWEEPING (1998)
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Robert Morgan, for Applicant
Tim McGinn, for Respondent

Submissions received: 28 April 2021 from Applicant
29 April 2021 from Respondent

Determination: 16 June 2021

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Tom Williams is to pay Metallic Sweeping (1998) Limited costs of \$2,250.00.

[1] In the determination dated 14 April 2021, I dismissed Mr Williams' claims against Metallic Sweeping (1998) Limited and reserved costs. I now have submissions from both parties. This determination resolves the claim for costs.

[2] Mr Morgan submits that costs should lie where they fall, in light of the decision by Mr Williams to challenge my earlier determination. Mr McGinn's submission is that a

decision to challenge is not relevant to unresolved costs in the Authority. I agree with Mr McGinn that I should resolve costs, without regard to any challenge.

[3] The principle is that costs usually follow the event. Apart from the above submission, Mr Morgan does not point to any reason to depart from that approach here. None are apparent to me. Metallic Sweeping is entitled to an order of costs in its favour.

[4] Often costs in the Authority are assessed by the application of the widely known daily tariff approach. The investigation meeting lasted approximately half a day. There were evidential disputes but no legal complexities. Assessed by reference to the daily tariff approach, I would order a half-day of the rate for a first day (\$2,250).

[5] An uplift is sought and two grounds are advanced: a *Calderbank* offer and the conduct of the case by and for the Applicant. I deal with the latter issue first.

[6] The submission is that Mr Williams conducted himself poorly during the investigation meeting by changing his evidence and avoiding answers unfavourable to himself. It is said this lengthened the investigation meeting. I do not accept that Mr Williams' conduct while giving evidence had any material effect on the duration of the meeting. In addition, the responses referred to contributed to my assessment of the evidence. Reference to it in determining costs would, in effect, be to punish Mr Williams for the way in which he gave his evidence. That would be an improper approach to assessing costs.

[7] There is a submission that Mr Williams persisted with the unmeritorious claim for arrears and a penalty, despite efforts to show that the payment had been made. This part of the problem started when Metallic Sweeping withheld part of Mr Williams' final wages. A payment was made later. Despite that, arrears and penalty claims were included in the application to the Authority. There were several aspects about deductions from the final pay and the reinstatement of part of the deductions that needed to be explained, before I could determine that no arrears were owed. While I did not find that the original deduction was lawful, I did not consider that any breach would have warranted the imposition of a penalty. I note that no assessment of the time required to present evidence to defend the arrears and

penalty claims was provided. It was a minor part of the problem. Overall, these circumstances do not support an uplift from a daily tariff approach.

[8] The more substantial point concerns the *Calderbank* offer made by Metallic Sweeping in December 2020, prior to the January 2021 investigation meeting. I am asked to award costs of two-thirds of counsel's costs following the *Calderbank* offer. That would result in costs of \$5,600.00, as opposed to costs of \$2,250.00 based on a daily tariff approach.

[9] The *Calderbank* offer was to pay \$1,000.00 compensation and \$500.00 as a contribution to Mr Williams' costs. The offer by email on 2 December 2020 was expressed to be despite the prospect that Metallic Sweeping would prove Mr Williams resigned potentially causing it significant damages, his attempt to withdraw his resignation, Mr Williams' acting "abysmally" at the meeting called to discuss the resignation, the likelihood of Metallic Sweeping being able to justify its actions, and the prospects for remedies to be negated by Mr Williams' "contumelious conduct". It was open for acceptance for 48 hours, but Mr Morgan was asked to advise if more time was needed. There was no response. Counsel followed up on 8 December and Mr Morgan advised on 9 December 2020 that the offer had been declined.

[10] The Court of Appeal has emphasised that scarce Court resources should not be burdened by litigants who reject reasonable settlement offers, proceed with litigation but fail to achieve more than was previously offered. The normal effect of a *Calderbank* offer is that the costs position is reversed.¹ However, a *Calderbank* offer sometimes leads to an uplift in costs, for the party entitled to costs on ordinary principles as the successful party. As the Employment Court observed:²

There is both a public and a private interest in encouraging early offers of compromise in legal proceedings... There is also an interest in encouraging employers and employees to resolve matters at an early stage, and to give careful consideration at the outset to their prospects of success if they proceed down the litigation pathway. The statutory focus on alternative dispute resolution reflect this policy.

¹ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385.

² *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137 at [24].

[11] In the present case, the *Calderbank* offer was not made at an early stage. Proceedings were lodged in the Authority in 2019. The parties were then referred to mediation, Metallic Sweeping in its reply stating that it was then prepared to participate in mediation. Matters were not resolved. I convened a case management conference in June 2020. The matter was originally set for 24 September 2020, with statements of evidence from Mr Williams by 28 August and from Metallic Sweeping by 11 September. Mr Williams' evidence was lodged as directed. Metallic Sweeping sought and was granted an adjournment due to unexpected witness unavailability. The January 2021 date was agreed and Metallic Sweeping lodged its statement on 23 December 2020, its 2 December *Calderbank* offer not bringing matters to an end. Against that background, Mr Williams' rejection of the modest offer in favour of proceeding to the investigation meeting and Authority determination was not unreasonable.

[12] Counsel submits that costs should be set at \$5,600.00. However, giving that effect now to the *Calderbank* offer would cut across the legislative intent in respect of Authority proceedings. They should be low level, cost effective, readily accessible and non-technical, without the trappings of the Court.³ The application of the daily tariff approach to costs in the Authority adds certainty and should only be departed from for sufficient reason. There is insufficient reason to depart from the daily tariff approach in this case.

[13] There will be an order requiring Mr Williams to pay costs to Metallic Sweeping, based on a half-day of the daily tariff rate for the first day.

Philip Cheyne
Member of the Employment Relations Authority

³ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28.