

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 505
3121173

BETWEEN IRISH RUSIANA
Applicant

AND M & T BEAUTY LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Ashleigh Fechny, advocate for the Applicant
Jenny Beck, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 26 October 2021 from the Applicant
9 November 2021 from the Respondent

Date of Determination: 15 November 2021

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] On 12 October 2021 the Authority issued a determination finding that:

- (a) The circumstances of Irish Rusiana's employment ending did not amount to an unjustified dismissal.
- (b) Irish Rusiana was unjustifiably disadvantaged by the actions and omissions of M and T Beauty Limited in not paying her full wages during lockdown and failing to share sufficient information in the process of disestablishing Ms Rusiana's position.

(c) M&T Beauty Limited must pay Irish Rusiana the sums below within 28 days of this determination being issued:

- i. \$1628.40 gross arrears of wages;
- ii. \$203.50 gross arrears of holiday pay; and
- iii. A \$281.40 (net) Kiwisaver scheme contribution.

[2] The parties were asked to explore resolving costs by agreement but failed to do so. The investigation meeting took place over one day and written submissions were received thereafter.

Submission for Irish Rusiana

[3] Ms Fechny, after traversing relevant authorities, acknowledged that Ms Rusiana was not successful in her predominant claim that she had been unjustifiably dismissed. Ms Fechny then briefly submitted that having successfully obtained wage arrears and compensation for an unjustified disadvantage claim the normal daily tariff of \$4,500 was appropriate together with a \$266.56 disbursement to cover the cost of Ms Fechny's air travel to the hearing in Dunedin from her base in Christchurch.

Submission for M&T Beauty Limited

[4] Ms Beck responded with a similarly brief submission pointing out that Ms Rusiana had not been wholly successful in her claims. Ms Beck suggested her client had insufficient means to meet any cost award but did not file any evidence to support this assertion. Ms Beck suggested it would be equitable in all the circumstances to let costs lie where they fall.

[5] Neither party submitted any without prejudice offers for my consideration.

Costs principles

[6] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The discretion, it is accepted, is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹

¹ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

including that costs are not to be used as a punishment or as a reflection on how either party conducted proceedings, and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.²

The dilemma of ‘mixed success’

[7] To assess costs where, as is the case here, one party has only mixed success can be problematic as it is arguable that Ms Rusiana’s ‘success’ was partial and compensation modest as she failed to establish that she had been unjustifiably dismissed. However, Judge Smith in *William Coomer v JA McCallum and Son Limited* noted (omitting citations):

Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any ‘realistic appraisal’. That conclusion followed because they obtained a monetary award It was immaterial that they had not succeeded to the full extent of their claim because’ ... success on more limited terms is still success.³

Assessment

[8] A general principle for a successful party is that costs should ‘follow the event’ but here Ms Rusiana failed to establish that she was unjustifiably dismissed for an ulterior motive during a redundancy process that the Authority found to be enacted for genuine reasons. However, Ms Rusiana was successful in her claim to recover arrears of wages due to her former employer not properly paying the Covid-19 wage subsidy and Ms Rusiana was compensated for the distress this caused her as a result of a successful unjustified disadvantage claim. The Authority did not find that contributory conduct was at issue in an investigation meeting that took a day.

[9] In these circumstances, I exercise discretion to reflect the relative success of Ms Rusiana’s claims and consider the daily tariff is appropriate. In making this assessment I decline to award additional disbursements as I remain unconvinced that Ms Rusiana had to engage a Christchurch based advocate.

² Section 160(2) Employment Relations Act 2000.

³ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].

Award

[10] I order M & T Beauty Limited to pay Irish Rusiana the sum of \$4,500 as a contribution to her legal costs incurred.

David G Beck
Member of the Employment Relations Authority