IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 54
3084772

	BETWEEN	BRETT WEBLEY Applicant
	AND	BISH AUTOMOTIVE (SOUTH ISLAND) LIMITED First Respondent
	AND	PETER BLACK Second Respondent
Member of Authority:	Helen Doyle	
Representatives:	Chrissy Gordon, advocate for the Applicant Jeff Goldstein and Lynda Ryder, advocates for the Respondents	
Submissions Received:	18 January 2021 from the Applicant 21 January 2021 from the Respondent	
Date of Determination:	16 February 2021	

COSTS DETERMINATION OF THE AUTHORITY

A I order Bish Automotive (South Island) Limited to pay to Brett Webley the sum of $4,500 being costs and $71.56 being reimbursement to the filing fee.

Substantive determination

[1] The Authority found in its substantive determination dated 16 December 2020 that the applicant was employed by the first and not the second respondent and that he was

unjustifiably dismissed from his employment with the first respondent. It ordered payment of compensation.[1] It did not find a holiday pay claim made out but did make an award for penalties for breaches of s 81 of the Holidays Act 2003 and s 65 of the Employment Relations Act 2000 (the Act).

[2] Costs were reserved and the parties encouraged to attempt to resolve costs. The parties have not been able to resolve costs. The Authority has now received submissions from both parties.

The applicant's submissions

[3] Ms Gordon refers to the judgment of the full Court of the Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.[2] The Employment Court in *PBO* sets out the factors the Authority considers when exercising its discretion is to costs.

[4] Ms Gordon refers to the tariff-based approach to awarding costs in the Authority.

[5] There was an investigation meeting on 6 August 2020 and then a further short meeting for oral submissions to clarify aspects relating to the holiday pay claim on 4 December 2020.

[6] Ms Gordon submits there should be uplift in the daily tariff because of a Calderbank offer. An offer in the nature of a Calderbank offer to settle the matter was firstly made by the respondent to the applicant in a letter dated 22 July 2019. The offer was for $3,000 compensation under s 123(1)(c)(i) of the Act together with costs of $3,000 plus GST. In an email dated 23 July 2019 the applicant made a counter offer on a "without prejudice save as to costs" basis for the sum of $10,000 under s 123(1)(c)(i) of the Act together with costs. The counter offer was not accepted and the applicant lodged proceedings with the Authority. The Authority awarded the applicant an amount that exceeded the counter offer. The applicant has incurred costs of approximately $10,000 from that time.

[7] The applicant submits there should be no reduction in costs because the holiday pay claim was not made out. Ms Gordon submits that due to the failure to maintain compliant holiday and leave records the applicant was not able to be satisfied that he had received his correct entitlement and there was a penalty awarded under s 81 of the Holidays Act 2003.

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[1] *Webley v Bish Automotive (South Island Limited) and Peter Black* [2020] NZERA 519.
[2] *PBO Limited v Da Cruz* [2005] ERNZ 80.

[8] The applicant seeks costs in the sum of $8,000 together with the filing fee of $71.56.

The respondent's submissions

[9] Mr Goldstein on behalf of the respondent submits that the applicant is not entitled to any costs because his successful claim should be offset by the costs incurred by the respondent in relation to his unsuccessful claims.

[10] He submits there are a number of factors that the Authority should consider in exercising its discretion in respect of costs:

(a) The applicant's claim to a significant amount of money for holiday pay failed; and

(b) the applicant's claim that the second respondent was the employer failed; and

(c) the alleged "Calderbank offer" was not in fact a valid Calderbank offer.

[11] Mr Goldstein submits that the claim for holiday pay was "doomed to fail". He submits that the payslips indicated that the applicant was paid a salary for every week of his employment. The issue was then whether or not the applicant had actually taken his leave. He submits that the applicant had no proof to establish even a *prima facie* case for holiday pay and the respondent was put to trouble in defending its position. Mr Goldstein submits that the Authority ought to award the respondent a significant amount in costs for the applicant's failed claim. He refers to the respondent making submissions, analysing the calendars, preparing spreadsheets and written submissions and then attending a further investigation meeting.

[12] Mr Goldstein submits that the offer made by the applicant on 23 July 2019 did not meet the requirements of a Calderbank offer. The terms of the offer were not clear as it did not indicate what claims the offer was settling. Further, that there was insufficient time to consider the offer as only three days were available. He also submits that it was not clear from the offer that it would be used in the cost setting if the applicant was unsuccessful. He submits there is no justification for uplift and if the applicant is entitled to an award of costs it should only be on a tariff basis for one day. Further that the respondent is similarly entitled to a costs award of the same amount and the effect of the submissions ought to be that each party is ordered to pay their own costs.

Determination

Who was successful?

[13] There is a longstanding principle that the successful party is entitled to costs.

[14] Mr Goldstein seeks to persuade the Authority to depart from the usual principle that as a successful party the applicant would be entitled to costs. Mr Goldstein submits that although the applicant was successful it was not to the extent of the amount claimed.

[15] Some recent guidance about mixed success and costs is found in an Employment Court judgment *Coomer v JA McCallum and Son Limited.*[3] *Coomer* was a challenge to an Authority determination.[4] It is useful to set out the facts. The Authority had determined while Mr Coomer was successful there should be an award of costs of $4,500 in favour of the respondent. Mr Coomer had claimed he should be paid wages for work undertaken in the factory; he sought a penalty for a failure to have a signed employment agreement and further said that he had been constructively dismissed and was entitled to remedies. The Authority did not find that Mr Coomer was constructively dismissed, the claim for wages failed on the basis that he was a volunteer and the Authority declined to award a penalty. The Authority did find that Mr Coomer had a grievance that he was unjustifiably disadvantaged. Judge Smith in his judgment found on challenge that Mr Coomer was the successful party and that he was entitled to an award of costs. In that case it was found that the conclusion "rests entirely on the success he had had with his personal grievance and the award made to him."[5]

[16] The applicant in this case was successful by a greater margin than in *Coomer*. As was stated in *Coomer*, success could not have been achieved without having first lodged a claim in the Authority.[6]

[17] The applicant is the successful party and is entitled to consideration of costs.

Duration of the meeting

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[3] *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.
[4] *Coomer v JA McCallum & Son Ltd* [2017] NZERA Christchurch 84.
[5] Above n 3 at [44].
[6] Above n 3 at [43].

[18] I intend to approach costs on the basis of the daily tariff. The first day of the investigation meeting concluded from the Authority minute book at 4.15pm. The second meeting took about an hour.

[19] I consider it more appropriate to treat the investigation meeting as a full day rather than more than one day. The tariff for a full day is $4,500.

Increase or decrease to the tariff?

Calderbank offer

[20] Ms Gordon seeks uplift to $8,000 on the basis of the counter offer as the amount awarded exceeds it. Mr Goldstein submits that the offer did not meet the requirements of a Calderbank offer and should not be taken into account. It was sensible to attempt to resolve matters before proceedings were lodged as the parties did.

[21] The approach to a Calderbank offer in the exercise of a discretion as to costs is broadly an assessment whether the respondent was unreasonable in rejecting it.[7] The grievance as raised in the May 2019 letter was wide-ranging. The offer to settle by the applicant was for $10,000 and $3,000 costs without elaboration as to the merits of all or any of the claims. Notwithstanding and with knowledge of the claims in front of the Authority the respondent was reasonably placed to assess merits even without proceedings having been lodged. The offer followed mediation. I do accept however that without proceedings, clearer terms with reference to merits would have assisted.

[22] Importantly, the offer was only open for three days between 23 July and 26 July 2019 after which point it was stated that it would lapse and proceedings would be lodged with the Authority. Given that the Authority file shows that proceedings were in fact not lodged until 16 December 2019 the short timeframe was unreasonable and did not provides fair time for consideration and reflection. There was nothing to support that the offer was renewed before the investigation meeting. In those circumstances I do not conclude it was unreasonably rejected.

[23] Such an offer is but one factor to be taken into account in the exercise of the discretion as to costs.

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[7] *Xtreme Dining Limited Trading as Think Steel v Leighton Dewar* [2017] NZEmpC 10.

[24] In all the circumstances I am not minded to give weight to the offer in the email dated 23 July 2019 in the exercise of my discretion as to costs.

Unsuccessful holiday pay and identity of the employer issues

[25] The applicant was not successful with his claim that he was owed holiday pay. The Authority found that records required to be kept by the respondent were not compliant with s 81 of the Holidays Act 2003. In particular there was no clear record that could be relied on for dates on which annual leave was taken and payment for those dates. There were some inconsistencies between the pay records and the calendar entries made by the applicant when he was to be on leave.

[26] The respondent was put to some cost to counter Mr Webley's claim that he did not take all his annual leave over the period of employment. That cost would have been minimal if a compliant holiday and leave record had been kept. In the absence of such a record, the investigation of the claim took longer and there was a greater obligation on the respondent to provide records to establish dates annual leave was taken. I am not satisfied in the exercise of my discretion that should be visited on the applicant. If a compliant holiday and leave record had been supplied before the investigation meeting such a claim may not have been pursued.

[27] The claim that the second respondent employed the applicant was not successful. The applicant accepted during the investigation meeting that information put to him indicated he was employed by the first respondent. Mr Goldstein submits this was supplied before the investigation meeting but not conceded. He refers to this claim as frivolous.

[28] I weigh that there was no written employment agreement between the parties that identified the parties to the relationship. Had there been a written employment agreement it would be unlikely that this claim would have been pursued. Even if it had it would have occupied limited time. In any event the time this matter occupied in the investigation meeting was not significant.

[29] The importance that cost awards in the Authority be reasonably predictable has been emphasised by the Employment Court in a recent judgment. The Authority in that case had

reduced costs based on tariff to reflect some wasted costs however on challenge the award for costs in the Authority was increased to daily tariff without reduction by the Court.[8]

[30] I am not minded in this case to increase or reduce the daily tariff for reasons set out above.

[31] I order Bish Automotive (South Island) Limited to pay to Brett Webley the sum of $4,500 together with reimbursement of the filing fee of $71.56.

Helen Doyle
Member of the Employment Relations Authority

[8] *Canterbury Westland Kindergarten Association Inc v Jane Barnes and Jane Barnes v Canterbury Westland Kindergarten Association Inc* [2020] NZEmpC 199.