

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 58
3125894

BETWEEN AARON MITCHELL
Applicant

AND BREADS OF EUROPE (2015)
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Paul Mathews, advocate for the Applicant
Robert Thompson, advocate for the Respondent

Submissions Received: 3 January and 1 February 2023 from the Applicant
27 January 2023 from the Respondent

Date of Determination: 7 February 2023

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The Authority found in its determination dated 19 December 2022 that the applicant had made out two unjustified disadvantage grievances but not a claim for unjustified constructive dismissal. The applicant was awarded compensation and reimbursement of limited wages however not to the extent claimed. There were other awards made for reimbursement of unpaid wages, holiday pay and an alternative day together with an award of a penalty for a breach of good faith.¹

[2] During the investigation meeting, the applicant withdrew claims for underpayment of wages during the COVID-19 lockdown period and a claim for failure to provide a workplace

¹ *Aaron Mitchell v Breads of Europe (2015) Limited* [2022] NZERA 673.

safe from harassment. A monetary claim for reimbursement for unpaid meal breaks throughout the entire period of employment was withdrawn and reliance instead placed on compensation for the unjustified disadvantage claim about meal breaks. At the investigation meeting, the respondent also agreed to reimburse money deducted.

[3] Costs were reserved and failing agreement being reached a timetable was set for an exchange of costs submissions.

[4] The Authority has now received costs submissions on behalf of the applicant and respondent.

The applicant's submissions

[5] In a succinct submission, Mr Mathews says that costs should follow the event and that the applicant was successful in several of his claims.

[6] The applicant seeks costs based on the daily tariff for a day and one quarter which is a total of \$5,375.

[7] In a reply to the respondent's submission Mr Mathews said that the investigation meeting was longer than a day because of the supply of written submissions, that most of the investigation meeting was focussed on the issue of unlawful deduction and that the respondent undertook to pay the deducted amount.

The respondent's submissions

[8] Mr Thompson submits that the respondent had a substantial element of success in defending the claims of the applicant because the applicant's primary claim and the focus for the defence was the constructive dismissal claim. He submits that the amounts claimed for the unjustified disadvantage claims were not obtained and that the applicant withdrew claims at a late stage in the proceedings and there was cost incurred in defending these matters. It is submitted that it would be unreasonable to make an award of costs in accordance with the daily tariff without taking this into account.

[9] The legal principles appropriate for costs in the Authority and consistent with its functions and powers as stated by the full Court of the Employment Court in *PBO Limited*

(formerly *Rush Security Limited*) v *Da Cruz* are referred to in submissions.² These principles were subsequently affirmed in *Fagotti v Acme & Co Ltd*.³

[10] Mr Thompson refers to Employment Court and Court of Appeal judgments in which costs have been considered where there has been mixed success.⁴ He also refers to an Authority determination where both parties had a measure of success, and it was determined that costs should lie where they fall.⁵

[11] The respondent seeks costs lie where they fall or that any award of costs be significantly reduced to take the respondent's success into account.

The issues

[12] The Authority needs to determine:

- (a) What is the legal framework for an assessment for costs where the parties have mixed success?
- (b) Who was the successful party?
- (c) Should costs lie where they fall or should there be an adjustment to the daily tariff rate?

What is the legal framework to assess costs where the parties have had mixed success?

[13] Clause 15(1) of the second schedule to the Employment Relations Act 2000 (the Act) provides that the Authority may order any party to a matter to pay to the other party such costs and expenses as it thinks fit.

[14] In *Da Cruz* it was recognised that the Authority can set its own procedure and that it has held to some basic tenets when considering costs.⁶ These include that there is a discretion as to whether costs will be awarded and in what amount. The discretion should be exercised in accordance with principle and not arbitrarily. Equity and good conscience is to be considered on a case-by-case basis. Costs are not to be used as a punishment or an expression of

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 at [44].

³ *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

⁴ *Health Waikato Limited v Elmsly* [2004] 1 ERNZ 172 (CA) and *Coomer v JA McCallum & Son Limited* [2017] NZEmpC 156.

⁵ *Anthony Porima v Loggertech NZ Limited* [2022] NZERA 549.

⁶ Above n 2.

disapproval and costs generally follow the event. The nature of the case can also influence costs and the Authority can order costs lie where they fall in certain circumstances. Costs will be modest and frequently judged against a daily tariff set for current matters at \$4,500 per day for the first day and \$3,500 for each subsequent day.

[15] In *Coomer* the Employment Court considered a challenge to an Authority determination that had ordered the employee pay costs to the employer notwithstanding the employee had some success. As in this matter, the employee in *Coomer* had not made out a claim that he had been constructively dismissed, but it was found that he had been unjustifiably disadvantaged and there was an order for payment of compensation for that grievance. The plaintiff's claim for wages failed and the Authority declined to issue a penalty.⁷

[16] There was reference in *Coomer* to the judgment of the Court of Appeal in *Health Waikato Ltd v Elmsly* where the trial Judge's conclusion that Dr Elmsly had sufficient success at trial to warrant an award of costs, was open to him. This was notwithstanding that most of the hearing time was spent arguing about issues where in the end Health Waikato was successful.⁸

[17] The employee in *Coomer* was found to have been the successful party, however, the daily tariff in the Authority was reduced to reflect the measure of success the employer company had. The challenge to the Authority's determination therefore was successful.⁹

[18] Mr Thompson has referred to an Authority determination in which the employee had some limited success but there was an order that costs lie where they fall.¹⁰ Costs are a matter of discretion, and the Authority has primarily relied on the principles as set out above from the Employment Court and the Court of Appeal.

Who was the successful party?

[19] The applicant failed to establish some of his claims. The respondent successfully defended the claim of constructive dismissal which was the main claim. In some claims where the applicant was successful, he did not succeed to the full extent that had been claimed. The applicant was however successful in his unjustified disadvantage personal grievances,

⁷ Above n 3 at [13]– [15].

⁸ Above n 3 at [39] and [40].

⁹ Above n 3 at [44] and [45].

¹⁰ Above n 5.

reimbursement of wages, holiday pay and in the award of a penalty. It was also agreed at the investigation meeting that the respondent reimburse the applicant money that had been deducted. The applicant withdrew some of his claims during the investigation meeting.

[20] There was mixed success, but the applicant could not have achieved the success he did without going to the Authority. The Authority was not provided with a *Calderbank* letter. The applicant was the successful party.

Should costs lie where they fall, or should there be an adjustment to the daily tariff rate?

[21] The applicant was the successful party. Costs generally follow the event and I do not find it appropriate to depart from that principle and find that costs should lie where they fall.

[22] In assessing a starting point, Mr Mathews submits that Authority should consider the daily tariff based on a day and a quarter because written submissions were provided.

[23] The investigation meeting occupied one full day. It commenced at 9.30am and concluded at 5pm. The daily tariff is set for all preparation for an investigation meeting. It would be unusual to consider extending the daily tariff because written submissions were provided. In the exercise of my discretion, given the nature of the case, I do not increase the daily tariff.

[24] The starting point for an assessment of costs is \$4,500.

[25] It is appropriate to take into account that the applicant was not successful in all his claims including his main claim of unjustified constructive dismissal. As Mr Mathews submits, the evidence focussed extensively on the deductions from his wages which was the main basis for the constructive dismissal claim. Whilst that claim was unsuccessful, the alternative claim of unjustified disadvantage based on unreasonable deductions from wages without consent was made out. Some claims were withdrawn by the applicant however the time taken during the investigation meeting for these was not as significant and needs to be balanced by the agreement by the respondent during the investigation meeting, to pay money deducted.

[26] Taking all matters into account a fair and reasonable award of costs is arrived at by deducting from the daily tariff of \$4,500 the sum of \$750 to account for the mixed success.

[27] I order Breads of Europe (2015) Limited pay to Aaron Mitchell costs in the sum of \$3,750 and reimburse his filing fee in the sum of \$71.56.

Helen Doyle
Member of the Employment Relations Authority