

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 110
3138841

BETWEEN DARREN HEALEY
Applicant

AND BUSINESS DISTRIBUTORS LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Paul Mathews, advocate for the Applicant
Anna Oberndorfer, advocate for the Respondent

Investigation Meeting: On the papers

Submissions Received: 9 March 2022 from the Applicant
9 and 23 March 2022 from the Respondent

Date of Determination: 25 March 2022

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] On 25 February 2022 the Authority issued a determination finding that:

- (a) The circumstances of Darren Healey's employment ending did not amount to an unjustified constructive dismissal.

- (b) Darren Healey was unjustifiably disadvantaged by the actions and omissions of Business Distributors Limited in how it investigated working environment concerns identified by Darren Healey.
- (c) Darren Healey had his individual employment agreement unilaterally altered without his consent.
- (d) In the circumstances Business Distributors Limited must pay Darren Healey:
 - i. \$6,400 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.
 - ii. \$5,077 (gross) combined lost wages pursuant to s 123(1)(b) Employment Relations Act 2000.

[2] The parties were asked to explore resolving costs by agreement but failed to do so. The investigation meeting took just over one and a half days including submissions (finishing at 2:30 pm on the second day).

Submission for Darren Healey

[3] In a brief submission Mr Mathews sought \$5,000 in costs, the filing fee of \$71.56 and meeting fee of \$153.33.

[4] Mr Mathews acknowledged that Mr Healey had “mixed success with regard to his claims” but suggested that only a small portion of the investigation meeting focused upon his unsuccessful constructive dismissal claim and that the investigation meeting would have been of a similar length regardless.

Submission for Business Distributors Limited

[5] Ms Oberndorfer responded with a more detailed and concise submission which traversed established case law and asserted that Mr Healey had not been wholly successful in all his claims, including the predominant one of constructive dismissal. The respondent argues that this, coupled with Mr Healey’s failure to disclose the extent of his other claimed remedies

in a timely fashion, warrants a reduction in costs as this extended the investigation meeting's duration. Overall, Ms Oberndorfer suggested that this should be one of those rare occasions where it would be equitable to let costs lie where they fall.

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

Costs principles

[7] 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 including those 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'

[8] To assess costs where, as is the case here one party has only mixed success can be problematic as it is arguable that Mr Healey 'success' was partial and compensation modest as he failed to establish that he had been unjustifiably constructively 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

[9] A general principle for a successful party is that costs should 'follow the event', despite Mr Healey failing to establish that he was unjustifiably constructively dismissed and the evidence disclosing he resigned at a time when he had secured alternative employment. It was

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

² Section 160(2) Employment Relations Act 2000.

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

also found that Mr Healey had contributed to the circumstances giving rise to his personal grievance in a manner that would have made his ongoing employment problematic.

[10] However, Mr Healey was successful in his claim to recover arrears of wages due to his former employer not properly applying the Covid-19 wage subsidy and Mr Healey was compensated for the distress caused by how his expressed concern about co-workers was investigated.

[11] In these circumstances, I exercise discretion to reflect the relative success of Mr Healey's claims and consider that the daily tariff for one day is appropriate. In making this assessment I decline to award additional disbursements apart from the filing fee.

Award

[12] I order Business Distributors Limited to pay Darren Healey the sum of \$4,500 as a contribution to his legal costs and to reimburse Mr Healey the Authority filing fee of \$71.56.

David G Beck
Member of the Employment Relations Authority