

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 137
3161822

BETWEEN SAKALIA HUCH
 Applicant

AND SUPERCITY TOWING
 LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Emma Brankin, advocate for the applicant
 JJ van Vuuren, advocate for the respondent

Submissions Received: 2 March 2023 from the applicant
 16 March 2023 from the respondent

Date of Determination: 20 March 2023

COSTS DETERMINATION OF THE AUTHORITY

What did the Authority decide?

[1] The Authority determined Sakalia Huch’s employment relationship problems with his former employer Supercity Towing Limited (Supercity or the company).¹

[2] Mr Huch was found to have been disadvantaged by unjustifiable actions of Supercity regarding:

- (a) reduction in pay to wage subsidy rate and reduction in hours and pay in other periods; and
- (b) suspension in December 2021.

¹ *Sakalia Huch v Supercity Towing Limited* [2023] NZERA 74.

[3] For those grievances Supercity was ordered to pay Mr Huch \$38,770.40 gross lost wages along with \$6,000 and \$2,000 respectively for compensation for humiliation, loss of dignity and injury to feelings.

[4] Mr Huch was found not to have been unjustifiably dismissed.

[5] The parties were to attempt to resolve the costs issue between themselves but have not been able to reach agreement.

[6] Mr Huch now seeks costs. Submissions were received from both parties.

What principles apply to costs?

[7] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The power is discretionary with its use governed by principles.² These include that costs will usually follow the event and the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience.

What costs should be awarded here?

[8] Mr Huch was successful in three out of his four unjustified action grievances, with the original pay and hours reduction claims being regarded as one grievance. A grievance about Supercity's development of a vaccination mandate/policy and Mr Huch's unjustified dismissal claim regarding his termination using that policy were not established. A breach of good faith claim was regarded as part of the successful grievances but did not result in a separate penalty award.

[9] In summary, Mr Huch had partial success, establishing significant parts of his claim. He is entitled to a contribution towards his costs.

[10] When assessing costs, the starting point is the Authority's daily tariff. Here the investigation meeting took two days. The tariff for the first day of a meeting is \$4,500 with \$3,500 for the second, totalling \$8,000.

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

[11] Mr Huch seeks \$10,875 costs plus the Authority's filing fee. This is calculated on two meeting days, an additional quarter of a day for submissions which were provided in writing and a \$2,000 uplift for an attempt to settle. Mr Huch's actual costs are said to exceed that amount.

[12] Supercity notes the partial success and considers that there were several aspects of Mr Huch's unsuccessful dismissal claim which had to be examined. The company's position is that costs should lie where they fall.

Partial success

[13] The length of the investigation meeting was extended by Mr Huch's unjustified dismissal claim. However, some of that evidence would have been needed anyway to investigate the successful suspension grievance.

[14] Without the dismissal and vaccination mandate/policy grievance the investigation including time to hear submissions would have taken at most around a day and a half. This totals \$6,250 of the tariff.

Without prejudice save as to costs offer

[15] On 29 September 2022, about a month before the investigation meeting, Mr Huch's representative sent Supercity's representative an email which included in the heading "without prejudice save as to costs". An offer included was spelt out to be a *Calderbank* offer which would be put before the Authority when costs were considered. By the time the offer was made a proportion of costs incurred would have already been incurred as the parties' witness statements were in other than Mr Huch's reply statement.

[16] The offer was for settlement of:

- (a) compensation under s 123(1)(c)(i) of the Act of \$12,000;
- (b) wages arrears for the periods of reduction o wage subsidy of \$11,000; and
- (c) contribution to costs of \$9,000 plus GST

[17] There is no indication of any response by Supercity. Although the amounts of the components are somewhat different, overall the offer is for considerably less than the

Authority's award. A significant amount of costs could have been saved had Supercity accepted this reasonable offer. Costs should be uplifted to take that into account.

Orders

[18] Supercity Towing Limited is ordered to pay Sakalia Huch \$8,000.00 as a contribution to his costs and \$71.56 for the Authority's filing fee within 28 days of the date of this determination.

Nicola Craig
Member of the Employment Relations Authority