

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2024] NZERA 219
3230399

BETWEEN MUSTAFA HUSSAINI
Applicant

AND REAL BREAD LIMITED
Respondent

Member of Authority: David G Beck

Representatives: David Cain, advocate for the Applicant
Chris Cerecke, for the Respondent

Investigation Meeting: On the papers

Submissions Received: 2 April 2024 from the Applicant
15 April 2024 from the Respondent

Date of Determination: 17 April 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination of 19 March 2024, I found Mustafa Hussaini had been unjustifiably disadvantaged by Real Bread Limited's (Real Bread) failure to adhere to good faith principles in dealing with Mr Hussaini and that they must pay Mr Hussaini \$2,000.00 compensation and lost wages in the amount of \$1,840.¹

[2] Costs were reserved to allow the parties to explore agreement but with none being reached, Mr Hussaini has applied for an order of costs.

¹ *Mustafa Hussaini v Real Bread Limited* [2024] NZERA 159.

The application for costs

[3] Mr Hussaini's advocate seeks costs in the amount of the Authority's notional daily rate of \$4,500.00 and disbursements (the \$71.55 Authority filing fee). The investigation meeting took half a day and legal submissions were timetabled.

[4] Mr Cerecke submitted that an award of costs of \$2,000 was appropriate and in support of this noted Mr Hussaini had turned down an early Calderbank offer from Real Bread and then failed to better such at the Authority.

Assessment

The Authority's costs approach

[5] The Authority's discretion to award costs is well established and arises from Section 15, of Schedule 2 of the Employment Relations Act 2000.

[6] An issue is whether I should adjust the notional daily rate the Authority normally applies downwards after considering Real Bread's spurned Calderbank offer and Mr Hussaini's mixed success.

Calderbank offers

[7] On 4 August Real Bread in response to a without prejudice offer to resolve matters offered to pay Mr Hussaini \$3,000 compensation and \$4,000 + GST as a cost contribution on a full, final, and confidential basis to be recorded in a s 149 of the Act settlement agreement, signed by a mediator. The offer was left open for seven days and in financial terms appeared to be what Mr Hussaini requested. However, Real Bread indicated they would not issue an apology to Mr Hussaini or enter a non-disparagement agreement. In the event, this offer did not resolve matters. I am satisfied this was a genuine Calderbank offer and in his costs' submission, Mr Hussaini advanced no explanation for turning it down. In all the circumstances, I will consider this refusal as part of exercising discretion on costs.

The dilemma of 'mixed success'

[8] To assess costs where one party, as is here, has only mixed success is sometimes problematic. It is arguable that Mr Hussaini's success was partial and compensation

modest as he failed to establish his predominant claim that he had been unjustifiably dismissed from a permanent role.

[9] 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.’²

Costs for Mr Hussaini

[10] A starting point is that costs normally follow the event and as Mr Hussaini was partially successful in his personal grievance claim he is entitled to consideration of an award of costs.

Applying the daily rate

[11] As outlined in the substantive determination,³ the Authority’s approach is to apply a notional daily rate and only adjust this if persuaded that particular circumstances or other factors require an upward or downward movement.⁴ The discretion it is accepted, is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁵ including 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.⁶ The current Authority notional daily rate is \$4,500 for the first day of an investigation meeting.

Assessment

[12] Taking all the factors identified in submissions into account and applying the Authority’s discretion I consider that Mr Hussaini is entitled to a cost contribution for

² *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].

³ *Ibid* at [103].

⁴ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

⁵ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁶ Section 160(2) Employment Relations Act 2000.

the half day investigation meeting. Taking the Calderbank offer into account I fix that amount at \$2,000.

Order

[13] Real Bread Limited is to pay Mustafa Hussaini a contribution to his costs in the amount of \$2,000 and \$71.55 as reimbursement of the Authority filing fee.

David G Beck
Member of the Employment Relations Authority