

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 117
3125094

BETWEEN YASHAR ABDOLLAH
ZADEH
Applicant

AND HAMID REZA JEIHANI
Respondent

Member of Authority: Peter Fuiava

Representatives: William Fussey, counsel for the Applicant
Jenni-Maree Trotman, counsel for the Respondent

Submissions received: 7 December 2022 from the Applicant
18 November 2022 from the Respondent

Determination: 8 March 2023

COSTS DETERMINATION OF THE AUTHORITY

A. Yashar Abdollah Zadeh to pay \$1,500 as a contribution towards Hamid Reza Jeihani's costs which is to be paid by way of instalments over the next six months with the first payment starting 31 March 2023 and then on the last day of each month thereafter until the full sum is paid.

[1] In a determination issued on 25 October 2022, I found that Mr Zadeh was not an employee of Mr Jeihani and Mr Zadeh's claim was dismissed as a result because the Authority had no jurisdiction to consider it.¹

¹ *Zadeh v Jeihani* [2022] NZERA 544.

[2] The question of costs was reserved and the parties were encouraged to resolve the matter between themselves. If they were unable to do so, Mr Jeihani was to lodge and serve a memorandum within 28 days following the determination. Mr Zadeh would then have 21 days to lodge any reply memorandum.

[3] On 18 November 2022, Ms Trotman lodged and served a memorandum as to costs for Mr Jeihani. On 7 December 2022, Mr Fussey's reply memorandum was received by the Authority which was supported by an affidavit from Mr Zadeh. In his affidavit, Mr Zadeh stated that he was struggling financially and he provided documents which included bank statements, a bank loan debt which is now with a debt collecting agency, an outstanding account with another law firm, and a tax debt with Inland Revenue.

Costs principles

[4] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) to award costs. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.² Those principles are as follows:

- a. The Authority has a discretion whether to award costs, and how much, but the discretion must be exercised in accordance with principle and not arbitrarily.
- b. The statutory jurisdiction toward costs is consistent with the Authority's equity and good conscience jurisdiction.
- c. Equity and good conscience are to be considered on a case-by-case basis.
- d. Costs are not to be used to punish or express disapproval for the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- e. The Authority can consider whether all or any of the parties' costs were unnecessary or unreasonable.
- f. Costs generally follow the event (i.e., the unsuccessful party will normally be required to contribute to the costs of the successful party).
- g. *Calderbank offers* may be taken into account when setting costs.

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

- h. Awards will be modest.
- i. Frequently costs are judged against the notional daily tariff.
- j. The nature of the case can influence costs, which means the Authority may order those costs should lie where they fall.

Costs submissions

[5] Ms Trotman submitted that the way Mr Zadeh conducted his claim in the Authority warrants an uplift. Counsel refers to Mr Zadeh withdrawing his claim in the Authority after a fulsome Statement in Reply had been filed and that he continued to pursue the claim as a way to delay a debt recovery proceeding Mr Jeihani has against him in the District Court. Mr Jeihani has incurred great expense in order to defend what Ms Trotman says was a vexatious claim that lacked merit. She has provided a copy of an invoice schedule totalling \$14,498.13. It was submitted that the Authority exercise its discretion and order costs against Mr Zadeh based on 1.5 days of the daily tariff or \$6,250 (\$4,500 for the first day + \$1,750 being half of each additional day of an investigation meeting).

[6] Mr Fussey submitted that there are no factors pointing towards an uplift. While Mr Zadeh's claim had initially been withdrawn in the Authority this was by his former representative who acted without his instructions. It was further submitted that Mr Zadeh had a *prima facie* case to argue and that regardless of the outcome, the claim was genuine. As to undue hardship, Mr Fussey submitted that any costs award be modest and that payment be spread over a period of no less than 12 months.

[7] Mr Zadeh's affidavit attests that while he is earning an above average salary, he is treading water financially because he owes debts to a bank which is now with a debt collector, has an outstanding account of comparable size with another law firm, is not able to keep up with a significant tax debt with Inland Revenue which is continuing to grow as a result, and he is paying his current lawyer's account by instalments.

[8] There is no evidence provided to the Authority of a Calderbank offer and there has been no response from Mr Jeihani regarding Mr Zadeh's affidavit.

Costs analysis

[9] Determining the preliminary matter on the papers has saved the parties from incurring additional costs of an investigation meeting and I adopt as my starting point half a day of the notional daily tariff which equates to \$2,250. From there the starting point is adjusted upwards or downwards depending on the circumstances of the case.

[10] It was submitted that Mr Zadeh's claim was vexatious. I have not made such a finding in my preliminary determination. However, I accept that Mr Jeihani has been put to considerable cost in opposing what was not a strong albeit *prima facie* case. As the successful party, Mr Jeihani is entitled to be awarded costs but I find no basis to increase the starting point.

[11] That said, I do find a basis to decrease the starting point which relates to financial hardship. Although I do not have information regarding Mr Zadeh's wife's income and expenses and information concerning the number of children the couple may have and how old they are, the addition of another debt to join several others Mr Zadeh has must be fairly recognised in the cost-setting exercise. Accordingly, I reduce the starting point from \$2,250 and I arrive at an end point of \$1,500. While I have been invited to spread any costs award over 12 months, a period of six months is a more realistic timeframe in my view.

Order

[12] Yashar Abdollah Zadeh is ordered to pay Hamid Reza Jeihani \$1,500 as a contribution towards his legal costs. Payment shall be made in six-monthly instalments of \$250 per month with the first payment to be made no later than 5 pm 31 March 2023 to Mr Jeihani or to his counsel Ms Trotman. Subsequent payments of \$250 per month are then to be made by 5 pm of the last day of each month until the entire sum is paid in full.

Peter Fuiava
Member of the Employment Relations Authority