

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 49
3084932

BETWEEN	BRETT CHRISTOPHER ARTHUR Applicant
AND	OSS LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	David Traylor, counsel for the Applicant Tim Oldfield, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	22 December 2020, from Applicant 19 January 2021, from Respondent
Determination:	12 February 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 8 December 2020 which found Mr Arthur was unjustifiably dismissed by OSS Limited and awarded remedies in his favour reimbursing lost wages and compensation for non-economic loss.¹ The issue of costs was reserved and a timetable set for filing memoranda if the parties were unable to resolve costs themselves. Mr Arthur now applies for a costs award in its favour.

¹ *Arthur v OSS Limited* [2020] NZERA 506.

Mr Arthur's claim for costs

[2] Mr Arthur seeks a contribution to costs of \$11,200 plus reimbursement of the filing fee of \$71.56. He submits that as the successful party he is entitled to a contribution to his costs and that given the investigation meeting took two full days and the Authority's daily tariff approach, the starting point should be \$8,000. Although Mr Arthur represented himself at the investigation meeting he was supported by legal representation throughout the matter including during the investigation meeting. This decision was made to reduce his costs and is not a reasonable basis to reduce the daily tariff starting point.

[3] Mr Arthur also submits a without prejudice save as to costs settlement offer made on 12 May 2020 (total of \$51,500 including GST) is a reasonable basis for an uplift to the daily tariff starting point. The Authority awarded more than that amount to Mr Arthur being a total of \$76,700. The offer was ignored and justifies a substantial uplift of 40%. A schedule of costs has been provided.

OSS's response

[4] OSS submits firstly Mr Arthur's settlement offer was not fully effective and warrants only a modest uplift and secondly reductions should be made because several of Mr Arthur's claims were unsuccessful.

[5] In respect of the first issue OSS submits the 12 May settlement offer contained non-financial factors which are remedies which the Authority cannot grant, it was unrealistic for Mr Arthur to seek those remedies given his conduct and OSS's rejection was not unreasonable². It follows only a modest uplift should be given for rejecting the settlement offer.

[6] OSS also submits Mr Arthur's unsuccessful claim for commission, holiday pay, breach of the employment agreement and penalty claim along with an unsuccessful

² *Mattingly v Strata Title Management Limited* [2014] NZEmpC 15 at [28].

argument that the redundancy was not genuine warrant a significant reduction in costs. OSS relies on *Mattingly* as authority to support such a reduction.

Costs principles

[7] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.³

Costs analysis

[8] Mr Arthur was the successful party and it is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs. It is accepted Mr Arthur has incurred actual costs in respect of this matter. He should receive a contribution to costs incurred.

[9] The notional daily tariff is a starting point. The applicable daily tariff is \$4,500 with subsequent days \$3,500. It is accepted the starting point for costs for this matter, which involved two hearing days, is \$8,000. Factors to consider next are matters which would lead to an increase or decrease from that starting point.

[10] The settlement offer was sufficiently clear on its face including that it may be considered a relevant factor in a costs setting. If OSS had accepted Mr Arthur's

³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.

settlement offer it would be in a better position than it finds itself now. An uplift in costs is justified. OSS submits any uplift should be modest due to the non-financial factors raised in the settlement offer. Given OSS did not respond to the 12 May settlement offer there is no contemporaneous information before the Authority as to the reasons why it did not accept the offer. This does not strike me as a situation similar to *Mattingly*. There will be no decrease on this basis.

[11] It is correct that a number of claims made by Mr Arthur were unsuccessful and that investigation meeting time was used dealing with those matters. It is accepted that if Mr Arthur had not pursued unsuccessful arguments the hearing time would have been reduced. There should be some consideration given in setting costs that the hearing time was increased due to unsuccessful arguments.

Conclusion

[12] OSS Limited is ordered to pay Brett Arthur \$10,000.00 as a contribution to his costs within 21 days of the date of this determination.

[13] In addition OSS Limited is ordered to pay Brett Arthur the sum of \$71.56 within 21 days of the date of this determination.

Marija Urlich
Member of the Employment Relations Authority