

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 316
3133857

BETWEEN	KEVIN BREEN Applicant
AND	RENTOKIL INITIAL LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Sam Houliston, counsel for the Applicant Justin Foden, advocate for the Respondent
Cost Submissions	8 July 2022 from Applicant 27 June and 11 July 2022 from Respondent
Determination:	13 July 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 10 June 2022 ([2022] NZERA 242), the Authority found that the Applicant, Mr Kevin Breen, had not been constructively dismissed or unjustifiably disadvantaged from his employment by the Respondent, Rentokil Initial Limited (Rentokil Initial) .

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and both parties have filed submissions in respect of costs.

[3] The matter involved 2 days of meeting time. Ms Foden on behalf of Rentokil Initial, citing actual costs of \$8,750.00 (plus GST), is seeking a full reimbursement of those costs in addition to \$350.00 for the preparation of the costs memorandum.

[4] Mr Houlston on behalf of Mr Breen, accepts that costs will be awarded, however submits that this should be at the notional daily tariff rate in the Authority of \$8,000.00 for a two day investigation.

[5] Ms Foden submits that Rentokil Initial was completely successful in its defence of Mr Breen's claims.

[6] Ms Foden also submits that Rentokil Initial made a Calderbank¹ offer, that is a without prejudice save as to costs offer, to Mr Breen on 18 March 2022. The Offer stated that Rentokil would consent to Mr Breen withdrawing the proceedings on the basis that each side paid its own costs.

[7] Mr Houlston submits that there are no factors which would warrant the Authority deviating from its usual practice of awarding the tariff amount.

[8] In regard to the Calderbank Offer Mr Houlston submitted for Mr Breen that it was not unreasonable for him to reject the offer. This is on the basis that this was a case in which the credibility of the witnesses was a crucial factor and it was not unreasonable to proceed to an investigation unless the challenge to credibility was of itself, vexatious or 'frivolous'.²

[9] It is further submitted by Mr Houlston that Rentokil Initial's Calderbank Offer represented no more than a "drop hands" arrangement whereby Mr Breen would withdraw his proceedings and both parties meet their own costs. He submits that the Court of Appeal *Hira Bhana & Co Ltd v PGG Wrightson Ltd* rejected such an offer being consistent with the overall purpose of a Calderbank Offer.³

Principles

[10] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

² *Hira Bhana & co Ltd v PGG Wrightson Ltd* [2007] NZCA 342 at [24]

³ Above n 2 at [26]

- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[11] Costs are at the discretion of the Authority⁴. The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*⁵.

[12] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

Costs Award

[13] Rentokil Initial was the successful party in this case and costs usually follow the event.

[14] It is necessary to consider what effect the Calderbank Offer should have upon the award of costs in this matter.

[15] Whilst parties ignore Calderbank offers at their peril, in this case the Calderbank Offer did not offer Mr Breen more than the opportunity to walk away and meet his own costs. He chose to reject the offer and proceed to an investigation by the Authority. His decision to do so I find was not unreasonable in the circumstances of the credibility issues.

[16] Consequently I make no order for an uplift in costs above the notional daily tariff rate in the Authority.

[17] Rentokil Initial has applied for costs in respect of its costs submissions. The Authority does not generally award costs on costs applications, and I am not minded to make an exception in this case.

[18] **I order Mr Breen to pay to Rentokil Initial the sum of \$8,000.00 as costs pursuant to clause 15 of Schedule 2 of the Act.**

⁴ *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

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

Instalments

[19] Mr Houliston has applied on behalf of Mr Breen for the costs award to be payable by instalments. He submits that Mr Breen is self-employed and supports his wife who is unable to work due to a terminal condition.

[20] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings, and I acknowledge that the financial circumstances of Mr Breen appear to warrant the payment of the sums awarded to Rentokil Initial by way of instalments.

[21] The parties are to discuss this issue between them. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements cannot be agreed between them.

Eleanor Robinson
Member of the Employment Relations Authority