

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 62A/10
5287623

BETWEEN Gwen Brocklehurst
 Applicant

AND KBM Machine Maintenance
 Limited
 Respondent

Member of Authority: Denis Asher

Representatives: Gary Tayler for Ms Brocklehurst
 Raewyn Gibson for the Company

Submissions received: By 28 May 2010

Determination: 4 June 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 12 April 2010 (WA 62/10) I found against Ms Brocklehurst's claim that the Company was responsible for the actions of a police officer during the investigation of a criminal matter and that the applicant was unjustifiably disadvantaged by those actions.

[2] Ms Brocklehurst's claim for a penalty action in accordance with the Wages Protection Act 1983 (WPA) was also unsuccessful.

[3] Costs were reserved.

Respondent's Costs Submissions Summarised

[4] In costs submissions received on 10 & 28 May the Company relies on the principles set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

[5] A significant costs award is sought on the basis the applicant's claims were entirely unsuccessful.

[6] The respondent's costs are necessary and reasonable.

[7] This is an appropriate case for the Authority to depart from the general practice of awarding costs on the basis of a notional daily rate, and to make a significant or even full costs award.

[8] Not only did the respondent immediately arrange mediation, following receipt of the applicant's claim, but – despite having incurred costs – wrote to Ms Brocklehurst on 9 February advising it was prepared to forego seeking costs in the event the applicant withdrew her claim on or before 12 February.

[9] The Company incurred additional costs in respect of the penalty claim when it was very clear Ms Brocklehurst had not been disadvantaged by the respondent's acknowledged technical breach of the WPA.

[10] Costs incurred by the respondent total \$6,875.00 (invoice attached).

[11] Given the lack of merit of the applicant's claim a significant award is sought.

The Applicant's Position Summarised

[12] The applicant does not challenge the principles relied on (*Da Cruz*, above).

[13] The reasonableness of the costs incurred by the respondent are largely not challenged.

[14] The claim for higher than usual costs is challenged on the grounds this was effectively a test case as there is no apparent judgement of the court on the question of vicarious liability if a police officer oversteps the mark in interrogating an employee at the invitation of the employer. To that end the Authority invited the applicant to have the matter transferred to the Employment Court but in the interest of keeping costs down it was declined. Costs should therefore lie where they fall.

[15] The Authority did not conclude that the claim was vexatious and frivolous.

[16] Repeated email requests to the respondent to settle matters on agreed terms went unanswered until the purported Calderbank offer was received.

[17] The purported Calderbank is lacking in respect of essential requirements and has no effect:

- a. First, the timeframe provided was unreasonably short, being 3 days in the first instance: see *Shanks v Agar* [1992] 2 ERNZ 578.
- b. Second, and more importantly, it contained no offer for Ms Brocklehurst to consider that the Authority would normally take into account.
- c. Costs were not recoverable (as implied by the respondent) at that point were the applicant to withdraw, as the Authority has consistently refused to award costs where a party withdraws before the preparation for the case commences. And,

- d. Finally, the case was in any event unremarkable in terms of process and was always going to be decided on some identified questions of law where the material facts were not in dispute.

[18] The conflicting position of the Employment Court and Authority in respect of penalties (cases cited) supports a finding as to the merit of Ms Brocklehurst's penalty application.

[19] Because of the case's straight forward nature the investigation lasted less than 3 hours and the Authority enjoyed the full co-operation from all witnesses.

[20] If the Authority does not accept the submission that costs should lie where they fall it is submitted the usual range should apply and, per full day of hearing costs, no more than \$1,000 should be awarded.

Discussion and Findings

[21] Mr Tayler is quite right to point out an error in my substantive determination: paragraph 45 should have referred to s. 4 of the WPA, and not to s. 65 (a transcription/proofing error on my part). I apologise to the parties for any confusion and/or inconvenience this has caused.

[22] I agree with Mr Tayler's observation that the case "*was always going to be decided on some identified questions of law, where the material facts were not in dispute*" (par 4.6 of his submissions received on 21 May). In this case the identified question of law (see par 1 of the substantive determination) was: was the respondent liable for the actions of a police officer investigating a criminal matter at its request? As is made clear at par 30 of the substantive determination, "*There is no evidence of the Police acting as the Company's agent in any capacity*". The uncontested evidence was of a police officer responding throughout to a formal complaint and carrying out an investigation into an alleged breach of the Crimes Act 1961.

[23] Because the outcome was determined by the evidence I do not accept any question of law lay in this uncommon but not remarkable employment relationship problem, and it therefore did not amount to a test case.

[24] I also accept Mr Tayler's submission that no reliance can be placed on the respondent's offer to not seek costs if the applicant withdrew because it did (and does) not meet the requirements of a genuine Calderbank offer.

[25] Without intending disrespect to the parties, this was an undistinguished personal grievance and costs should accordingly follow the event.

[26] Having regard to the parties' arguments and *Da Cruz* (above), I am satisfied that costs of \$1,500 should be awarded in favour of the respondent.

Determination

[27] Ms Brocklehurst is to pay to the Company as a contribution to its fair and reasonable costs the sum of \$1,500 (one thousand and five hundred dollars).

Denis Asher

Member of the Employment Relations Authority