

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 443  
5302895

BETWEEN                      BRENDAN CLARKSON  
   Applicant  
  
AND                              CRAFTSTONE NEW  
   ZEALAND LIMITED  
   Respondent

Member of Authority:      R A Monaghan  
  
Representatives:            R Rolston, advocate for the applicant  
   F Peters, counsel for respondent  
  
Memoranda received:      16 November 2012 from applicant  
   15 November and 5 December 2012 from respondent  
  
Determination:              10 December 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]      In a determination dated 25 October 2012 I recorded an agreement the parties had reached resolving a claim and counterclaim, and directed that payment be made accordingly. Costs were reserved and the parties have submitted memoranda on the matter.

[2]      Mr Peters' memorandum merely informed the Authority of the costs incurred by Craftstone in the course of this employment relationship problem. Only the costs of legal representation can be the subject of a claim for costs here. They amounted to \$2,083.45.

[3]      The remainder of the costs amounted to a charge for the general manager's time and a claim for the reimbursement of his expenses. These are not costs of representation, rather they are costs and charges incurred before counsel was

instructed, and by, in effect at the time, a litigant in person. Costs of this kind cannot in general be recovered.<sup>1</sup>

[4] Ms Rolston sought costs quantified at the notional daily rate of \$3,500, plus costs in respect of mediation conducted at the Authority's direction, and travel expenses. The total sought was \$5,101.70.

[5] In support Ms Rolston relied on what she called a Calderbank offer contained in a letter dated 6 August 2012. The letter noted that a likely outcome in the Authority was an order in respect of the unpaid portion of the monies due to Mr Clarkson in the amount of some \$4,000 and that costs in the sum of \$3,500 would follow. It went on to say that the employment relationship problem could be settled by a payment of \$8,000 under s 123(1)(c)(i) of the Employment Relations Act 2000, comprising \$4,000 in respect of the unpaid sums of money, \$2,000 as compensation for injury to Mr Clarkson's feelings, and \$2,000 in respect of costs.

### **The conduct of the matter**

[6] The resolution of this matter should have been simple. Craftstone did not deny liability for the outstanding wages and holiday pay which Mr Clarkson sought in respect of the termination of his employment in March 2011. Mr Clarkson did not deny that he owed money to Craftstone - in particular for his use of Craftstone's telephone, petrol and visa cards for personal purchases - and I record for completeness that the employment agreement permitted deductions from salary or wages for any debt the employee owed to the employer. The question was simply one of quantification. It centred primarily on identifying which of the purchases on the cards Mr Clarkson had used were personal rather than business-related.

[7] Despite this, the matter required four teleconferences between the Authority and the parties, two attempts at mediation, and a scheduled investigation meeting.

[8] It appears other issues arose, and it is unfortunate if they contributed to unnecessary delay and complication in the resolution of this matter. These issues were referred to in an amended statement of problem lodged in May 2012.

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<sup>1</sup> *Murphy and Routhan t/a Enzo's Pizza v van Beek* [1998] 2 ERNZ 607

[9] The amended statement of problem asked the Authority to determine:

- a personal grievance in that Craftstone had caused Mr Clarkson to suffer a disadvantage in relation to the ‘manner in which it treated him during the period following the termination of his employment’; and
- that Craftstone should pay penalties.

[10] I raised with Mr Clarkson difficulties caused by the fact that the personal grievance concerned events occurring after the end of the employment relationship, and the failure to identify a proper basis for the penalty claims.

[11] He responded in a memorandum saying his personal grievance was raised in a letter to Craftstone dated 20 April 2011. The letter set out a background to the parties’ dispute about payment, and expressed the view that Mr Clarkson had grounds for a personal grievance as the way the dispute had been handled was not fair and reasonable and had caused him humiliation and hardship. As for the penalty claims, Mr Clarkson alleged that Craftstone’s failure to make the final payment of his wages and holiday pay was a breach of good faith for which a penalty was payable under s 4A of the Act and that the breach of good faith was continuing.

[12] The attempt to pursue a personal grievance in respect of the post-termination dispute about payment was misconceived. Secondly, it was arguable that the claim for a penalty was out of time, and in any event in the circumstances I did not consider the failure to make the final payment of wages and holiday pay amounted to a breach of good faith to which s 4A applied. I raised my further concerns during the last two of the teleconferences.

[13] The original problem of quantification remained for determination at the investigation meeting. At an early date Craftstone had provided copies of the relevant invoices identifying what it believed were personal purchases, together with a spreadsheet identifying what it believed Mr Clarkson owed to it. On two occasions I directed Mr Clarkson to respond identifying for his part which purchases were personal, but he had not done so by the date of the investigation meeting. The investigation meeting took one day, and the meeting time was used in addressing that matter.

### **The Calderbank offer**

[14] The offer of settlement by a payment to Mr Clarkson of \$8,000 under s 123(1)(c)(i) of the Act exceeded significantly the amount which became the consent order of the Authority. The approach to the quantification of the amount was also misconceived particularly in that it assumed the existence of a personal grievance.

[15] Accordingly I give the offer no weight.

### **Order for costs**

[16] There was no dispute about liability. By his lack of response to my directions to respond regarding which purchases were personal, Mr Clarkson contributed substantially to the failure to conclude an agreement regarding quantum prior to the investigation meeting so that a meeting was required. In those circumstances I do not consider him the successful party and do not in any event consider it appropriate make an order for costs in his favour.

[17] The conduct of the matter as I have summarised it means I consider Mr Clarkson has caused unnecessary cost to Craftstone. An order for costs in its favour is warranted.

[18] The amount Craftstone is able to claim is less than the notional daily rate usually applied by the Authority. I therefore award it.

[19] Mr Clarkson is ordered to contribute to Craftstone's costs in the sum of \$2,083.45.

R A Monaghan

Member of the Employment Relations Authority