

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA182A/10
5287015

BETWEEN DEMI COOK
 Applicant

A N D BRADIANA ENTERPRISES
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Jonny Sanders, Advocate for Applicant
 Sue Grey, Counsel for Respondent

Submissions Received: 9 November 2010 from Applicant
 29 October 2010 from Respondent

Date of Determination: 11 November 2010

COSTS AND REMUNERATION DETERMINATION THE AUTHORITY

Remuneration

[1] In the Authority's substantive determination dated 16 September 2010, a finding was made that sick pay and holiday pay were due and owing to the applicant, Ms Cook, by the respondent, Bradiana. The parties were encouraged to seek to reach agreement on the matter themselves but were unable to do so. Leave was reserved for a further application to the Authority. This portion of this determination deals with those outstanding matters.

[2] Bradiana submits that in respect of sick pay, the amount of \$140.40 is owing. That amount is accepted by Ms Cook. In respect of holiday pay, the parties have calculated the entitlement differently. I sought to have the parties address the matter because there was no agreement about holiday leave taken by Ms Cook. In the result, that dispute remains outstanding, as does the method of calculation. I am satisfied that Mr Sanders, for Ms Cook, has correctly calculated the holiday pay entitlement in accordance with the principles of the Holidays Act 2003 and I adopt his figures as a

consequence. The submissions filed on behalf of Ms Cook indicate a gross sum of \$1,401.61 owing in respect of holiday pay.

[3] Accordingly, I direct that Bradiana is to pay Ms Cook the total gross sum by way of unpaid sick leave and unpaid annual holiday leave in the sum of \$1,542.09.

The application for costs

[4] In the substantive determination dated 16 September 2010, both of Ms Cook's claimed personal grievances were rejected although the Authority was satisfied that Ms Cook was owed unpaid holiday pay. Costs were reserved.

The claim for costs

[5] Bradiana asks for costs to be fixed in its favour in the sum of \$2,500. It says that Ms Cook was completely unsuccessful in her two substantive claims (each of personal grievance) although it is acknowledged that she was successful in her subsidiary wages claim. The claim for costs is augmented by Bradiana's contention that, amongst other things, Ms Cook's advocate ought not to have been involved in the matter as her representative because it is contended that he was *personally and directly involved in the events leading to the plaintiff's resignation*.

[6] For Ms Cook, it is contended that she no longer has employment and as a high school student is in no position to make any contribution to the costs incurred by Bradiana. Further, it is suggested that as a director of Bradiana was actively involved in Ms Cook's personal grievance claim in the early stages, it is unreasonable to conclude that fees of \$2,500 have been *reasonably incurred* when much of the original work would effectively have been *pro bono*.

Determination

[7] The law on the Authority's cost fixing jurisdiction is usefully discussed in the Employment Court decision of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. Amongst other things, the Employment Court accepted the appropriateness of the tariff-based approach frequently used by the Authority in a costs setting environment provided that the daily tariff approach was applied in accordance with principle. The various factors that the Authority might consider in exercising its discretion are set out in the Court's judgment.

[8] In the particular circumstances of this case, it is clear first of all that the daily tariff approach would, on general principles, produce a very modest result. The matter was dealt with by the Authority in barely a half day's hearing and on that basis, all other things being equal, the daily tariff approach would net a maximum figure of \$1,500.

[9] However, there are other factors at play here. First, I do not accept the submission by Bradiana that there was somehow impropriety in Mr Sanders' being involved for Ms Cook. The Authority concluded, and made a finding, that the employment relationship came to an end on 21 October 2009 as a consequence of the involvement of Ms Cook's mother. At that point, Mr Sanders was not in any way involved and even if he were, it is a commonplace in the employment jurisdiction that such involvement is tolerated.

[10] There is nothing in Bradiana's claim for costs that will allow me to assess their reasonableness. There are no invoices or notes of attendances provided to the Authority nor is there any indication of the hourly rate charged or of the work done by Ms Grey as distinct from the work done by Ms Ritchie. I accept the submission made on Ms Cook's behalf that the practical reality was that much of the work in resisting her claim was actually done by Ms Ritchie who is a director of Bradiana. The Authority is entitled to take the view in assessing the appropriateness of a costs application that legal services provided *in house* ought not to receive the same consideration in a costs setting, as fees charged by outside counsel.

[11] However, the overriding consideration in the present case is that Ms Cook is a schoolgirl. As a consequence, she has no financial resources of her own and I am advised is not currently in employment. It follows that any costs award is in effect punitive rather than compensatory and the law is clear that a costs award is designed to compensate and not to punish. I am satisfied in the present case that an appropriate exercise of the Authority's discretion is that costs should lie where they fall.

[12] Bradiana is directed to pay to Ms Cook for her use the total sum of \$1,542.09 being unpaid sick pay and unpaid holiday pay to which she is entitled.

James Crichton
Member of the Employment Relations Authority

