Employment Court of New Zealand

Crossen v Yangs House Limited [2021] NZEmpC 102 (7 July 2021)

Last Updated: 12 July 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2021] NZEmpC 102
EMPC 256/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CHRISTINE CROSSEN Plaintiff
AND	YANGS HOUSE LIMITED First Defendant
AND	LIU YANG Second Defendant

EMPC 330/2020

AND IN THE MATTER	of a challenge to a determination of the Employment Relations Authority
BETWEEN	YANGS HOUSE LIMITED First Plaintiff
AND	LIU YANG Second Plaintiff
AND	CHRISTINE CROSSEN Defendant

Hearing:	21–22 April 2021 (Heard at Christchurch)
Appearances:	H Holderness and J Hobcraft, counsel for plaintiff P Brown, advocate for defendants
Judgment:	7 July 2021

JUDGMENT OF JUDGE K G SMITH

CHRISTINE CROSSEN v YANGS HOUSE LIMITED [2021] NZEmpC 102 [7 July 2021]

[1] In March 2018 Christine Crossen signed a settlement agreement with Yangs House Ltd which, on its face, purported to resolve the employment relationship problems between them. The agreement was completed as a record of settlement under s 149 of the Employment Relations Act 2000 (the Act).

[2] After signing the settlement agreement and being paid the compensatory sum she was owed under it, Mrs Crossen lodged a claim in the Employment Relations Authority for unpaid wages and holiday pay. She considered that her claim was not compromised by the agreement.

[3] The Authority disagreed.1 It held that Mrs Crossen was prevented from pursuing the claim because the settlement agreement resolved all disputes between the parties to it.

[4] Mrs Crossen's proceeding in the Authority included an application for a penalty to be imposed on Yangs House because it had refused, at least initially, to supply her with time and wage records the company was required to keep under s 130 of

the Act. The Authority declined to impose a penalty. In a subsequent determination the Authority ordered Mrs Crossen to pay costs of the investigation to Yangs House and Liu Yang.2

[5] The Authority's determinations produced two challenges. The first of them was by Mrs Crossen. She challenged the substantive determination on the basis that it contained material errors of fact and law about the proper interpretation and application of the settlement agreement. She also challenged the Authority's refusal to impose a penalty.3 The second challenge was by Yangs House and Ms Yang on the basis that the Authority's costs orders were inadequate.

Mrs Crossen's challenge

[6] The errors attributed to the Authority in Mrs Crossen's challenge were that:

1 *Crossen v Yang House Ltd* [2020] NZERA 295 (Member O'Sullivan).

2 *Crossen v Yangs House Ltd* [2020] NZERA 394 (Member O'Sullivan).

3 Commonly referred to as a non-de novo challenge.

(a) It failed to properly interpret and apply the settlement agreement.

(b) It failed to have regard to ss 131(1) and (2) of the Act.

(c) It failed to make a finding at all about Mrs Crossen's claim that she was employed by Ms Yang from October 2015 until February 2016.

(d) It erred in failing to impose a penalty under s 130(4) of the Act for the failures by Yangs House to produce time and wage records.

[7] Mrs Crossen sought to establish that the settlement agreement did not prevent her from recovering minimum entitlements for arrears of wages and unpaid holiday pay she claimed were owing to her under the Minimum Wage Act 1983 and Holidays Act 2003 respectively. Additionally, she sought to overturn the Authority's decision not to impose a penalty on Yangs House and to have any penalty paid to her.

[8] Mrs Crossen sought an order making Ms Yang responsible for paying any outstanding minimum entitlements that Yangs House does not pay.

Did the Authority err in interpreting the agreement?

[9] The linchpin of the Authority's determination was a conclusion that the settlement agreement compromised all of Mrs Crossen's claims because of clause 10 that reads:

10. Both parties acknowledge that they have had the opportunity to seek legal advice in consideration of the termination of the employment relationship, and as to the terms of this record of settlement.

This Record of Settlement is a full and final settlement of all matters between the Applicant and the Respondent arising out of their employment relationship.

[10] Mr Holderness, counsel for Mrs Crossen, identified the following issues in attempting to establish that the Authority had erred in its interpretation of the settlement agreement:

(a) Should clause 10 of the settlement agreement be interpreted as meaning that the parties settled all possible matters between them, including the plaintiff's minimum entitlements?

(b) Is there a difference between foregoing a claim to minimum entitlements and giving up (or compromising) the rights/ability to pursue that claim?

(c) Depending on how those issues are determined, what is the effect of s 131 of the Act?

[11] As is evident from Mr Holderness' statement of issues, there were two strands to the arguments for Mrs Crossen. The first strand was that, properly construed, the settlement agreement had not compromised Mrs Crossen's claims for statutory minimum entitlements. The second and related strand was that, in any event, it is not lawfully possible to compromise a claim for statutory minimum entitlements. Consequently, what the settlement agreement provided for is immaterial because Mrs Crossen is entitled to claim them.

[12] It was common ground that interpreting the settlement agreement is an objective exercise to ascertain the meaning it would convey to a reasonable person having all of the background knowledge reasonably available to the parties in the situation they were in at the time of the agreement. In this exercise context is significant and taking it into account does not

depend on establishing any ambiguity in the agreement being interpreted.4

[13] Before considering Mr Holderness' submissions it is necessary to say something more about the settlement agreement.

4. *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [62]- [63].

The settlement agreement

[14] The settlement agreement was certified by a mediator under s 149 of the Act. It is in a format commonly used in certified mediated settlements. It has a heading "Record of Settlement", with a subheading, "Section 149 Employment Relations Act 2000". It is divided into three sections. The first section names the parties to the agreement; Mrs Crossen and Yangs House. Ms Yang was not named as a party and is not mentioned anywhere in it.

[15] The second section begins with a subheading "Agreed Terms of Settlement to Employment Relationship Problems", followed by ten numbered clauses containing what was agreed by the parties. This section ends, immediately after clause 10, with the signatures of the parties.

[16] The third section, separately signed by the parties, confirmed they understood the consequences for them once the settlement agreement was signed by a mediator.5 It ends with confirmation by the mediator that, before he signed the agreement, he explained to the parties the effects of ss 148A, 149(1) and (3) of the Act.6

[17] The mediator signed the agreement immediately underneath a statement that he was satisfied the parties understood the effect of those sections of the Act and that they had advised him that no minimum entitlements were foregone in reaching agreement. The consequence of his signature was that the agreement became final, binding and enforceable under s 149(1) of the Act.

Analysis of the settlement agreement

[18] Against that background Mrs Crossen's case was that the settlement agreement dealt with her personal grievance claims for unjustified dismissal and unjustified disadvantage, but not her claims for statutory minimum entitlements for unpaid wages and holiday pay.

5. Meaning a mediator employed or engaged by the Chief Executive of the Ministry of Business Innovation and Employment to provide mediation services.
6. Section 148A states that certain entitlements may be the subject of mediation. Section 149(1) authorises a mediator holding a general authority given by the Chief Executive to sign agreed terms of settlement. Section 149(3) makes a signed settlement agreement final and binding.

[19] The first strand of Mr Holderness' argument comes from analysing clause 10, describing the extent of the agreement. He submitted that, while clause 10 referred to a full and final settlement, it was not clear what was settled. He asked a rhetorical question: what are "...all matters between the applicant and the respondent arising out of their employment relationship" referred to in the clause? His answer was that the phrase "arising out of their employment relationship" acted as a qualifier, limiting or confining the settlement. It was only those matters arising from the employment relationship itself that were settled.

[20] The argument was that reading the agreement in this qualified way meant that the plaintiff's statutory minimum entitlements could be seen as falling outside the scope of the settlement, because they arise as a matter of law. Mr Holderness said that they are not simply an incidence or by-product of the employment relationship between the parties. He drew a contrast between those entitlements and the plaintiff's personal grievance claims which he said arose only because of the employment relationship and in the way it unfolded or ended. It followed, in his submission, that clause 10 can be read as meaning that the settlement was limited to "all matters" relating to the plaintiff's personal grievance claims.

[21] Support for this proposition was drawn from clause 10 referring to the parties having had the opportunity to seek legal advice "...in consideration of the termination of the employment relationship...". That was because the definition of "employment relationship problem" in s 5 of the Act includes personal grievances but does not specifically mention claims for payment of minimum entitlements.7

[22] Mr Holderness took comfort from clause 1, dealing with the confidentiality of all matters relating to the "employment relationship problem". His submission was that it was difficult to see how a claim for statutory minimum entitlements is, or is related to, the existence of an employment relationship problem. Those entitlements

7. Employment Relations Act 2000, s 5: "Employment relationship problem includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment."

are payable to the employee regardless of the state of the relationship between the employee and employer and whether or not a dispute exists.

[23] Mr Holderness acknowledged that clause 10 is capable of being read more broadly than this analysis proposed, so that it could be suggested the parties were settling minimum entitlements and personal grievances. However, seeking to apply the test in *Firm PI*, he drew on other contextual factors to support his preferred interpretation.8 Those factors were said to be:

(a) The agreement as a whole.
(b) The negotiations that took place before the agreement was entered into, so far as they can be objectively ascertained.
(c) The relevant statutory context; because a reasonable observer is taken to have knowledge of the statutory minimum entitlements.
(d) Clause 5 declaring statutory rights to minimum entitlements have not been foregone. It reads:

In reaching this agreement the parties confirm that they have not agreed to forego minimum entitlements (e.g. money or leave entitlements under the Minimum Wage Act 1983, or the Holidays Act 2003, or the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016 as specified in s 148A(3) of the Employment Relations Act 2000).

(e) The absence of a clause specifying that there was an agreement between the parties as to the quantum of the plaintiff's minimum entitlements.

(f) The settlement agreement provided for payment for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act, which is compensation payable for personal grievance claims. No other payments were provided for in the agreement.

8 *Firm PI*, above n 4.

(g) The certificate by the mediator recording the parties as having advised him that no minimum entitlements were foregone in the agreement.

[24] This context was said to also illustrate that properly interpreted clause 10 was confined to Mrs Crossen's personal grievance claims.

[25] The first difficulty with this analysis is that it invites a narrow reading of clause 10 on the basis that the phrase "employment relationship" allows a distinction to be drawn between personal grievances that arise from that relationship and claims for minimum entitlements that arise from statutes. Such a distinction is artificial. Both arise from statutes; personal grievances are provided for by the Act. The minimum entitlements claimed by Mrs Crossen are created by the Minimum Wage Act and Holidays Act respectively. None of Mrs Crossen's claims could exist in the absence of an employment relationship.

[26] The second difficulty is that, read as a whole, the settlement agreement favours a broad meaning being given to clause 10 rather than a narrow one. There is no reason to read the end of clause 10 as qualifying, or narrowing down, the breadth of what was agreed merely because the reference was to what arose from the employment relationship. Such an approach unreasonably minimises the words "all matters" and invites a restrictive view of what arose in the employment relationship and employment relationship problem. All of the claims arose from that relationship.

[27] The breadth of clause 10 is mirrored, in some respects, in clause 1 which also refers to the settlement of "all matters" relating to the employment relationship problem. As well as repeating "all matters" the expressions "relating to" and "employment relationship problem" suggest an expansive interpretation was intended.

[28] While Mr Holderness mentioned some clauses in the settlement agreement favouring his interpretation there are others favouring a wider and more comprehensive agreement. In clause 6, the parties agreed to not make disparaging comments about each other. Instead they agreed to confine any public comment to the

statement in clause 2, that Mrs Crossen had resigned and that "Yangs House wish her well". That is indicative of an attempt at a comprehensive compromise.

[29] Similarly, a desire to end all disputes can be seen in clause 7, imposing an obligation on Yangs House to provide a positive reference about Mrs Crossen's competence, skills, reliability and honesty. To like effect is clause 8 that requires company property to be returned. Those financial and non-financial terms come to a head in clause 10, stating the agreement is the full and final settlement of the employment relationship.

[30] The third difficulty is the context provided by the dispute beginning when Sacked Kiwi wrote a letter on Mrs Crossen's

behalf to the defendants in January 2018. The letter was detailed. Personal grievance claims were made as were claims for unpaid wages and holiday pay.

[31] Mr Holderness submitted it would be wrong to allow Sacked Kiwi's letter to unduly inform the interpretation of the settlement agreement. His point was that an assumption should not be made, in the absence of something more, that the parties intended to compromise everything in that letter. Just because Sacked Kiwi made claims for wages and holiday pay alleged to be owed did not mean, he said, that everything mentioned in the letter flowed through into the compromise in the agreement.

[32] The Sacked Kiwi letter was the catalyst for the dispute and must have set the parameters of the negotiations that followed. The only other correspondence produced in evidence were emails between representatives where Yangs House insisted on the words "full and final" being added to a draft of clause 10. There was no other evidence about communication between Mrs Crossen and Yangs House before the settlement agreement was signed.

[33] Mr Brown, advocate for the defendants, invited an inference to be drawn from Sacked Kiwi's letter and subsequent emails that the parties were settling all matters and that explained why "full and final" was to be added to a draft version of clause 10;

indicating all disputes were being compromised. I agree. The wording of clause 10, the balance of the settlement agreement and the context in which it was written supports a broad reading that the parties intended a comprehensive resolution to their dispute.

[34] The second strand to Mr Holderness' submission was that it was not possible, in any event, to have compromised Mrs Crossen's statutory minimum entitlements. His reason for that submission was that the Minimum Wage and Holidays Acts prevent contracting out of the entitlements created by them. Consequently, it follows, that any settlement that resulted in an attempt to contract out, or having that effect, is unlawful and of no effect. That is also the effect of s 148A(2) of the Act prohibiting a mediator from signing a settlement agreement where a party has agreed to forego all or part of that person's specified entitlements.

[35] Mr Holderness also relied on s 131 of the Act. The section provides that, where there has been default in payment to an employee of any wages or other money payable by an employer, or where payment has been made at a rate lower than legally payable, the amounts unpaid or short-paid can be recovered by the employee in the Authority. The power created by s 131, to begin an action for arrears, is extended by s 131(2), so that the ability to take recovery action applies despite the acceptance by the employee of payment at a lower rate.9

[36] Relying on the combination of those sections, Mr Holderness submitted that the settlement agreement could not have compromised Mrs Crossen's claims for unpaid wages and holiday pay as a matter of law. Consequently, and as acknowledged by clause 5 of the agreement, it followed that she was free to take recovery action. Pursuant to s 131(2), she was able to initiate proceedings no matter what the settlement agreement provided.

[37] Mr Holderness anticipated a response to this argument from the defendants, to the effect that the agreement did not purport to compromise statutory minimum entitlements but, instead, dealt with a cause of action (or a potential cause of action)

9 Employment Relations Act 2000, ss 131(1)(a)–(b) and 131(2).

claiming those entitlements and that they are two different things. That distinction was drawn in *Maharaj v Wesley Wellington Mission Inc*, which decision he criticised as creating a distinction without a difference.10 He argued that there is no difference between those concepts because foregoing something means to give it up, to relinquish it, or decline it. Consequently, compromising a cause of action where what was pleaded was a claim for statutory minimum entitlements was indistinguishable from giving up those entitlements. On his analysis, an agreement that did so was in breach of s 148A(2) of the Act.

[38] In advancing this submission, Mr Holderness acknowledged that minimum entitlements could be provided for in a settlement agreement, under s 149 of the Act, but only in a declaratory way.

[39] I agree that minimum entitlements cannot be foregone in an agreement certified under s 149, or otherwise. However, that does not assist Mr Holderness' submission that Mrs Crossen's claims were preserved and can now be pursued.

[40] The flaw in Mr Holderness' submission was that he conflated an inability to forego statutory minimum entitlements with resolving disputes about the existence or extent of them. On his analysis, the ability to mediate about a disputed claim for minimum entitlements is shorn of all effectiveness. That cannot be correct.

[41] The object of the Act, in s 3(a), includes building productive employment relationships through promoting good faith in all aspects of the employment environment and of the employment relationship. Relevantly, mediation is promoted in s 3 as the primary problem-solving mechanism other than for enforcing employment standards.11

[42] Section 148A(1) of the Act allows statutory minimum entitlements to be the subject of mediation and for them to be included in agreed terms of settlement. Those entitlements that can be the subject of mediation are listed in s 148A(3): the Minimum

10 *Maharaj v Wesley Wellington Mission Inc* [2016] NZEmpC 129 at [42].

11 Employment Relations Act 2000, s 3(a)(iv).

Wage Act, Holidays Act, the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016 or the Support Workers (Pay Equity) Settlements Act 2017.

[43] Reading together ss 148A(1), 148A(3) and 3(a) indicates Parliament intended that parties to an employment relationship are able to resolve disputes about minimum entitlements and have the resulting agreement incorporated into a settlement certified under s 149(1). Once those entitlements have been established, however, s 148(A)(2) prevents a mediator from endorsing any agreement that negotiates them away. It would not be permissible, for example, to pay a lesser amount or swap the minimum entitlement for some other remedy.

[44] In that way bona fide disagreements can sensibly be addressed satisfying both s 148A(1) and s 3(a)(iv) of the Act. Were the situation otherwise, a purported settlement under s 149 of the Act of a dispute over claims for statutory minimum entitlements would not produce finality. An employee would always be free to start recovery action in the Authority after entering into a settlement agreement. An employer could never be satisfied that the litigation risk had been removed by what was thought to have been a complete compromise. Such ongoing uncertainty cannot have been intended, given the Act's object and especially where mediation is the preferred means of resolving disputes.

[45] This conclusion is consistent with the explanatory note to the Employment Relations Amendment Bill (No 2) 2010 that led to the introduction of s 148A into the Act.12 That explanation stated the intention of the section was not to prevent minimum entitlements from being considered in mediation but, rather, to ensure that the lawful amount of them, once determined, cannot be reduced.

[46] For completeness, I do not accept that *Maharaj* created a distinction without a difference. That case involved a dispute about a potential claim for minimum entitlements. The plaintiff in that case chose to avoid the risk and cost of litigation by

12. Employment Relations Amendment Bill (No 2) 2010 (196-1) (explanatory note) at 6. The amendment took effect from 1 April 2011.

settling. The settlement brought certainty to what had previously been uncertain. That is conceptually different from foregoing an undisputed entitlement as part of a deal.

[47] Finally, in this case there was a dispute about the work Mrs Crossen performed and, therefore, if she was owed any wages or holiday pay. Mrs Crossen said that she either worked, or was on call, for long hours each week and had no time off because the motor lodge business owned by Yangs House was open all the time. Her evidence was supported by the employment agreement that provided for lengthy hours of work; calculated by Sacked Kiwi as 105 hours per week. Mr Hobcraft, counsel for Mrs Crossen, prepared a spreadsheet calculating what was said to be owed based on a conservative 98 hours per week.13

[48] Conversely, Ms Yang said that, despite the wording of the employment agreement, Mrs Crossen was expected to work about 35 hours per week. She went on to say that those were the hours she was working having taken over the job Mrs Crossen used to have. She disputed Mrs Crossen's description of the work required because the motor lodge's reception was staffed in shifts and another employee came on duty at times Mrs Crossen claimed to be working. Further, she said some of the tasks Mrs Crossen claimed to perform, such as laundry, were handled by contractors.

[49] I agree with the Authority that the settlement agreement resolved the outstanding issues between Mrs Crossen and Yangs House including the personal grievances and wages and holiday pay claims. It follows that there was no error by the Authority.

[50] That conclusion does not resolve this challenge because Mrs Crossen claimed she was employed by Ms Yang, not Yangs House, from October 2015 until February 2016. The settlement agreement did not refer to Ms Yang and the determination did not address this subject.

[51] Mrs Crossen said she first began working for Ms Yang in October 2015 in response to a request by Ms Yang for her help and to have accepted accommodation

13 By reference to the potential extent of the motor lodge's office hours.

on the premises to work as the business' on-site manager. Mrs Crossen said between October 2015 and February 2016 she was paid

$420 per week, in cash, provided in an envelope bearing Chinese characters.

[52] Not surprisingly, Ms Yang disagreed. She denied ever employing Mrs Crossen personally. Her explanation for Mrs Crossen living on the premises was that she made the accommodation available out of kindness, because Mrs Crossen had lost her previous job that provided it. On Ms Yang's evidence Mrs Crossen was not expected, and was not asked, to work. Ms Yang denied paying Mrs Crossen cash, in an envelope with Chinese characters, and said that was a payment method used by Mrs Crossen's former employer. Ms Yang pointed to the fact that an employment agreement was signed in February 2016 and said that, if work had started in October 2015, there was no reason to have delayed until then to sign an employment agreement.

[53] What was said by Mrs Crossen and Ms Yang was diametrically opposed. There was no evidence corroborating either of them. Cross-examination was not extensive, or helpful, and the position remains uncertain. In those circumstances Mrs Crossen has not established that she was employed by Ms Yang from October 2015 until early 2016.

Did the Authority err in not imposing a penalty?

[54] The Authority declined to impose a penalty arising from Yangs House's initial refusal to provide time and wage records to Mrs Crossen when requested. The information was eventually provided although what was supplied did not comply fully with the Act's requirements.

[55] The Authority dealt with the penalty claim succinctly. It declined to award a penalty because, although Yangs House failed to provide wage and time records as requested that was because the company took the view that, having settled all matters, there was no need for it to provide the records.14

14 *Crossen*, above n 1, at [16].

[56] The Authority went on to note that, when it pointed out to Yangs House the obligation to produce the records remained, it did produce them. For completeness, the Authority concluded that the late production of the records made no difference to the matters it had to decide.

[57] Mrs Crossen's claim pleaded that the Authority erred by failing to impose a penalty on Yangs House for repeatedly failing to produce time and wage records. The pleading was that, in particular, the fact that Yangs House may have thought the settlement agreement excused it from having to comply with s 130(2) of the Act was not a proper reason to decline to impose a penalty.

[58] Mr Hobcraft submitted that the Authority erred because it did not have any discretion to decline to impose a penalty where the employer was in default in the situation presented by Yangs House's refusal to provide complying records. In supporting this part of Mrs Crossen's challenge, he took his stand entirely on submissions that a penalty was obligatory once a failure to supply the records on time was established.

[59] The records disclosed provided some information about Mrs Crossen's time and wages but did not satisfy s 130(1)(a) – (j) inclusive. For example, the information did not include her postal address, the number of hours worked each day in the pay periods, the pay for those hours, or the method of calculating pay. What was supplied was a spreadsheet naming Mrs Crossen, recording the pay week, the amount of the pay, PAYE and, on occasion, extra payments such as for hours worked on a public holiday.

[60] Under s 130(4) of the Act, every employer who fails to keep time and wage records is liable to a penalty. Mr Hobcraft considered the wording of s 130(4), of being "liable" to a penalty, meant one had to be imposed once a breach was established and the only area left to the Authority's discretion was as to its amount. Two breaches were identified and a $5,000 penalty for each one was said to be appropriate. The claim was that each penalty should be payable to Mrs Crossen not the Crown.

[61] I do not agree with Mr Hobcraft's analysis of s 130(4). In the context of that section, the word "liable" does not bear the meaning argued for. I consider it means only that an employer in default is exposed to the risk of a penalty. The Authority's jurisdiction to award penalties is set out in s 135 of the Act. Section 135(4) makes it clear that the Authority has jurisdiction to give judgment for any amount or to dismiss the claim. In other words, the Authority has a discretion about whether to impose a penalty and, if it does, to make subsequent decisions about the amount of that penalty and if any of it should be directed to be paid to the employee.

[62] The Authority declined to impose a penalty having been satisfied with the explanation for the initial refusal to supply the time and wage records. That was an exercise of a discretion by the Authority. It was satisfied that the circumstances did not justify any penalty being imposed.

[63] There is no indication in the determination, or elsewhere, that in weighing up what happened relevant matters were

put aside or irrelevant ones were considered. Nothing in the determination indicates that the decision was plainly wrong.

[64] The Authority's approach to the penalty application could not be said to be in error. Further, there is no reason to conclude that a penalty should now be imposed. For completeness, I note that the statement of claim did not plead that what was supplied failed to comply with s 130 and that subject does not, therefore, require further consideration.

[65] Mrs Crossen has not shown that the Authority erred in declining to impose a penalty and this aspect of her claim fails.

Challenge by Yangs House

[66] Yangs House challenged the Authority's costs decision in its favour.15 The Authority began by referring to its usual tariff of $4,500 for the first day of an

15 *Crossen*, above n 2.

investigation meeting and $3,500 for each subsequent day. It awarded costs of $2,500 against Mrs Crossen because the meeting lasted less than a day.

[67] To reach that amount the Authority used a starting point of $4,000. Yangs House and Ms Yang were recorded as claiming a shortfall to them of $1,810 between the Authority's daily tariff and costs they had incurred.16 In reaching its decision to award $2,500, the Authority recorded having seen tax invoices of Yangs House after October 2019 totalling $4,340 plus GST. Some other invoices were put aside, presumably because they were not relevant.

[68] Yangs House and Ms Yang made a claim in the Authority for an uplift because of a settlement offer they had made without prejudice except as to costs. The offer was made after a directions conference and following mediation. The amount offered was small at $1,000.

[69] Not only did the Authority decline to uplift costs, it appears to have reduced them from what might have been awarded because that was "more appropriate under the circumstances". The Authority did not explain what those circumstances were, although it seems Yangs House and Ms Yang were awarded less than they might have been expected to receive because the Authority took an adverse view of the very low offer seeing it as inflammatory rather than a genuine offer to settle.

[70] The successful party in litigation is usually entitled to an award of costs. Yangs House and Ms Yang succeeded entirely in their defence. On a principled basis, therefore, they were entitled to costs. The determination did not refer to any behaviour by them suggesting their actions had exacerbated the costs of the proceeding or had otherwise failed to contain costs.

[71] I have a lingering concern that the defendants were penalised for taking a very robust view about the strength of their case which was, in fact, borne out by the determination. Despite that reservation, by the time this hearing concluded there was no evidence or submissions by the plaintiff or the defendants about this challenge. The

16 At [6].

offer to settle referred to in the Authority's costs determination was not produced in evidence. The only witnesses to give evidence, Mrs Crossen and Ms Yang, did not refer to the costs incurred in the investigation meeting or otherwise address the subject of the challenge to the costs order.

[72] There was no explanation for the subject of this challenge not being addressed. In those circumstances, the only option available is to dismiss the challenge.

Outcome

[73] Both challenges are dismissed.

[74] Costs are reserved. If either party considers costs should be pursued, memoranda may be filed proposing a timetable for exchanging submissions, although the parties are reminded that the Legal Services Act 2011 applies.

K G Smith Judge

Judgment signed at 2 pm on 7 July 2021