

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 92  
5425038

BETWEEN                      KAREN HAMILTON  
   Applicant  
  
A N D                              KELLY                      CHAMBERS  
   LIMITED  
   Respondent

Member of Authority:        Helen Doyle  
  
Representatives:              Peter Moore, Advocate for Applicant  
   Raelene Kelly, Counsel for Respondent  
  
Submissions Received:        8 April and 15 May 2014 from Applicant  
   7 and 19 May 2014 from Respondent  
  
Date of Determination:        27 June 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     The Authority in a determination dated 25 March 2014 found that the parties had entered into a binding agreement under which the applicant had compromised her rights to bring a personal grievance related to her redundancy. The Authority also found that the applicant was owed the sum of \$930 being unpaid employer contributions to KiwiSaver and she was awarded interest on that sum.

[2]     Costs were reserved and failing agreement a timetable set for an exchange of submissions. Two sets of submissions from each party have now been received.

[3]     Both parties seek costs.

**The applicant's submissions**

[4]     Mr Moore has referred the Authority to the leading case on costs in the Authority – *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 and the principles in that case.

[5] In respect of the principle that costs generally follow the event Mr Moore submits that there were three distinct elements to the case. The first was the KiwiSaver issue, Mr Moore refers to the second as accord and satisfaction (the binding agreement), and finally he submits that there was an issue of remedies if it was not found that there was a binding agreement.

[6] Mr Moore submits that the applicant was wholly successful on the first KiwiSaver issue. He submits in relation to the remaining two issues that the applicant had mixed success. Notwithstanding that the Authority found the parties had reached a binding agreement, Mr Moore submits that the Authority restored the applicant's unconditional right to receive payment which had not been forthcoming under that agreement and, as I understand the submissions, has still not been paid.

[7] Mr Moore submits that in light of that the applicant has been successful or largely successful and is entitled to costs.

[8] He then refers in his submissions to the daily tariff in the Authority of \$3,500. He submits that although the investigation was only one day submissions were provided after the investigation meeting and the starting point for an award based on the daily tariff should be \$4,655.00 on the basis of  $\$3,500 \times 1.33$  days.

[9] Mr Moore submits that although there have been without prejudice negotiations, there has been no communication sent by the respondent in the nature of a *Calderbank* offer.

[10] He submits that there should be an increase in costs payable to the applicant due to the conduct of the respondent for the following reasons:

- (a) There was no correspondence about the KiwiSaver issue and yet no substantive defence offered to it; the matter first having been raised by the applicant in July 2012.
- (b) The respondent failed to adhere to timetabling directions including times nominated by Ms Kelly. In this regard, Mr Moore sets out a variety of occasions when the respondent missed deadlines, did not attend a directions conference held by the Authority and lodged a substantial amount of documentation by way of a Statement in Reply, briefs of evidence and supporting documents on 29 and 30 October

2013 with the investigation meeting held on 8 November 2013. Mr Moore says that caused additional cost to the applicant.

- (c) The respondent continued to maintain that the use of the s.149 agreement process under the Employment Relations Act 2000 was illegitimate and amounted to a *procedure ruse*.
- (d) The respondent has *wilful blindness* with regard to the issue of costs. Mr Moore refers to the content of open correspondence by Ms Kelly which was attached to submissions in an attempt to settle costs. He submits that the assertions in the correspondence were either to intimidate the applicant or disingenuous.

[11] Mr Moore submits that the total costs to the applicant, not including those associated with the costs application, come to \$11,342 including GST. Invoices were attached. Mr Moore submits an award of costs in favour of the applicant in the region of \$6,000 would be appropriate together with a reasonable contribution to the costs submission of \$500. That is a total of \$6,500.

[12] Mr Moore was granted leave to respond to new matters in Ms Kelly's submission although not the usual process. I have read the reply submission. I don't need to set out anything at this point from those submissions in response.

### **The respondent's submissions**

[13] Ms Kelly submits that on any fair view of the Authority's determination, whether taking into account the issues or the quantum claimed and awarded, the applicant *decidedly fails and the respondent seeks costs*.

[14] She submits that the KiwiSaver issue was not contested by the respondent as to liability or quantum and no costs were incurred in litigating the issue. Ms Kelly noted that the Authority did not order the compensation claimed.

[15] Ms Kelly submits that the proceedings were totally unnecessary in that the respondent had at all times remained willing to honour the agreement and that it was the applicant who departed from the terms of the agreement with her advocate not accepting that the agreement had been made.

[16] Ms Kelly submits that the conduct of the case was such that it should result in increased or indemnity costs. She refers to the Court of Appeal judgment in *Bradbury v. Westpac Banking Corporation* [2009] NZCA 234 and refers to the circumstances in that case in which indemnity costs have been ordered. Ms Kelly refers to some questioning undertaken of her by Mr Moore during the Authority's investigation meeting and submits that factors referred to as circumstances in which indemnity costs have been awarded are *in play* in this case.

[17] Ms Kelly submits that the commencement of the proceedings was not so much for compensation or lost wages but for costs recovery. Ms Kelly submits that the respondent sought to have the issue of whether there was a binding agreement determined as a preliminary issue to prevent costs and escalation of issues but that was refused by the applicant. There is reference to issues being unnecessarily raised by the applicant designed to increase the pressure on the respondent.

[18] Ms Kelly seeks indemnity costs of \$28,100 and a further \$2000 for the preparation of cost submissions because Mr Moore did not agree to negotiate costs. Ms Kelly says that from that sum there should be a set-off of the amounts the applicant is entitled to.

[19] Ms Kelly submits that the respondent's actual costs are \$28,100 together with a further \$2,000 for the preparation of costs submissions. Ms Kelly asks that from the sum of \$30,100 there should be set-off of the agreement amount and KiwiSaver.

[20] Finally Ms Kelly notes that the respondent has had nothing in the form of consideration for the agreement due to the applicant's refusal to bring an end to the issues and that only recently did the applicant, through Mr Moore, advise that she had disposed of a coat which Ms Kelly had provided to her.

[21] I have read Ms Kelly's submissions in reply to Mr Moore's further submissions.

### **Determination**

[22] This was a most unfortunate employment relationship problem. Resolution of it started out in a manner consistent with s. 101 of the Act which sets out the object of part 9 of the Act, a part concerned with personal grievances, disputes and enforcement. The object of part 9 includes recognition that employment relationship

problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship.

[23] The Authority found in its determination that the parties had reached a binding agreement on 9 April 2012. It has never been performed and has never been the subject of a signed settlement agreement. The agreement was for payment of a modest amount of \$1612.50 and an end to all matters in dispute between the parties and it was reached reasonably shortly after the applicant's redundancy. Matters then unravelled. The respondent took issue with the proposed s. 149 settlement agreement form and did not comply with deadlines for payment and/or signing. Rather than bringing the matter to the Authority for enforcement at that time the applicant proceeded after the deadlines had expired as if agreement had not been reached. The respondent though maintained it had.

[24] It was not until 10 July 2013 that a statement of problem was lodged with the Authority by the applicant alleging unjustified dismissed or in the alternative unjustified disadvantage. The statement of problem referred to negotiations having taken place but no agreement having been reached. The emails relied on by the Authority to find the binding agreement were not provided with the statement of problem and there was nothing to alert the Authority clearly to a defence that there was an agreement until the statement in reply was lodged with the Authority on 29 October 2013.

[25] The senior support officer had granted an extension of time to lodge a statement in reply to Ms Kelly until 30 August 2013 as she had requested but that time frame was not complied with. Ms Kelly did not attend an Authority telephone conference on 19 September 2013 for reasons provided in a letter sent the same day as the telephone conference. In the letter she sought leave to file a statement in reply and said it would be done by 11 October 2013. Ms Kelly advised that the company still maintained its objection to the proceeding but only detailed one specific reason that no personal grievance had been raised with the employer within the statutory timeframe. A statement in reply was not actually received until 29 October 2013 eight days before the commencement of the investigation meeting and after the applicant had provided in accordance with the timetable her statements of evidence.

[26] Within the statement in reply there was a proposal to have the question of whether the parties had settled matters determined as a preliminary step. That did not appear to have been read by Mr Moore and the suggestion although sensible was made far too late. The Authority would not have immediately been given the documents by the support officer. Ms Kelly's own statement of evidence and indeed the statement in reply went further than simply the issue of agreement. They would not have had to if the defence had been put earlier and much time and cost could have been prevented.

[27] At any time from the time of service of the statement on problem in early July 2013 Ms Kelly could have sent a memorandum to the Authority setting out the defence and asking for a telephone conference to discuss how best to manage the investigation meeting. That did not occur. The Authority had no documentation in front of it relating to the agreement until Ms Kelly provided her statement of evidence and statement in reply on 29 October 2013 shortly before the investigation meeting. It was not therefore in a position to make an assessment of the best way to proceed at an early stage.

[28] At the commencement of the investigation meeting Ms Kelly did suggest the Authority determine two preliminary matters, the issue of agreement and whether the personal grievance had been raised within the statutory time frame. Mr Moore had travelled from Christchurch to represent the applicant and both parties had provided statements of evidence covering all the additional issues. It was too late to restrict the evidence in that way.

[29] The Authority a few days before the investigation meeting had suggested to the parties that they involve a mediator by way of telephone to see if the matter could be resolved. I understand that did occur although the matter was not resolved.

[30] The ultimate outcome was that the respondent was successful in its primary defence that there was a binding agreement between the parties and that the applicant could not therefore pursue her personal grievance. The applicant was successful with her claim for KiwiSaver payment which hadn't been addressed prior to the investigation meeting, was not referred to in the statement in reply and therefore required investigation and determination.

[31] The applicant against the outcome seeks costs in the sum of \$6500 and the respondent some \$30,100. Looking at the matter in the round the applicant had a small success when weighed against her other claims and the respondent was successful in its primary defence that there was a binding agreement.

[32] It is unfortunate though that the respondent did not participate at a much earlier stage in the process and advise of the defence so it could have been investigated in a cost efficient manner. The failure to put the defence of a binding agreement at an earlier time did I find increase the cost to both parties and unnecessarily so. It may for example have been appropriate to determine the matter on the papers.

[33] Both parties have presented their submissions on the basis that costs must follow the event and the successful party must receive an award. That is the usual principle. There have been cases though where in the exercise of its discretion in accordance with principle and consistent with the equity and good conscience jurisdiction of the Authority the Authority has declined to award costs to either party.

[34] The applicant was largely unsuccessful with her employment relationship problem although she had not been paid in line with the agreement and her issue as to KiwiSaver did require resolution. There were matters requiring resolution and finality. I accept that Mr Moore's line of questioning was of concern at times to Ms Kelly although costs are not designed to punish and they didn't contribute in any significant way to the length of the investigation.

[35] The respondent whilst largely successful unfortunately did not present its defence in a timely way to enable the Authority to dispose of the case in a much more effective manner. That failure led to the respondent incurring unnecessary costs for which it now seeks reimbursement on an indemnity level.

[36] I find that the circumstances of this case are such that there should not be an award of costs to either party and I so order.

Helen Doyle  
Member of the Employment Relations Authority