

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 498
3118112

BETWEEN CHRISSIE JI
Applicant

AND PREMIER HYGIENE LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Penny Swarbrick, counsel for the Respondent

Investigation Meeting: On the papers

Submissions [and further 19 October 2021 from the Respondent
Information] Received: 27 October 2021 from the Applicant
5 November 2021 from the Respondent

Date of Determination: 10 November 2021

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

Costs claimed by respondent

[1] The applicant has withdrawn her claims from the Authority. The respondent is seeking an award of costs against the applicant of \$2,032, because it unnecessarily incurred costs in addressing the applicant's claims. The respondent does not seek to recover any costs associated with mediation, as those are not recoverable.

Costs principles

[2] The legal principles that apply to an award of costs by the Authority are so well established that they do not need to be detailed in this determination.¹

[3] The Authority normally adopts a notional daily tariff based approach to costs. The current notional daily tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day. The notional daily tariff is then adjusted to reflect the particular circumstances of each case.

Time involved in this matter

[4] The costs awarded in this case will need to reflect that the applicant withdrew her claims before an investigation meeting or the filing of evidence occurred. This matter involved the filing of a Statement of Problem, Statement in Reply, an Amended Statement of Problem, an Amended Statement in Reply, attendance at a Case Management Conference and communications between the Authority and parties.

Sequence of events

[5] The parties' employment relationship ended in November 2019. On 10 June 2020 the applicant purported to raise personal grievances related to the alleged incorrect deduction of annual leave; workload allegedly including another employee's work; and the respondent taking issue with the applicant giving one month's notice.

[6] The respondent advised the applicant that her personal grievance claim had not been raised within the 90 day time limit required by s 114(1) of the Employment Relations Act 2000 (the Act). On or about 14 September 2020 the applicant lodged a Statement of Problem with the Authority in support of her claims. The respondent's Statement in Reply was lodged on or about 29 September 2020.

[7] On 28 January 2021 the parties attended mediation. At that point the applicant was represented by counsel. The respondent's counsel made an open offer to the applicant's counsel dated 22 February 2021, advising that the respondent would pay the amount the applicant claimed as outstanding annual holiday pay, solely in order to end the litigation, but

¹ *PBO Limited (formerly Rush Security) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co. Limited* [2015] NZEmpC 135.

reiterated its view that her claims were entirely without merit. The respondent offered to waive its right to claim costs or to proceed with its potential counterclaims against the applicant if she withdrew her claims in the Authority.

[8] By email dated 24 February 2021 the applicant, who at that time was representing herself, responded by making an additional claim for interest and indicating that she intended to pursue her claims with the Authority.

[9] On 1 June 2021 the Authority required the parties to provide it with a copy of the applicant's individual employment agreement, raised an issue regarding the identity/legal name of the employer not being correctly recorded in the Statement of Problem, and identified to the applicant that there appeared to be a number of jurisdictional hurdles she faced if she wanted to pursue her claims. The applicant was given an opportunity to take advice and reconsider her position.

[10] On 8 June 2021 the respondent, without admission of liability, paid the applicant the amount she had claimed in the Statement of Problem as wage arrears relating to her unpaid annual holiday allegation. However, the respondent clarified at the time it paid this amount that it considered it to be in excess of what the applicant was due by about \$300. However, it had taken a pragmatic approach to this payment in the hope of ending the litigation, while reserving its right to recover any overpayment if the applicant continued with her claims, and the respondent filed its proposed counterclaims against her.

[11] On or about 13 June 2021 the applicant filed an Amended Statement of Problem that went further than merely correctly identifying the respondent. The Amended Statement of Problem changed the wording of the claims in the original Statement of Problem and raised new claims for interest on the holiday pay and breach of an employment agreement. The Amended Statement of Problem then required further amendment by redaction, because it contained reference to without prejudice matters.

[12] The respondent filed an Amended Statement in Reply on 25 June 2021, pointing out that any claim for a breach of an employment agreement was out of time and that there was no jurisdiction for the award of interest claim.

[13] On 15 July 2021 the Authority held a lengthy Case Management Conference with the parties during which the jurisdictional and evidential hurdles the applicant faced regarding her claims was discussed.

[14] That was followed up with a detailed Minute to the parties regarding the claims, and the specific difficulties that the applicant faced in pursuing the claims she had identified in her Amended Statement of Problem. The Authority urged the applicant to take legal advice before timetabling directions were made for the filing evidence.

[15] The applicant was asked to advise the Authority of her intentions regarding her claims within four weeks. The applicant did not respond to the Authority within that time, but she eventually withdrew her claims by email dated 7 October 2021.

Respondent's submissions

[16] The respondent submits that the applicant pursued claims that were clearly without merit. It says that the applicant had an opportunity in February 2021 to withdraw her claims and to avoid the prospect of a claim for costs being made against her, and the lodging of any counterclaims, which the respondent had indicated were likely should the applicant proceed. At that time the applicant was legally represented by counsel.

[17] The applicant declined that proposal and instead put the respondent to further unnecessary cost by filing an Amended Statement of Problem which purported to add and change the character of the claims, and to which the respondent had to file an Amended Statement in Reply.

[18] Having made the decision to proceed with unmeritorious claims, in the face of knowing that the respondent could and would likely claim costs against her, the applicant should not reasonably expect that her actions in putting the respondent to unnecessary cost in addressing those claims should be without consequence.

[19] The respondent is adamant that the allegations regarding the payment or non-payment of holiday pay cannot be taken into account because the respondent did not accept liability for it, but merely paid the amount the applicant was seeking in order to bring the litigation to an end.

[20] The respondent further says that the applicant's claim was not confined to holiday pay because it also involved multiple other causes of action which the respondent has consistently asserted were unmeritorious and out of time.

[21] The respondent says it has incurred actual costs of \$3,080 plus GST plus disbursements in defending the applicant's claims, excluding the costs associated with this costs application. However, it is only seeking to recover a contribution of 66 per cent of that, namely \$2,032.

Applicant's submissions

[22] The applicant says that she has suffered from ill-health and adverse consequences relating to the stress involved in her employment relationship with the respondent. The applicant submitted she had to pursue the Authority proceedings in order to be paid for the annual holiday arrears she alleged she was owed. She pointed out that the respondent did pay her the amount she had been seeking.

[23] The applicant says she is not working and at the time she filed her submissions was about to give birth. She therefore submitted that an award of costs against her would cause her hardship.

Costs assessment

[24] Costs are discretionary, with the discretion to be exercised on a principled basis. While the respondent has incurred costs after having put the applicant on notice that should she proceed with her claims then it would be seeking costs from her, it is appropriate for it to be able to recover some contribution towards its actual costs.

[25] Because the applicant was legally represented by counsel at the time that offer was made in February this year, she must have known that her claims were without merit and faced significant jurisdictional hurdles. Her legal representative must have given the applicant legal advice regarding the merits of her case. The applicant nevertheless elected to pursue claims that on the face of it were without merit.

[26] However, it is not appropriate to award the respondent the level of costs it is seeking. The Authority is guided by the principle that costs in the Authority should be modest. The starting point for assessing costs in this matter is \$1,285.71, which on a pro rata basis reflects two hours of the notional starting tariff of \$4,500 for the first day of an investigation meeting.

[27] That notional starting tariff of \$1,285.71 then needs to be adjusted to reflect the particular circumstances of this matter.

[28] The applicant is not currently working and it appears that her annual holiday claim was not on the face of it entirely without merit, because there was a dispute between the parties regarding what actual annual holiday the applicant had actually taken.

[29] While the Authority recognises that the respondent denied liability for any holiday pay arrears, it made the sensible decision that it would have cost more to argue about the conflicts in the evidence on that issue than to pay the (in its view) extra holiday pay the applicant was seeking, knowing it could recover an overpayment if these proceedings continued to a substantive investigation.

[30] Because the applicant's employment ended in November 2019 and she did not receive her annual holiday pay (or at least the disputed amount) until 8 June 2021, there is some merit in the applicant's submission to the Authority that if she had not pursued these proceedings she would not have been paid the extra annual holiday pay she had sought.

[31] The Authority considers that costs are payable in this case because the applicant proceeded with her claim and materially amended it, after being offered the opportunity to withdraw the claim but be paid the holiday pay she was seeking on a without admission of liability basis at a time when she was legally represented.

[32] The applicant knew that if she proceeded, the respondent intended to claim costs against her. The applicant also continued to pursue claims that were obviously without merit even after she had been paid the full amount of holiday pay she was claiming. It is therefore reasonable and appropriate for the applicant to contribute towards the respondent's costs incurred after she declined the February 2021 settlement offer.

Costs order

[33] The applicant is ordered to pay the respondent \$643.00 towards its actual legal costs within 30 days of the date of this determination. That is approximately half of the pro-rated notional starting tariff. This reduction has been made to the notional starting tariff for this matter of \$1,285.71 in acknowledgment of the applicant's current circumstances, as a new

mother who is not currently working and does not know when she will be re-entering the workforce again.

Rachel Larmer
Member of the Employment Relations Authority