

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 88
5150509

BETWEEN TREVOR DAVID KILGOUR
 Applicant

A N D QUEENS HIGH SCHOOL
 BOARD OF TRUSTEES
 Respondent

Member of Authority: Helen Doyle

Representatives: William Clark, Advocate for applicant
 Barry Dorking, Counsel for Respondent

Submissions: 31 May 2011 and 9 June 2011 from applicant
 9 June 2011 and 13 June 2011

Date of Determination: 21 June 2011

DETERMINATION OF THE AUTHORITY ON QUANTUM AND COSTS

[1] This determination addresses two outstanding matters.

[2] The first matter is that in my determination dated 12 May 2011 I awarded redundancy compensation to Mr Kilgour less an amount paid to him of \$4,634.39 gross that I found should be set off. I also ordered interest be payable on the amount at the rate of 5.5% from 27 January 2009. There was a small adjustment to be made to the weekly amount on which compensation was to be calculated of \$7.97 per week for 52 weeks. I reserved leave for either party to come back to the Authority if there were difficulties with the calculation and Mr Clark has asked the Authority to assist.

[3] The second matter is that I reserved the issue of costs. Mr Kilgour provided costs submissions himself and Mr Dorking replied to the submissions.

Quantum of redundancy compensation

[4] The employment agreement provided for redundancy compensation equivalent to four weeks for the first year and two weeks for every year of employment. For Mr Kilgour that is 52 weeks. Taking into account the adjustment I found should be made, the gross redundancy compensation is \$20,420.40 based on \$392.70 per week multiplied by 52. Mr Dorking's calculations in this respect are correct. From this starting point Mr Clark raises three issues.

[6] The first and second issues concern the amount to be deducted from the redundancy compensation. Mr Clark submits that the respondent should explain to the tax department that they made an overpayment to Mr Kilgour and that only the net amount received by him should be set off against the gross sum owing otherwise Mr Kilgour is taxed twice. I do not accept that. The gross amount already paid to Mr Kilgour of \$4,634.39 should be deducted from the gross sum of \$20,420.40. That is the gross amount of redundancy compensation owing to Mr Kilgour less what he has already been paid. There is a gross sum of \$15,786.01 owing to Mr Kilgour for redundancy compensation. It is that sum on which Mr Kilgour will then be taxed and the net balance will be paid to Mr Kilgour. It is not an overpayment tax situation and Mr Kilgour is not paying tax twice.

[7] The third issue is that Mr Kilgour says that the six week notice period is an integral component of clause 19 of the redundancy provision and that there should be payment accordingly. Reserving leave to determine quantum if the parties have difficulties is not to be taken as an opportunity to litigate matters afresh. There was no claim for paid notice from the applicant before the Authority and no doubt had there been such a claim the matters Mr Dorking raised in his submissions as to notice if properly put would have been worked out would have been raised on behalf of the respondent. The issues put in this respect would require the Authority to make a further determination and it is not prepared to do so on the basis that leave was reserved for a specific purpose only to return to the Authority.

[8] There is also an issue raised as to whether the interest payable should compound after 12 months. The answer to that is no. The determination in para.87 is

to the effect that interest is payable on the basis as set out in the two earlier paragraphs. That is redundancy compensation calculated on the adjusted weekly amount less the amount to be set off and in the absence of a specific reference to net amounts to be paid on the gross amount so arrived at (\$15,786.01) until paid.

Costs

[9] Mr Kilgour in his submission said that he was currently on a sickness benefit and had no realistic prospects of getting a job. He explained that his actual costs were \$6000 and attached a contract between him and Mr Clark to this effect. He said that it was his understanding that \$3500 is a notional amount for contribution towards costs.

[10] Mr Dorking in his submission submits that the financial situation of the applicant should not be taken into account. He also refers to the fee structure of Mr Clark showing an increasing level of costs as the matter progresses. The fee for mediation for example is \$3000 but \$6000 if the matter does not settle there. On that basis Mr Dorking submits that the maximum able to be claimed is \$3000.

[11] Mr Dorking also submits that the claims made by the applicant were for \$163,000 and he was only awarded \$26,000 approximately or 16% of the claim and that he is therefore not entitled to the same level of costs if he had achieved 100%.

[12] Mr Dorking submitted that on the basis of 16% success the costs award should be \$480 based on a daily tariff of \$3000.

[13] Mr Dorking also submits that the first amended statement in reply acknowledged Mr Kilgour was entitled to redundancy compensation and compensation under s. 123 (1)(c)(i) of the Act and that a hearing was essentially unnecessary and costs in relation to defending the unreasonable wage claim came out of money for the education of children.

Determination

[14] I have carefully considered the submissions. Although Mr Dorking makes some persuasive submissions I do not consider that this is a case where I should depart from the usual principle that the successful party is entitled to costs. I do accept that there was an early concession in relation to the redundancy by the respondent but then in a further and final statement in reply a technical argument was mounted to the extent that there was no redundancy payable at all and that is what had to be considered during the investigation.

[15] A significant part of the applicant's claim that he should have been paid at the grade C level in the collective agreement was unsuccessful. The claims on which the applicant was ultimately successful occupied far less time both in the investigation meeting and submissions.

[16] I intend to start at a notional tariff for this matter that occupied almost a full day of \$3000. There should be a reduction because a claim that occupied a significant amount of time was unsuccessful of \$700. I then arrive at an amount that I consider fair in the circumstances of \$2,300.

[17] I order Queens High School Board of Trustees to pay to Trevor Kilgour the sum of \$2300 being costs.

Helen Doyle
Member of the Employment Relations Authority