

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 78B/09
5144170

BETWEEN DAVID PAINTER
 Applicant

AND CANSTAFF LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Peter Macdonald, Advocate for the Applicant
 Robert Thompson, Advocate for the Respondent

Submissions: 2 & 23 September 2009 from the Applicant
 30 September 2009 from the Respondent

Determination: 1 October 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 13 August 2009 I upheld Mr Painter's claims for arrears of wages and holiday pay. I declined to treat that problem as a personal grievance of unjustified dismissal. Costs were reserved and a timetable was set for memoranda from both parties. Calculation of holiday pay owing was reserved in case of disagreement about quantum. This determination concludes both these issues.

[2] A memorandum on costs was received on behalf of Mr Painter on 2 September 2009. I infer that it was served on the respondent at the same time. On 17 September the Authority was asked to issue a certificate of determination no doubt to allow enforcement action to begin. Mr Painter's representative was asked to clarify the holiday pay issue first and on 23 September he confirmed that the only holiday pay claimed related to the sum payable on the arrears awarded. The respondent's representative was copied in on that communication and was specifically asked for any comment on the quantum of holiday pay and the costs claim, a response on the latter point being overdue by then. On 28 September, Mr Painter's representative

asked about progress which resulted in a response from the respondent's representative on 29 September to the effect that he was waiting for the respondent to approve a memorandum and he expected to lodge that *either this afternoon or tomorrow morning*. It is now 1 October. While I was preparing this determination, I was made aware that the Authority had received by email late yesterday the respondent's submissions. Although the submissions are out of time I will not ignore them largely because they raise an issue I intended to deal with anyway.

[3] The claim for holiday pay of \$726.00 (gross) is the minimum that could be owed given the earlier finding about arrears of wages. On that basis the sum is not disputed by the respondent. Accordingly I order the respondent to pay that sum as holiday pay. A certificate of determination can now be issued.

[4] The investigation meeting took about half a day. It was factually and legally uncomplicated. I am asked to assess costs on the basis that the respondent's position was *significantly devoid of merit* and award costs of \$2,000.00. I decline to approach the assessment on that basis. The respondent resisted Mr Painter's claims for reasons that were found to lack substance but it is in the same position as most unsuccessful respondents. Its conduct was not such as to cause additional costs for the applicant which it should now be ordered to pay. Although the respondent was unsuccessful, it avoided Mr Painter's problem being treated as a personal grievance of unjustified dismissal for the purposes of remedies. Still, in substance Mr Painter was the successful party and is entitled to costs in accordance with *PBO Ltd v Da Cruz* [2005] ERNZ 808. Applying a daily tariff approach I would award about \$1,500.00 in costs. However there is another factor that must be considered.

[5] Mr Painter initially was not represented and he advanced his problem as being non payment of wages and holiday pay. Later, when represented, Mr Painter sought to include personal grievances of unjustified dismissal and unjustified disadvantage. In an earlier determination I ruled that no personal grievance about the termination of the employment was raised within 90 days nor were there any exceptional circumstances to justify leave to raise that grievance out of time. Costs were reserved. That issue was investigated by both parties providing submissions. Given the respondent's success on the point it is entitled to an award of costs in its favour which I assess at \$250.00.

[6] The submission for Canstaff is that costs should lie where they fall. I do not accept that submission. Canstaff succeeded on a preliminary point that was dealt with by way of submissions only. It also succeeded on not having the arrears treated as an unjustified disadvantage grievance but that hardly incurred any additional costs. Mr Painter succeeded on the major point in dispute. Mr Painter should have costs of \$1,500.00 while Canstaff should have costs of \$250.00. That leaves Canstaff to pay costs of \$1,250.00 to Mr Painter.

Orders

[7] Canstaff Limited is to pay Mr Painter arrears of holiday pay of \$726.00 (gross).

[8] Canstaff Limited is to pay Mr Painter costs of \$1,250.00.

Philip Cheyne
Member of the Employment Relations Authority