

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 460A/10  
5158040  
5310433

BETWEEN                      LYNETTE MAY PAYNE  
   Applicant (5158048)

AND                              PHILIP PAYNE  
   Applicant (5310433)

AND                              GARTH WILLIAM ELLMERS  
   and SANDRA MAXINE  
   ELLMERS t/as ELLMERS  
   PROPERTIES  
   Respondents

Member of Authority:      R A Monaghan

Representatives:            D Rishworth, counsel for applicant  
   G Tayler, advocate for respondent

Memoranda received:      9 and 21 December 2010 from applicants  
   6 and 10 December 2010 from respondents

Determination:              23 December 2010

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]      In a determination dated 27 October 2010 I found the termination of Mr and Mrs Payne's employment on the ground of redundancy was justified.

[2]      Costs were reserved.

**Memorandum filed out of time**

[3]      Mr Tayler filed a memorandum seeking costs some two weeks after the expiry of the 28 day period specified at [49] of the determination. He had not sought an extension of time, and filed the memorandum without commenting on its lateness or

offering any reason for the lateness. He was required to address this matter before I proceeded, and did so by making a belated request for an extension of time.

[4] Mr Rishworth opposed the application for a grant of an extension of time. He said his clients were entitled to consider the matter at an end when, after the expiry of the 28-day period no request for costs had been filed in the Authority.

[5] Mr Tayler's reason for filing out of time amounted to a generalised statement about difficulties in contacting his client, and pressure of work in November in particular. Pressure of work is not a compelling reason and the failure even to request an extension of time in advance (with reasons) is, unfortunately, a common experience in the Authority but that does not make it acceptable.

[6] It was also asserted, and disputed, that there was unlikely to be any prejudice to the applicants arising from the failure to file in time.

[7] I take into account the following comments of the Employment Court on a challenge to a costs determination affected by a party's failure to file a memorandum in time<sup>1</sup>:

*[26] ... The issue, however, is how long the parties are entitled to delay when a time limit for further action has been set. The position is similar to the time limit for appeal. Once such time limits expire, one or other of the parties at risk from any appeal is entitled to assume that the matter is at an end and can take steps accordingly in light of that decision. In the present case I am of the view that it was not unreasonable for the Authority Member to decide that Mr Whitehead had been affected in that way. ... I would not necessarily couch the effect as prejudice but rather as the inevitable consequences of failure of a party in litigation to comply with reasonable time limits. The time limit of 28 days was a lengthy period. ... The time limit was set to ensure that after a reasonable period there would be some finality on the matter. While the Authority and the Court have jurisdiction to extend time, time limits cannot be allowed to run on indefinitely.*

[8] In that case the relevant set of submissions was filed a little under 4 weeks late. The reason for the delay was counsel's initial absence on leave, then overlooking the date for filing the submissions on costs. The court concluded that, by exercise of a discretion, the time limit should not be extended. Judge Perkins said that, had he come to a contrary view, any award of costs would have to be

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<sup>1</sup> *Metallic Sweeping (1998) Limited v Whitehead* [2010] NZEmpC 23

substantially reduced, if not extinguished, by the fact that the defendant was obliged to participate in the challenge through no fault of its own.<sup>2</sup>

[9] Further to a comparison with the application of time limits to the filing of appeals (or challenges), a frequently-cited summary of the general principles regarding extensions of time for filing a challenge is found in *Stevenson v Hato Paora College Trust Board*<sup>3</sup>, where I note that: the time limit was exceeded by 12 days, which was ‘not inordinate’; the principal question was whether the justice of the case required the extension to be granted; and the delay was not the direct fault of the applicant himself. However since there was no real prospect of success in the challenge, the application for an extension of time was declined.

[10] I would reach similar conclusions here except that, subject to any material expressed to be ‘without prejudice save as to costs,’ the respondents had a real chance of success in their application for an order for costs.

[11] In addition, a factor I consider significant here is that after receipt of the determination the parties attempted to agree on costs, as they were invited to do. They set out their positions in exchanges spread over the first two weeks after receipt of the determination, but were unable to reach an agreement. Thus, although the time limit for filing in the Authority was not adhered to, the fact that costs have been sought should not otherwise have come as a surprise to the applicants.<sup>4</sup>

[12] While I remain dissatisfied with the length of the delay and the adequacy of the explanation, the above matters lead me on balance by a bare margin to proceed to address the claim for costs on its merits.

### **The parties’ arguments**

[13] Mr Tayler sought a contribution to costs in the sum of \$4,000. Although the investigation meeting lasted half a day, he said this was a direct reflection of the preparation carried out by both representatives. He also pointed out that the

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<sup>2</sup> At [27].

<sup>3</sup> [2002] 2 ERNZ 103

<sup>4</sup> While details of the parties’ offers were redacted from the material provided in relation to costs, I had sought the dates of their communications and was provided with the redacted communications accordingly.

applicants had initially filed separate claims, and extra work was required to identify the differences between them. Finally, he referred to claims made under the Minimum Wage Act 1983 which did not proceed.

[14] Mr Rishworth said costs should lie where they fall, and relied substantially on the failure of the respondents to provide copies of the documentation regarding the transfer of ownership of the motor inn until the investigation meeting. He also commented that the matter was argued concisely and expeditiously, and said the claims under the Minimum Wage Act were abandoned at an early stage. Last, he asked that account be taken of the further costs incurred in respect of the need to address the application for an extension of time for seeking costs.

### **Determination**

[15] Both parties cited the principles in *PBO Ltd (formerly Rush Security Ltd) v da Cruz*<sup>5</sup>.

[16] The respondents were the successful parties, and are entitled to a contribution to their costs. Although separate employment relationship problems were filed both were heard together, which in a costs setting assisted all concerned. The facts were essentially the same in both, so for the purposes of assessing costs and as far as the termination of employment is concerned I treat the matter as a single problem.

[17] Further to the claims for payment under the Minimum Wage Act there had been an investigation by a labour inspector, who took the matter no further because of lack of evidence. Mr Rishworth says that is why the claims did not proceed in the Authority. However since I regard the keeping of a record of hours worked as something for which the applicants themselves, as the on-site managers, were arguably responsible I would be unlikely to hold the lack of evidence against the respondents. Aside from this, the contents of the file suggest it is likely that any costs incurred in respect of the matter were incurred in the course of exchanges with the labour inspector and not in the course of or for the purposes of this proceeding. The respondents have not provided any information showing otherwise. Accordingly I do not take this matter into account in respect of costs.

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<sup>5</sup> [2005] ERNZ 808

[18] A notional daily rate for a half day investigation meeting would be \$1,750. However I consider it appropriate to reflect the costs incurred by the applicants in addressing the application for an extension of time - being a cost to which they should not have been put - by reducing that amount.

[19] The applicants are therefore jointly and severally ordered to contribute to the respondents' costs in the single sum of \$1,250.

R A Monaghan

Member of the Employment Relations Authority