

[3] This matter was accorded urgency and the parties attended an investigation meeting in Hamilton on 21 December 2012. The purpose of that investigation meeting was to determine whether the Authority had jurisdiction to hear Mr Rogers' claims when his employment agreement contained a trial period provision.

[4] The key issue was whether the trial period provision complied with the requirements of s.67A of the Employment Relations Act 2000 (the Act) and with the decisions of the Employment Court in *Smith v. Stokes Valley Pharmacy (2009) Ltd*¹ and *Blackmore v. Honick Properties Ltd*². The Authority wanted to determine the jurisdiction issue first because if the trial period provision was valid then it would not have jurisdiction to hear the interim reinstatement application and dismissal grievance claims.

[5] Although the Authority had been expecting to hear evidence relevant to the validity of the trial period provision the respondent and his witness did not attend the investigation meeting³, although Mr Willis' two counsel did.

[6] The investigation meeting into jurisdiction was adjourned because the Authority was not available to sit in Hamilton until 10 January 2013 and it needed to hear and test the evidence relating to the trial period in order to determine whether or not it was valid. The application for interim reinstatement was therefore timetabled to be heard on the papers as an urgent matter because unless he was interim reinstated then Mr Rogers was going to have to vacate the farm accommodate. The Authority committed to providing its determination on interim reinstatement by 04 January 2013.

[7] Member Dumbleton declined to order interim reinstatement in a determination dated 04 January 2013⁴. An investigation meeting on the jurisdiction issue was set down in Hamilton on 10 January 2013 in Hamilton.

¹ [2010] NZEmpC 111.

² [2011] NZEmpC 152.

³ They were at a funeral but that message had not been received by the Member prior to the meeting commencing.

⁴ [2013] NZERA Auckland 6.

[8] The Authority⁵ in a determination dated 24 January 2013⁶ concluded the trial period provision was valid so it did not have jurisdiction to hear Mr Rogers' dismissal grievance.⁷

[9] The parties were encouraged to resolve costs by agreement but that has not occurred. Mr Willis now seeks a costs order in his favour. He claims legal costs⁸ of \$40,803, Mr Hall's farm consultancy costs of \$3,450, and additional costs of \$862.50 relating to Mr Rogers' refusal to leave the farm accommodation which are yet to be billed to him. Mr Willis sought reimbursement of all of these costs on a full indemnity basis.

[10] Mr Willis also seeks to enforce the undertaking filed by Mr Rogers in support of his interim reinstatement application. Mr Willis claims he has suffered loss and therefore seeks damages from Mr Rogers as per his undertaking. Mr Willis claims that Mr Rogers' application for interim relief meant replacement farm workers were unable to move into his farm accommodation which meant they had to commute to the farm for work.

[11] Mr Willis submits that if Mr Rogers had not made the application for interim reinstatement he would have been required to vacate the farm accommodation on 6 January 2013 so it would have been available for the replacement farm workers from that date. Mr Willis seeks reimbursement of \$1,057.15 he says he paid the replacement farm workers to meet the cost of their travel from 06-24 January 2013.

[12] Mr Rogers did not file submissions in relation to either costs or the application to enforce the undertaking. Subsequent to the deadline for Mr Rogers to file his submissions expiring Mr Bennett sought an extension of time to file submissions. The information in support of such an application was unsatisfactory so Mr Bennett was given further time to provide information in support of his request for an extension of time. Mr Bennett failed to respond to provide the information requested by the deadline provided. No further information has subsequently been provided by Mr Bennett so the matter is dealt with on the information currently before the Authority.

⁵ Member Larmer.

⁶ [2013] NZERA Auckland 25.

⁷ Mr Rogers withdrew his unjustified disadvantage claim at the investigation meeting on 10 January 2013.

⁸ Excluding mediation costs

Issues

[13] The following issues require determination:

- (a) What costs should Mr Willis be awarded?
- (b) Should Mr Willis be reimbursed for the travel of his replacement farm workers?

What costs should Mr Willis be awarded?

[14] Mr Willis as the successful party is entitled to a contribution towards his costs. This covers:

- (a) The investigation meeting in Hamilton on 21 December 2012;
- (b) The interim reinstatement application which was heard on the papers and determined on 04 January 2013;
- (c) The investigation meeting into jurisdiction held in Hamilton on 10 January 2013.

[15] I find this is not an appropriate case in which to award full indemnity costs. As the Court of Appeal in *Bradbury v. Westbank Banking Corporation Ltd*⁹ stated, indemnity costs are exceptional and therefore require exceptionally bad behaviour by a party. I do not consider Mr Rogers engaged in any reprehensible conduct or pursued his matter in a reprehensible way.

[16] I adopt the Authority's usual notional daily tariff based approach to costs. The current notional daily tariff is \$3,500 which must then be adjusted to reflect the particular circumstances of this matter.

[17] I do not consider there are any factors which would warrant a reduction to the notional daily tariff.

⁹ [2009] NZCA 234.

[18] I consider that the following factors warrant an increase to the notional daily tariff:

- a. The case matter was granted urgency so was progressed urgently immediately prior to Christmas and between Christmas and New Year at considerable cost and inconvenience to Mr Willis
- b. The Authority in its determination on interim reinstatement concluded¹⁰ that Mr Rogers' case (based on the untested information before it as at 04 January 2013) was not arguable at all. The Authority identified the type of information it expected in support of Mr Rogers' claim that he was already an employee at the time he signed the employment agreement containing the trial period provision
- c. In the jurisdiction determination¹¹ I noted the poor quality of Mr Rogers' evidence regarding offer and acceptance which were critical elements of his claim. This meant the Authority and Mr Willis heard evidence about offer and acceptance from Mr Rogers for the first time on 10 January 2013.
- d. Member Dumbleton's conclusion that Mr Rogers did not have an arguable case should have put Mr Rogers on notice there were serious deficiencies in the manner in which he had presented his case to the Authority. He did not subsequently adequately address those deficiencies and did not undertake a critical merits assessment which meant Mr Willis was put to the costs associated with the 10 January 2013 investigation meeting.

[19] I order Mr Rogers to pay Mr Willis \$8,000 costs consisting of:

- (a) \$500 for the investigation meeting on 21 December 2012;
- (b) \$2,500 for the interim reinstatement matter which was heard on the papers and determined on 04 January 2013;
- (c) \$5,000 in respect of the Authority's investigation on 10 January 2013 regarding jurisdictional.

¹⁰ Paragraph [22].

¹¹ Paragraph [27].

[20] I decline to reimburse Mr Willis for Mr Hall's invoice of \$3,450 because he could have been summonsed as a witness at almost no cost¹² to Mr Willis. I therefore do not consider it reasonable for Mr Rogers to pay all or part of Mr Hall's invoice because it was Mr Willis' choice to engage Mr Hall when that did not need to occur.

[21] As an aside, had I been minded to have ordered some reimbursement of Mr Hall's invoice I would have been concerned about the lack of specificity of his invoice in terms of charge out rate and time undertaken on activities or the actual cost of "*sundry administration and travel costs*".

[22] I find Mr Willis is not entitled to recover the unbilled costs he says were associated with removing Mr Rogers from the farm accommodation after the Authority's jurisdiction determination was issued. I consider such costs did not relate to the Authority's investigation so are not recoverable.

Should Mr Willis be reimbursed for the travel costs of his replacement farm workers?

[23] Mr Willis claims that although Mr Rogers was unsuccessful in his application for interim relief:

Member Dumbleton allowed the applicant to remain living at the respondent's farm property until his grievance claims are finally determined.

[24] I find that is not a correct reading of Member Dumbleton's determination. Paragraph [27] of the Authority's determination on 4 January 2013 deals solely with an assessment of where the balance of convenience lay. The Authority concluded the balance of convenience favoured Mr Rogers being allowed to continue to reside in the farm accommodation until his grievance claims had been finally determined.

[25] Assessing the balance of convenience is one of the tests which the Authority must apply when determining an interim reinstatement application. That one test was in favour of Mr Rogers however the other tests were not. These other tests weighed against the granting of interim reinstatement, which accordingly was declined.

[26] I therefore find that if Mr Willis allowed Mr Rogers to stay in the farm accommodation from 06-24 January 2013 that did not occur as a result of the

¹² Witness expenses and travel costs would have had to have been paid by Mr Willis.

Authority's order or direction. It was a matter entirely within Mr Willis' sole discretion so I find he is unable to recover any costs associated with the travel of farm workers over that period.

Rachel Larmer
Member of the Employment Relations Authority