New Zealand Employment Relations Authority Decisions

Solar Bright Limited v Bayliss (Christchurch) [2018] NZERA 1021; [2018] NZERA Christchurch 21 (22 February 2018)

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Last Updated: 28 February 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 21
5633936

BETWEEN JOHN BAYLISS Applicant

AND SOLAR BRIGHT LIMITED Respondent

AND

BETWEEN SOLAR BRIGHT LIMITED Applicant

AND JOHN BAYLISS Respondent

Member of Authority: Helen Doyle

Representatives: Peter Cahill, Advocate for Applicant

Respondent, unrepresented

Submissions and information received:

19 December 2017, 8 January 2018 and 7 February 2018 from Applicant
No submissions from Respondent

Date of Determination: 22 February 2018

DETERMINATION OF THE

AUTHORITY ON COSTS AND QUANTUM OF DEDUCTIONS FROM WAGES TO BE REIMBURSED

A Solar Bright Limited is ordered to pay to John Bayliss the sum of

$3,346.87 being costs.

B Solar Bright Limited is ordered to reimburse John Bayliss the sum of $2,893 being money incorrectly deducted from his salary.

C. **Solar Bright Limited is ordered to pay to John Bayliss costs on the application for an order for reimbursement of money in the sum of**

$575.

Employment relationship problem

[1] In my determination dated 8 June 20171 I found that Mr Bayliss was not constructively or actually dismissed, but that he was unjustifiably disadvantaged in his employment by virtue of his suspension and loss of the benefit of the use of his company car. No order was made for a penalty for a breach of good faith. There was a dispute as to whether Mr Bayliss owed money to Solar Bright and/or whether he should be reimbursed money deducted from his salary. The Authority suggested in its determination that the parties reach some agreement perhaps with the assistance of a mediator about that matter. It provided some guidance in the determination about this to assist them in reaching agreement and noted a likely finding there should be reimbursement of some money by Solar Bright to Mr Bayliss. Leave was reserved for either party to return to the Authority in the event agreement could not be reached.

[2] I found in terms of the claim by Solar Bright Limited (Solar Bright) against

Mr Bayliss that there were breaches of the non-solicitation restrictive covenants.

Issues

[3] This determination deals with three issues.

[4] The first is that Mr Bayliss has made an application for costs on the substantive matter.

[5] The second is that Mr Bayliss has returned to the Authority to seek orders for reimbursement of money deducted from his

salary.

[6] The third is an assessment of what award for costs should be made on the application for an order for reimbursement of money deducted.

No response from Solar Bright and no attendance at telephone conference on 7

February 2018

1 [2017] NZERA Christchurch 90

[7] I am satisfied that Mr Cahill's applications were duly served on Solar Bright. There was time given to the respondent to respond bearing in mind the Christmas period. Submissions as to costs were to be lodged and served before 31 January 2018 and the other application for reimbursement of money deducted from Mr Baliss's salary to be discussed at a telephone conference.

[8] On 29 January 2018 the Authority received an email from the Chief Executive of Powerhouse Ventures Limited (Powerhouse Ventures) Paul Viney. Powerhouse Ventures is a shareholder of Solar Bright. The email provided that the former directors of Solar Bright, Pat and Nicola Martin, were no longer employees or directors and that the company at that stage had no directors and there was no authorised contact point. Mr Cahill subsequently sent an email to the Authority that he had been advised by Mr Viney to simply continue with seeking a determination.

[9] Solar Bright was advised by letter sent to its registered office that there was to be a telephone conference with the Authority on 7 February 2018. There was no attendance on behalf of Solar Bright at the telephone conference with the Authority.

[10] The Authority confirmed with Mr Cahill that a non de novo challenge before the Employment Court did not concern the deductions matter.

[11] The Authority issued a notice of direction advising the nature of the matters that Mr Bayliss wanted to be determined. It advised that a determination on both matters would be provided. I understand that the notice of direction and one additional piece of information provided by Mr Cahill was served on the registered office of Solar Bright.

Submissions on costs

[12] Mr Cahill submits that the total costs incurred by Mr Bayliss were $14,418.75

GST inclusive. Included in that sum is a claim for attendance at mediation before the Authority investigation meeting and attendance at mediation following the investigation meeting. There is also included in that sum a claim for attendance at two meetings as part of the redundancy process consultation.

[13] Mr Cahill seeks full costs or a reasonable contribution to full costs.

[14] Mr Cahill refers to the judgment of the full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz2* in which it referred to principles that are appropriate to the Authority in setting costs and consistent with its function and powers. The full Court in *PBO* recognised that the Authority has to consider each case in light of its own circumstances.

Determination on costs

[15] The Authority exercises its discretion as to whether costs should be awarded in accordance with established principles and not arbitrarily.

[16] Mr Bayliss was successful in his application before the Authority and I accept that there should be consideration of an award of costs in his favour.

[17] The Authority in most cases assesses costs using a notional daily tariff approach. It makes adjustments to that tariff depending on the circumstances of the case. An increased daily tariff of $4,500 applied for matters lodged in the Authority from 1 August 2016 which tariff Mr Cahill has referred to in his submissions. On checking the file however I note that Mr Bayliss's statement of problem was lodged with the Authority on 14 July 2016 and at that time the daily tariff was $3,500.

[18] The daily tariff is set in the first instance, subject to an assessment of whether there should be any adjustments, to reflect both earlier preparation and attendance at the investigation meeting. I also record that the attendance at the first mediation is not a matter that has elements to attract an increase to the tariff. I do not however have that same view with respect to the second mediation as I shall go on to explain. For completeness I do not consider that attendance at two consultation meetings about redundancy should be reflected in any consideration as to costs.

[19] The investigation meeting was a full day and submissions were timetabled to be supplied after the conclusion of the meeting. Neither party contributed to an increase in the time for investigation. In fact, the conduct of both parties contributed to an efficient investigation of a matter with considerable documentation and some very lengthy statements of evidence. I find that it is appropriate to start with the daily tariff of $3,500 in this matter and then consider whether there should be any

adjustments upwards or downwards to the tariff.

2 *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 at [44]

[20] I will start with the outcomes. Mr Bayliss was not completely successful. He was unsuccessful in his unjustified dismissal claim. There was no penalty awarded for a breach of good faith. Solar Bright had some success with its claim against Mr Bayliss which it was agreed would be investigated at the same time as Mr Bayliss's claims. My notes confirm that Mr Bayliss's claim occupied the majority of the time in the investigation meeting.

[21] I find it fair in the exercise of my discretion to adjust the daily tariff by $800 downwards to reflect the outcomes.

[22] I then make two further adjustments upwards. The first is to reflect that there was time taken to try to resolve the issue of deductions and reimbursements after the determination at mediation. Mr Cahill has set out in his submission that attendance at mediation after the determination to discuss that matter was for a period of 2.5 hours. I find it very likely that other matters were also discussed at that time and it is accordingly fair to assess an adjustment upward on the basis of half that time. That is a sum assessed at Mr Cahill's charge out rate of $250 plus GST and an adjustment upward of $359.37 is to be made to the tariff.

[23] The second adjustment is to reflect submissions were lodged after the investigation meeting time. The submission from Solar Bright was particularly lengthy and I find it appropriate to make an adjustment to reflect the time for consideration and response to those submissions. I adjust the tariff upwards for one hour's work at the rate of $287.50.

[24] Although Mr Cahill has been critical of Solar Bright's behaviour costs are not to be used as a punishment or an expression of disapproval. I find that the adjustments upwards and downwards specified above reflect any matters that should increase or decrease costs.

[25] In the exercise of my discretion I find that a fair and reasonable contribution to costs is the sum of $3,346.87.

[26] I order Solar Bright Limited to pay to John Bayliss the sum of $3,346.87 being costs.

What orders should be made for reimbursement of money deducted from Mr

Bayliss's salary

[27] The second issue is what orders should be made for reimbursement of money deducted to Mr Bayliss.

[28] The Authority dealt with deductions of money and the requirements under the

Wages Protection Act 1983 in paragraphs [88]–[96] of its determination.3

[29] The Authority observed in paragraph [93] that it would seem that Mr Bayliss would be entitled to some reimbursement, but not for all money deducted. In paragraph [95] it was not satisfied Solar Bright was bound by a discharge of debt.

[30] In paragraph [94], to assist the process of agreement, the Authority stated that it was not satisfied payment of the two weeks salary, whilst Mr Bayliss was sick with sick leave exhausted, was in the nature of a loan. Rather that there had been a change of heart on that matter. Two weeks salary is $2,493.

[31] Mr Cahill clarified to the Authority that he seeks reimbursement for

Mr Bayliss of the sum of $2,493. I accept that sum is owed.

[32] Further, he observed that on the loan schedule as at 24 September 2015 there was a balance of $3193 owing. The difficulty is that a further payment/deduction by Mr Bayliss of $200 on 8 October 2015 shows as an increase to $3393 when it should have reduced to $2993. A further payment/deduction of $200 on 22 October 2105 brought it back down again to $3193 but it is not until 5 November 2015 that the balance is shown as $2993. By that time Mr Bayliss has paid an additional $400 which I find he is entitled to be reimbursed for.

[33] I order Solar Bright Limited to pay to John Bayliss the sum of $2,893 being reimbursement of money incorrectly deducted from his salary.

Costs on this application

[34] It is appropriate to assess costs on the application for an order for reimbursement. I consider an assessment on the basis of two hour's work at Mr

Cahill's charge out rate of $250 plus GST would be fair and reasonable. This

3 Above n1

includes preparation of the memorandum by Mr Cahill about reimbursement and subsequent information provided about the additional issue about overpayment. Further there was attendance on a telephone conference with the Authority and a number of communications with the authority officer.

[35] I order Solar Bright Limited to pay to John Bayliss costs for obtaining an order for reimbursement of money in the sum of $575.

Helen Doyle

Member of the Employment Relations Authority

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