

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 113
5514695

BETWEEN THE WHYTE GROUP LIMITED
Applicant
AND ARTI CHAND
Respondent

Member of Authority: Trish MacKinnon
Representatives: Geoff O’Sullivan, Counsel for Applicant
Blair Scotland, Counsel for Respondent
Investigation Meeting: On the papers
Submissions Received: 12 October 2015, from the Applicant
28 September and 14 October 2015, from the
Respondent
Determination: 19 November 2015

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] Ms Chand seeks full indemnity costs in respect of an unsuccessful application made by The Whyte Group Limited to reopen an investigation.

[2] The Whyte Group Limited (TWGL) submits that costs should be in accordance with the usual daily tariff applied by the Authority. On the basis that the application for reopening was decided on the papers and would have occupied less than half a day if it had been heard in the Authority, TWGL submits the correct order of costs would be half of the Authority's normal daily tariff.

Background

[3] Ms Chand applied to the Authority in August 2014 for orders requiring her former employer to pay unpaid wages, notice period, holiday pay and bonus, all of which she claimed were owing at the time of her resignation. An investigation meeting was held on 25 November 2014. At an early stage of the investigation, and before any evidence had been heard, TWGL, through its representative and Managing Director, Brett Whyte, requested an adjournment to allow the parties to talk privately in an attempt to resolve matters informally.

[4] The investigation was adjourned for that purpose. The parties' talks were successful and within 2½ hours they informed me they had reached agreement on terms of settlement. They provided me with a copy of their typed and signed agreement and asked me to incorporate their terms of settlement into a Consent Determination. A Consent Determination was issued that day by which the terms of settlement reached by the parties became orders of the Authority.

[5] When TWGL failed to comply with all the terms of settlement Ms Chand sought an order for compliance and costs. Following an investigation meeting, a compliance order was issued on 21 January 2015.

[6] On 10 June 2015, TWGL applied for a reopening of the investigation which had resulted in the Consent Determination of 25 November 2014. The application was made on several grounds, including that the Authority did not properly consider the orders it issued in the determination.

[7] TWGL asserted that the determination contained orders that were substantially unreasonable and that the Authority did not have the jurisdiction to make those orders which, it said, constituted an illegal contract and were against public policy. Also included in the grounds was that the order of costs to be paid to the respondent's representative was excessive and the Authority had failed to investigate whether an order for costs was for a reasonable or justified amount.

[8] Ms Chand through her legal representatives filed a comprehensive response to TWGL's application. The response noted Ms Chand would seek full indemnity costs in relation to TWGL's application.

[9] I disposed of TWGL's application for reopening the investigation by way of a Member's Minute dated 11 September 2015. In that Minute I noted that the purpose of the Consent Determination of 25 November 2014 was to formalise and record the agreement the parties had reached of their own accord following private discussions initiated by Mr Whyte.

[10] In the Minute I noted the process that had led to the November 2014 Consent Determination. This had included a telephone conference with the parties two months before the investigation meeting, in the course of which I had asked Mr Whyte if he had taken legal advice on his company's situation in relation to Ms Chand. Mr Whyte had confirmed he had indeed taken legal advice. He had also stated he was arranging for counsel to represent him at the investigation and said TWGL would be lodging a counterclaim against Ms Chand.

[11] TWGL did not lodge a counterclaim before the investigation of 25 November 2014 which Mr Whyte attended without legal representation. In my Minute of 11 September 2015 I noted that, while it was Mr Whyte's right to represent TWGL himself, he could not credibly claim the lack of legal representation as a ground for reopening the investigation.

[12] I also referred in the Minute to Mr Whyte's role in requesting an opportunity, at an early stage in the investigation, to talk privately with Ms Chand and her representative in an attempt to resolve matters informally. I noted that a Consent Determination reflected the agreement reached by the parties. In this instance, one of the terms the parties agreed was that they had both had a reasonable opportunity to seek independent legal advice before entering into the settlement agreement. That being so, it would not have been appropriate for the Authority to question whether their agreement on the resolution of costs was reasonable.

[13] I noted that the terms of settlement reached and recorded in typed form by the parties were incorporated into a Consent Determination at their request. I further noted TWGL had not challenged the Consent Determination it had sought and nor had it challenged the subsequent compliance orders issued by the determination of 21 January 2015.

[14] The Minute observed that the application for reopening the investigation was lodged more than six months after the Consent Determination had been issued, and

more than four months after an order had been made for compliance with the terms of settlement incorporated into the 25 November 2014 Consent Determination. These factors, together with the absence of any valid grounds, led me to decline to exercise the discretion I held under clause 4 of Schedule 2 of the Employment Relations Act 2000 (the Act) to reopen the investigation.

Discussion

[15] Mr Scotland has provided evidence by way of itemised invoices to support Ms Chand's application for reimbursement of the actual costs of \$2,829.01 inclusive of GST she has incurred in relation to TWGL's application for reopening the investigation. The costs include \$805 for the preparation of the costs submission.

[16] Mr Scotland submitted that TWGL's claims were disingenuous and entirely without merit. In support of Ms Chand's request for full indemnity costs he noted:

- (a) *The applicant claimed the legal fees it had agreed to pay by way of full and final settlement were excessive, notwithstanding that the amount was explicitly recorded in the signed agreement.*
- (b) *The applicant attempted to rely on a lack of legal advice, despite assuring the Authority Member that legal advice had been sought, attending the proceedings without a representative, and being the party that initiated settlement discussions.*
- (c) *The applicant attempted to use a term of the agreed settlement which it had requested to be included, as the basis for declaring the consent determination to be an illegal contract.*
- (d) *The applicant had opportunities to challenge in the Employment Court against the consent determination, or the compliance order, and did not.*
- (e) *There was no legal precedent for reopening a consent determination, where the parties have reached agreement as to the terms.*

[17] Mr O'Sullivan, counsel for TWGL, submitted that the applicant had exercised a statutory right in seeking a rehearing and its application was not frivolous. He stated that Ms Chand had not approached TWGL in an attempt to resolve costs and accordingly there should be no recognition of time spent by her counsel in filing a costs submission.

[18] This was rejected by Mr Scotland who provided the Authority with a copy of an email, enclosing an invoice, he had sent to Mr O'Sullivan on 16 September 2015 in which Ms Chand's costs were set out and a request was made that Mr O'Sullivan seek his client's instructions on the matter of costs. Ms Chand's application to the Authority for costs was made after no response was received to the email.

[19] I am satisfied that Ms Chand has been put to considerable expense in defending TWGL's application for reopening and that this is a case where it is appropriate to apply the principle that costs normally follow the event. I note that TWGL has acknowledged that costs are merited in this instance although it opposes an award of indemnity costs. In *Bradbury v. Westpac Banking Corp*¹ the Court of Appeal held that indemnity costs were “*exceptional and require exceptionally bad behaviour*” in litigation. I find that TWGL's application for reopening the investigation had little merit but falls short of the exceptionally bad behaviour that would warrant full indemnity costs.

[20] I find it reasonable to adopt as a starting point the Authority's notional daily tariff (currently \$3,500), halved as proposed by Mr O'Sullivan. An adjustment to that amount of \$1,750 is warranted to take account of TWGL's failure to respond to Ms Chand's attempt to resolve the matter of costs without recourse to the Authority.

[21] I find an appropriate adjustment to be \$650. This is approximately 80% of the cost incurred for the preparation of cost submissions by Ms Chand's legal representative. In setting that amount I have recognised that, if TWGL had responded to Mr Scotland's email of 16 September 2015, some costs are likely to have been incurred in subsequent correspondence to reach agreement between the parties. For that reason I have not awarded the full \$805 sought by Ms Chand.

Determination

[22] The Whyte Group Limited is ordered to pay Ms Chand the sum of \$2,400.00 in costs, pursuant to clause 15 of Schedule 2 of the Act.

Trish MacKinnon
Member of the Employment Relations Authority

¹ [2009] NZCA 234