

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 37
5337459

BETWEEN ANDREW ALAN TODD
Applicant

AND GLENMAVIS LIMITED
First Respondent

AND GLENMAVIS FARM
PARTNERSHIP (2007)
Second Respondent

Member of Authority: Philip Cheyne

Representatives: James Guest, Counsel for Applicant
Len Andersen, Counsel for Respondent

Submissions received: 7 December 2011 & 9 January 2012 from Applicant
21 December 2012 from Respondent

Phone Conference: 22 December 2011

Determination: 29 February 2012

THIRD DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 21 November 2011 I upheld Mr Todd's personal grievance and arrears of wages claims and reserved costs for the parties to lodge memoranda. I also reserved any issue about quantum arising from the orders made. I then received memoranda from counsel following which I convened a phone conference to hear further on the issues raised. This determination resolves the question of costs and determines quantum.

[2] The respondent has challenged the Authority's substantive determination. For the respondent, counsel says that costs in the Authority should await the final outcome of the proceedings including the reference to the Court. However, the Authority's

standard practice is to finalise costs regardless of any challenge. That puts the Court in a better position to conclude matters between the parties. Accordingly, I will proceed to determine costs in the Authority.

Costs

[3] Relevant principles are expressed in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

[4] The usual approach is that costs follow the event. There is no reason in the present case to depart from that approach, nor did counsel suggest that there was some good reason. Therefore I consider that Mr Todd is entitled to an award of costs.

[5] I am told that Mr Todd's costs total \$17,500.88 and I have been provided with the relevant invoices. The first invoice dated 23 November 2010 (\$848.90) includes advice prior to the dismissal which occurred on 21 November 2010 and all the work appears to predate lodging his statement of problem in the Authority. I find that these costs are not relevant for present purposes. The second invoice is dated 22 June 2011 (\$1,610.00). I am not able to discern from the invoice precisely what and when work was done. The firm rendering the invoice is not the firm that represented Mr Todd when his statement of problem was lodged in the Authority on 9 March 2011. I cannot say with any confidence that the work covered by the 22 June 2011 invoice was reasonably necessary for the purposes of the Authority's investigation so the more appropriate course is to ignore this invoice for present purposes. This reflects the difference between legal work done on instructions and legal work done for the purposes of progressing proceedings - only the latter work is relevant in the present context. That leaves the third invoice dated 6 December 2011 (\$15,041.98). This invoice includes work done in relation to mediation. The usual approach is to ignore such costs for present purposes unless for some good reason those costs should be included when assessing Authority costs. In the present case I can see no such good reason. It is unclear what time was required for mediation but if I take the relevant legal costs as amounting to about \$13,000.00 I should have sufficiently allowed for the time involved in mediation.

[6] The matter involved some legal and factual complexity and reasonably large sums of money were genuinely at issue. There was some understandable uncertainty about the proper identity of the employer on Mr Todd's part. Part of his claim in effect involved the discharge of a mortgage granted over some land that he purchased with funds advanced by the people he dealt with as his employers. That gave rise to some legal complexity about jurisdiction and appropriate remedies. In part the claim related to arrears of wages where there were issues with the adequacy of the relevant records. Dealing with the matter included responding to the unsuccessful attempt on behalf of one of the partners to have me recuse myself for reasons unrelated to this matter. Originally the investigation meeting was scheduled for two days but with counsels' assistance based on careful preparation we were able to canvass the evidence and submissions within one day. However, the question of quantum has also required some time after the investigation meeting. These circumstances cause me to think that the matter would be better regarded as a two and a half day investigation meeting for the purposes of assessing costs on a daily tariff basis.

[7] Counsel seeks costs on an indemnity basis. The reasons advanced are Mr Todd's substantial success and the conduct of the respondent in threatening to involve the police and issuing a formal demand based on their rights as mortgagees. It would be improper to assess costs on the basis of punishing the respondent as seems to be implied in this approach. To the extent that these matters caused Mr Todd to incur extra legal costs they may be relevant for present purposes. However, treating the matter as a two and a half day investigation meeting allows sufficient recognition of any extra costs arising from these matters.

[8] As to an appropriate daily tariff rate I am referred to *Graham v The Bank of New Zealand* [2011] NZERA Christchurch 125 where I cited *Chief Executive of Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73 and *Johnson v Gilligan Business School Ltd* 3 April 2009, Travis J, AC14/09, cases where the Employment Court indicated that \$3,000.00 per day is a fair starting point for assessing costs on a daily tariff basis. I will adopt the same approach here.

[9] The result is that Glenmavis Farm Partnership (2007) must pay Mr Todd the sum of \$7,500.00 in costs. Mr Todd must also be reimbursed \$71.56 which he paid as the Authority lodgement fee.

Quantum

[10] In my earlier determination I said:

[63] There may be issues about the calculation of Mr Todd's final pay. I will reserve that in case the parties cannot agree quantum after applying the following findings. Mr Todd was overpaid 8 weeks salary and it must be accounted for. Mr Todd must be paid 18.5 days for alternative holidays. Mr Todd must be paid 8 weeks holiday pay less 12 days taken in July 2010 which must be treated as annual leave. Finally Mr Todd is entitled to 8% of his gross earnings from 1 July 2010.

[11] It is agreed between counsel that Mr Todd's final nett pay giving effect to the foregoing findings should have been \$22,578.13.

[12] It is common ground that Mr Todd was personally paid \$14,962.52. The parties' arrangements meant that Mr Todd's partner also received the same amount but for present purposes that must also be treated as a payment actually received by Mr Todd. I agree with counsel that the additional payment to Ms Malota for her own work should not count for present purposes. It follows that Mr Todd was overpaid, effectively receiving \$29,925.04 nett rather than \$22,578.13 nett. That leaves a balance of \$7,346.91 nett which Mr Todd owes to Glenmavis Farm Partnership (2007).

[13] I record Mr Todd's position that the overpayment of \$7,346.91 nett may be deducted from the compensation payable to Mr Todd as a result of his personal grievance.

Further remedy relating to the mortgage

[14] In my earlier determination I said:

[61] An appropriate remedy concerning the mortgage requires further comment. I have found as a term of the employment that Mr Todd is entitled to a discharge of the mortgage registered in favour of Dr Walker and Mr Budge. There is a submission that compensation could be awarded under s.123(1)(c)(ii) of the amount secured by the mortgage. That would compensate Mr Todd for the loss of a benefit, whether or not of a monetary kind, which the employee might reasonably have expected to obtain That might be correct but it attacks the problem indirectly because it only creates the circumstances in which the respondent would meet the compensation award by offering to discharge the mortgage.

[62] There is an alternative submission that the Authority could make a compliance order pursuant to s.137 of the Employment Relations Act 2000. I think this is a better

approach. Dr Walker's and Mr Budge's refusal to discharge the mortgage (except subject to conditions) amounts to a failure to comply with a provision of an employment agreement entitling the Authority to order them to do a specified thing (discharge the mortgage) to prevent further non-compliance. The matter was put thus only in submissions for the applicant. In addition it may be unnecessary to make a formal order now that the factual dispute has been determined in Mr Todd's favour. I will reserve the issue of an appropriate remedy for further consideration if the matter cannot be resolved between the parties.

[15] The position remains reserved.

[16] While counsel raised the question of a compliance order in his memorandum I think it would be inappropriate to take this matter any further at present. The challenge does not operate as a stay but I do not intend to put the parties to the further costs of seeking and opposing a stay by making further orders now when I expect the matter will be capable of resolution between the parties once the Court has dealt with the challenge.

Summary

[17] Mr Todd's final pay should have been \$22,578.13 nett. Because he effectively received \$29,925.04 (in total), Mr Todd owes Glenmavis Farm Partnership (2007) \$7,346.91 nett, which can be offset against compensation due to him under the earlier determination.

[18] Glenmavis Farm Partnership (2007) must pay Mr Todd the sum of \$7,500.00 in costs and \$71.56 in expenses.

Philip Cheyne
Member of the Employment Relations Authority