

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 358
3011051

BETWEEN GORDON VANDY,
 BRENDON TURNER and
 SHANE McRAE
 Applicants

A N D TRISTRAM MARINE
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Alex Kersjes, Advocate for Applicants
 Simon Scott, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 24 October 2017 from Respondent
 30 October 2017 from Applicants
 01 November 2017 from Respondent

Date of Determination: 17 November 2017

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

Employment relationship problem

[1] The three applicants filed a Statement of Problem on 24 May 2017 claiming wage arrears arising from Tristram Marine Limited’s failure to pay their correct Holidays Act 2003 (“HA03”) entitlements.

[2] Prior to filing their Statement in Reply the Applicants had expressed ongoing concern to Tristram Marine about the manner in which it was calculating their HA03 entitlements. The matter was not resolved at that point resulting in proceedings being filed with the Authority.

[3] Tristram Marine filed its Statement in Reply on 08 June 2017 acknowledging that in late 2016 it became aware that it may have miscalculated the HA03 entitlements it had paid to staff.

[4] Tristram Marine further said it had engaged the accountancy firm Deloitte to review its payroll payments to identify any outstanding wage arrears owed to staff.

[5] On 08 May 2017 Tristram Marine wrote to the applicants advising that they (Tristram Marine) were currently investigating the wage period 01 April 2011 to 31 March 2017 to determine whether or not the applicants' HA03 entitlements had been paid correctly.

[6] Tristram Marine advised that any wage arrears would be deposited into the applicants' bank accounts. Tristram Marine recorded its view that it hoped the approach it had taken would resolve any confusion regarding HA03 entitlements and invited the applicants to discuss any ongoing concerns they had with one of the Managing Directors or Deloitte.

[7] On 10 July 2017 Mr Vandy filed an Amended Statement of Problem under AEA 3011051 which raised new personal grievance claims for unjustified disadvantage and constructive dismissal as well as claims alleging breach of good faith and penalties for the alleged good faith breaches.

[8] On 28 September 2017 Mr McRae advised the Authority and Tristram Marine in writing that he wished to withdraw his wage arrears claim.

[9] Mr Vandy's and Mr Turner's Advocate emailed the Authority and Mr Scott on 09 November 2017 advising that they had both withdrawn their wage arrears claims under AEA 3011051 but wished to continue with other newer claims against Tristram Marine.

Issue

[10] Tristram Marine now seeks solicitor/client costs against each applicant. It relies on *Calderbank* letters it sent to each applicant dated 03 July 2017 to support its claim for solicitor/client costs.

[11] In each of these three separate *Calderbank* letters Tristram Marine offered to pay each applicant the amount of wage arrears that Deloitte's had identified were owing as a

result of its review of the payroll. The letters attached the Deloitte's leave payment calculations.

[12] In each of the *Calderbank* letters Tristram Marine advised that if the matter did not settle prior to mediation which was scheduled on 07 July 2017, and the claims proceeded to an investigation meeting then:

[...] we will produce this letter in evidence relative to costs. TML will seek their real and actual legal costs against you in the event you do not receive more than what is offered in this letter at hearing.

[13] On 07 July 2017 Tristram Marine wrote again to the applicants advising that it had paid the sums outlined in the individual letters it had sent to each applicant on 03 July 2017 by presenting them personally with cheques for the amount of wage arrears it believed it owed each of them.

[14] Tristram Marine advised that if the cheques were not deposited by 12 July 2017 the cheques would be cancelled and the wage arrears would be deposited into the last bank account that Tristram Marine had on file for each applicant.

[15] The 07 July 2017 letter further states:

We confirm our advice that the offer to settle without claiming costs from you is open until 5pm today. In that regard we repeat our advice in the said 3 July letter:

"You also need to be aware that if this matter does not settle, and proceeds to a hearing, we will produce this letter in evidence relative to costs. TML will seek their real and actual legal costs against you in the event you do not receive any more than what is offered in this letter at hearing. We trust that won't be necessary."

[16] Tristram Marine says its total legal costs in respect of all matters involving the three applicants less mediation costs amounted to \$9,351.25. Tristram Marine now seeks a costs order in its favour for that full amount.

Costs principles

[17] Costs principles in the Authority are so well established that I do not need to set them out again here. Although costs are discretionary the discretion is to be exercised on a principled basis.

[18] It is usual for an unsuccessful party to be ordered to contribute towards the successful parties' actual legal costs.

[19] The Authority usually adopts a notional daily tariff based approach to costs. An award of full solicitor/client costs is unusual. The Authority is more likely to adopt its usual notional daily tariff which can then be adjusted to reflect the particular circumstances of the case.

Findings

[20] This is not a suitable case for an award of solicitor/client costs. These were basic wage arrears claims involving the applicants' attempts to recover their full HA03 entitlements.

[21] As a result of these proceedings the applicants ended up being paid their wage arrears. After that had occurred each applicant withdraw their wage arrears claim. Prior to proceedings being filed the parties had not been able to resolve the wage arrears issues between them.

[22] I therefore consider that the applicants and not Tristram Marine can be said to be the successful party.

[23] The three applicants filed a claim alleging that they had not been paid their HA03 entitlements and after investigating the matter Tristram Marine determined that each of them were owed wage arrears.

[24] I therefore consider it was appropriate for the applicants to have filed their proceedings and in the overall assessment they can be said to have had a greater measure of success than Tristram Marine, who accepted it had wage arrears liability.

[25] In this case there appears to have been minimal work required in respect of this matter. Although Tristram Marine filed a Statement in Reply it was very short and contained minimal information other than acknowledging there was a potential wage arrears issue to be resolved which it had asked Deloitte to investigate.

[26] Tristram Marine was not required to file evidence or witness statements. It was not required to prepare for or attend an investigation meeting or to prepare or file legal submissions. No preparation was necessary.

[27] The matter was resolved at an early stage and well before any preparation for an investigation had occurred.

[28] I also consider that this situation can be seen as one that arose because of Tristram Marine's own failure to fully comply with its HA03 obligations. It was that failure that caused the applicants to file proceedings in order to recover that amounts owed to them.

[29] Had Tristram Marine met its obligations under the HA03 then the applicants could not be said to have been successful in respect of their wage arrears claims. But that was not the case.

[30] Each of the applicants was in fact owed arrears and did in fact subsequently recover their wage arrears which is why I view them as the successful party.

[31] I do not consider it is in the interests of justice to order the applicants to pay Tristram Marine any costs. Accordingly, Tristram Marine's application for costs does not succeed.

Rachel Larmer
Member of the Employment Relations Authority