

**IN THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

[2014] NZERA Christchurch 74
5423576

BETWEEN Mr A
 Applicant

AND B LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Philippa Tucker, counsel for the applicant
 Scott Wilson, counsel for the respondent

On the papers From the applicant on 17 April 2014
submissions received: From the respondent on 30 April 2014

Determination: 13 May 2014

DETERMINATION OF THE AUTHORITY (No. 2)

A. B Limited must pay Mr A \$6,010.34 in lost remuneration

B. B Limited must pay Mr A \$1,750 in legal costs and reimburse Mr A for the \$71.56 Authority filing fee.

[1] On 24 March 2014 I issued a determination finding in favour of Mr A. I provided an opportunity for the parties to return the Authority if they were unable to agree on the amount of weekly pay that Mr A should be reimbursed by way of lost wages. They have been unable to agree. The parties were also invited to agree on costs. They have been unable to do so.

[2] This determination decides what Mr A should be paid by way of lost wages and what costs should be paid by B Limited.

Lost wages

[3] Section 128(2) of the Employment Relations Act (the Act) requires *3 months' ordinary time remuneration* to be paid. Three months remuneration equates to pay for 13 weeks. Mr A was paid monthly. He was dismissed on 18 April 2013 and paid 4 weeks' notice. My determination ordered that he be paid for a further 9 weeks.

[4] There is a disagreement as to what Mr A's ordinary time weekly pay was.

Applicant's submissions

[5] Ms Tucker submits that based on the final pay and on the pays of the previous 3 months (January, February and March 2013) Mr A's ordinary monthly pay was for 173.33 hours at \$21.635 per hour meaning that his ordinary time remuneration was \$937.44 per week. To arrive at that figure she has divided 173.33 hours by 4 weeks to arrive at a weekly average of 43.33 hours and multiplied that by the hourly rate of \$21.635.

Respondent's submissions

[6] Mr Wilson submits that the average weekly pay received by Mr A based on the last full tax year he worked ending 31 March 2013 was \$888.50 per week. He has reached this amount by dividing Mr A's gross pay of \$46,326.53 by 52.14 weeks, which equates to 365 days for the full year.

Determination on ordinary weekly remuneration

[7] Ms Tucker's arithmetic assumes that each of the three months contains 4 weeks precisely. However, only February 2013 was four weeks exactly (28 days) as January and March have 31 days each – or 4 weeks and 3 days. There were 12.857 weeks in those 3 months. If the arithmetic is done on that basis it does not favour Mr A.

[8] I consider it reasonable to work out Mr A's ordinary time remuneration based on his income for the full tax year ending 31 March 2013 as proposed by Mr Wilson.

However, by my calculations Mr A's annual pay is \$46,426.53 which when divided by 52.14 weeks per annum equals \$890.42 per week gross, rather than the \$888.50 per week Mr Wilson submits.

[9] Mr A has already been paid for 4 weeks in lieu of notice.

[10] Therefore, Mr A should be paid \$890.42 per week gross for 9 weeks which equates to \$8,013.78 gross less 25% for contribution = \$6,010.34.

Costs

Applicant's submissions

[11] Ms Tucker seeks full reimbursement of Mr A's legal costs of \$5,985.61. She gives no reasons for that.

Respondent's submissions

[12] Mr Wilson says that while costs should follow the event in this case there is no reason to depart from the Authority's usual daily tariff approach. He submits that B Limited should pay a costs award of \$1,750 to Mr A being half of the Authority's usual daily tariff.

Determination on costs

[13] The Authority's jurisdiction to award costs is contained in Schedule 2, clause 15 of the Employment Relations Act 2000. The award of costs lies within the Authority's discretion so long as the Authority's decision is a principled one.

[14] Mr Wilson correctly submits that the Authority's basic tenets are well known. One of those is that indemnity costs are only awarded in exceptional cases.

[15] This case was not exceptional and there was no exceptionally bad behaviour on the respondent's behalf that should attract full costs.

[16] The hearing took half a day and in line with that and the Authority's usual practice I order B Limited to pay a contribution towards Mr A's legal costs of \$1,750. B Limited must also pay the Authority filing fee of \$71.56.

Christine Hickey

Member of the Employment Relations Authority