

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 349  
5314299

BETWEEN                      ANTONIO AGREITER  
Applicant

AND                              GINO LIMITED  
Respondent

Member of Authority:      R A Monaghan

Representatives:            M Moncur, advocate for applicant  
A du Plessis, advocate for respondent

Memoranda received:      13 and 28 July 2011 from applicant  
27 July 2011 from respondent

Determination:              5 August 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]      In a determination dated 8 July 2011 I made various orders for the payment of monies owing, and awarded compensation in respect of Mr Agreiter's unjustified constructive dismissal. I declined to make any orders for the payment of penalties.

[2]      Costs were reserved, and the parties have filed memoranda on the matter.

**The parties' positions on costs**

[3]      Ms Moncur sought a contribution to Mr Agreiter's costs in the sum of \$3,500 with reference to the notional daily rate applicable as appropriate in the Authority, and GL's conduct of the matter.<sup>1</sup> Since the investigation meeting lasted only slightly more than half a day, as a starting point I would assess any applicable notional rate as \$1,750. Ms Moncur also sought reimbursement of the filing fee of \$70.

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<sup>1</sup> Ref: *PBO Limited (formerly Rush Security Limited) v da Cruz* [2005] ERNZ 808

[4] Dr du Plessis pointed out that Mr Agreiter was not successful in all of the heads of claim, and said the claim in respect of holiday pay could have been referred to a labour inspector without incurring most of the costs to which Ms Moncur referred. Dr du Plessis also expressed concern about the claim for penalties, saying costs were incurred unreasonably in that respect also. He said Mr Agreiter would not have asked for a penalty himself and noted that penalties are payable to the crown, and further that any penalty considered appropriate could have been issued by a labour inspector.

[5] It was submitted further that, since the matter was in essence one involving claims for holiday pay and should have been referred to a labour inspector, Mr Agreiter should not be entitled to any contribution to his costs. Instead the respondent should be awarded reimbursement of its actual costs in the sum of \$8,452, or such lesser sum as was considered appropriate.

### **Determination**

[6] There are no grounds for an order for costs in favour of GL. In the circumstances of this case GL is fortunate not to be facing a claim for full costs by Mr Agreiter. Mr du Plessis was instructed at a relatively late stage. Prior to that Mr Jusufi had been unresponsive to the point that the Authority took the action referred to at [52] of the substantive determination. In many respects Mr Jusufi has been the author of his own misfortune.

[7] I would not have accepted the submission in any event. In general it may be more efficient and cost effective for an employee to approach the labour inspectorate for a resolution of concerns about holiday pay in the first instance. If a labour inspector concludes that money is owed, the inspector may issue a notice demanding payment, or commence an action in the Authority. However the Employment Relations Act 2000 does not oblige a party to approach a labour inspector. Claims for orders for the payment of holiday pay can be referred to mediation or lodged in the Authority directly by an individual or representative, or by a labour inspector on behalf of an individual when the inspector has been approached and considers such action appropriate. Nothing in the scheme of the Act provides a ground for

suggesting that the exercise of an election not to approach a labour inspector should sound in costs in the Authority later.

[8] As for the input of Ms Moncur, Mr Agreiter was entitled to seek the advice of a representative as he did. Subject to the instructions she received Ms Moncur was entitled to lodge such claims on as she considered necessary on her client's behalf. There was nothing inappropriate in the inclusion of claims in addition to holiday pay. That some of the claims were not successful can be taken into account in setting costs, but those claims were characterised in submissions on behalf of GL as frivolous and vexatious to the extent that costs should be awarded to GL. I do not accept they should be so characterised.

[9] The further submission concerning Mr Agreiter's likely attitude to penalties in the absence of input from his representative is speculative and inappropriate. I have already indicated that the representative was entitled to lodge such claims as she considered necessary. This extends to an entitlement to seek penalties if her advice to her client is that there are grounds for such a claim, and she is instructed to proceed accordingly. Moreover penalties have a punitive element intended to reflect the public interest in ensuring that employment agreements and certain statutory provisions are observed, and in that respect are not protective solely of individual interests.

[10] Regarding the extent to which Mr Agreiter was successful overall, he was indeed successful in his claim for holiday pay and is entitled to have his success reflected in costs. The claim of constructive and unjustified dismissal was also successful.

[11] The claim for penalties was not successful, but GL was fortunate in that respect. Claims for penalties should not be approached as boilerplate claims, and had the basis for the claims been better identified the outcome could have been different.

[12] Finally, a significant claim for payment for additional hours of work done and not paid for was not successful, based on a construction of the employment agreement.

[13] Overall, in that he achieved a degree of success Mr Agreiter is entitled to a contribution to his costs. I would have applied a reduction to the notional rate for a meeting of half a day in order to reflect the extent to which he was not successful. However I also accept that GL's conduct of the matter prior to the involvement of Mr du Plessis in particular was likely to have increased Mr Agreiter's costs unnecessarily.

[14] For that reason I do not apply a reduction. GL is ordered to contribute to Mr Agreiter's costs in the sum of \$1,750.

[15] GL is further ordered to reimburse Mr Agreiter for the filing fee of \$70.

R A Monaghan

Member of the Employment Relations Authority