

NOTE: An order at paragraphs [1] and [3] prohibits publication of certain information.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 407
3190440

BETWEEN	BDX Applicant
AND	PZY Respondent

Member of Authority:	Rachel Larmer
Representatives:	Adam Mapu, advocate for the Applicant Chris Rowe, advocate for the Respondent
Investigation:	On the papers
Submissions Received:	13 June 2023 from the Respondent No submissions from the Applicant
Date of Determination:	31 July 2023

COSTS DETERMINATION OF THE AUTHORITY

Non-publication order

[1] On 29 March 2023 the Authority issued a preliminary determination involving these parties that included an interim non-publication order, pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act).¹

[2] The preliminary determination has been challenged to the Employment Court, which has not rescinded or varied the interim non-publication order made by the Authority.

¹ *BDX v PZY* [2023] NZERA 160.

[3] The interim non-publication order currently in force in this matter prohibits publication of the parties' and witnesses' names, and information identifying them. The preliminary determination therefore identified the parties by the three randomised letters, which have also been used in this costs determination.

[4] The Authority stated in its preliminary determination that it would revisit the interim non-publication order when it determined the wage arrears claim, which was set down for an investigation meeting after the preliminary determination had been issued.

[5] Although the Authority noted in the preliminary determination that “[t]here should be no expectation of it continuing”, upon review it has been determined that the existing interim non-publication order will not be rescinded or varied by the Authority at this time.

[6] If the Authority used the parties' names, then the file number for this costs determination could be cross referenced to the preliminary determination, rendering the interim non-publication order nugatory. That would also identify the parties' names in the challenge currently before the Employment Court.

[7] The Employment Court has this matter before it, so it can rescind or vary the interim non-publication order if it considered that should occur. In the meantime, the Authority considered it appropriate to maintain the status quo in this costs determination regarding the interim non-publication order that was made in the preliminary determination.

Employment Relationship Problem

[8] The Respondent has applied for an order that the Applicant contribute towards its actual legal costs.

[9] The Applicant believed costs should lie where they fall, because he withdrew his wage arrears claim prior to the Investigation meeting (“IM”).

The Authority's investigation

[10] The Respondent's costs application was determined ‘on the papers’.

[11] Both parties were given an opportunity to lodge costs submissions and other information. The Respondent lodged costs submissions on 13 June 2023, which attached “*without prejudice except as to costs*” communications dating back to 14 April 2023.

[12] The Applicant was required to lodge his costs submissions (if any) by 27 June 2023. That did not occur. He did not engage with the Authority after he had withdrawn his wage arrears claim.

[13] However, prior to withdrawing his claim, the Applicant informed the Authority that the parties had a dispute about whether or not costs should lie where they fell. That indicated that the Applicant did not believe he should be required to contribute anything toward the Respondent's costs. That position was also reflected in the "*without prejudice except as to costs*" communications between the parties.

Background facts

[14] The Applicant was employed as an apprentice by the Respondent from 20 August 2020 to early February 2022, under an individual employment agreement.²

[15] The Respondent is an individual who operated a business (now sold) under a 'trading as' name linked to his own name. The Applicant worked in the Respondent's workshop alongside the Respondent and other employees.

[16] On 19 September 2022 the Applicant lodged a Statement of Problem that identified two personal grievance claims and a wage arrears claim.³

[17] The preliminary determination held that the Authority did not have jurisdiction to investigate the personal grievance claims, as they were not raised within the 90-day time period required by s 114(4) of the Employment Relations Act 2000 ('the Act'). Costs on that issue were determined in the preliminary determination.⁴

[18] During the CMC held on 5 December 2022 the Authority discussed what evidence it expected to receive from the parties regarding the wage arrears claim. The Applicant was specifically directed to provide sufficient detail of his claim to enable the Respondent to check his records while recovering from surgery on 16 December 2022.

[19] However, that did not occur, as the Applicant failed to provide the Respondent with any information by the required date.

² The date of termination was disputed.

³ The wage arrears claim has been set down for a substantive investigation meeting. The Statement of Problem raised another claim, which was withdrawn at the Case Management Conference.

⁴ Above n1.

[20] The wage arrears claim was set down for an ‘in-person’ IM on 8 and 9 June 2023, at a regional location outside of Auckland. The parties both lodged evidence consisting of witness statements and relevant documents prior to the IM.

[21] At 5.32pm on 6 June 2023 the Applicant emailed the Authority and Respondent advising he had withdrawn his wage arrears claim. Because that email was sent outside business hours it was not seen by the Authority until 7 June 2023, the day before the two-day IM was due to start and the same day the Authority Member was scheduled to fly to the IM region.

[22] Because the Applicant had previously advised he had “*been forced to withdraw his wage arrears claim*” the Authority asked him to address whether he was freely and voluntarily withdrawing his wage arrears claim. The Applicant provided confirmation that he was at 9.39am on 7 June 2023.

[23] The Authority then emailed the parties at 10.02am on 7 June 2023 confirming the IM on 8 and 9 June 2023 had been vacated, because the Applicant had withdrawn his claims. The Respondent replied by advising it would be applying for costs, so the Authority issued a timetable for the exchange of costs submissions.

Issues

[24] The following issues are to be determined:

- (a) What costs did the Respondent actually incur?
- (b) Should the Applicant be ordered to contribute to the Respondent’s costs?
- (c) If so, how much costs should the Applicant be ordered to pay?

What costs did the Respondent incur?

[25] The Respondent said it had incurred actual legal costs of \$6,334.75 after the preliminary determination was issued on 30 March 2023.

[26] These legal costs covered communications with the Applicant and Authority, briefing witnesses, preparing witness statements, locating, collating and lodging relevant documents and preparing for a two-day IM. Accommodation and travel had also been arranged for the Respondent’s advocate.

Should the Applicant be ordered to contribute towards the Respondent's costs?

[27] The Authority does not normally award costs in matters where the claims have been withdrawn. However, costs are discretionary so the Authority is not precluded from doing so in an appropriate case.

[28] The Applicant wrote to the Respondent on 18 August 2022 claiming (among other things) \$9,271.26 wage arrears. The Respondent provided the Applicant with his wage and time records on 2 September 2022.

[29] The Applicant claimed wage arrears of \$12,035.79 in the Statement of Problem ("SoP") he lodged on 19 September 2022, which did not provide details of his claim.

[30] The Applicant then claimed \$15,245.33 in the first witness statement he lodged on 24 February 2023. He subsequently amended that to claim \$1,171.56 in the second witness statement he lodged on 14 March 2023. He did not explain that change.

[31] On 24 May 2023 the Authority emailed a number of specific questions to the Applicant to effectively 'reality-check' his wage arrears claim, because based on the evidence that had been lodged (even if the Authority accepted everything the Applicant alleged), it appeared he had been overpaid by between \$1,415.25 and \$1,530, depending on the applicable rate of pay.

[32] The Authority pointed out that if the evidence it had been given was correct, then based on an analysis of the Applicant's own evidence he had been overpaid, because even if he had in fact worked all of the extra hours/overtime he claimed to have worked (which was disputed by the Respondent) he had still been paid for many more hours than he had worked.

[33] The Authority asked the Applicant to clarify aspects of his claim, to establish how he was claiming he was owed wage arrears when the available evidence showed he had been overpaid.

[34] That started a chain of communications where the Applicant indicated he would consider withdrawing his claim if costs could lie where they fell. The Respondent's position was that he was not prepared to absorb the costs he had incurred, given the significant preparatory work that had been done to that point.

[35] The Respondent's advocate put the Applicant on notice in an email sent at 4.51pm on Monday 29 May 2023 that she was travelling on 1 June to the IM location outside of Auckland

to meet with her client and his witnesses to prepare for the IM, so the Respondent would be incurring further costs associated with that.

[36] On 1 June 2023 the Applicant asked for a postponement of the IM on the same grounds that had already been declined by the Authority on 9 May 2023, so that request was also declined. The Authority also reminded the Applicant that he had not responded to its queries about his claim.

[37] On 1 June 2023 the Authority put the Applicant on notice of potential adverse costs consequences of proceeding with a claim that based on his own evidence (as at that date) had no prospect of success, because he had been overpaid. The Applicant was therefore invited to clarify the basis on which he was pursuing his claim and he was told he could lodge further evidence that supported his wage arrears claim, if he wanted to proceed with it.

[38] On Monday 5 June 2023 (the King's birthday public holiday) the Applicant emailed the Authority to say he "*had been forced to withdraw his claim.*" The Authority responded on 6 June 2023 to say that it would not accept a "*forced withdrawal*" and it would be investigating the circumstances of his withdrawal, to ensure it had not been a result of duress or intimidation/improper influence or the like.

[39] The Authority posed a number of questions asking why the decision to withdraw had been made, in light of the Applicant's advice that he believed his claim had merit and he had evidence to support his claim, which he had still not provided.

[40] In an email sent to the Authority, and Respondent, at 9.39am on 7 June 2023 the Applicant explained he had used a poor choice of words by saying he "*had been forced to withdraw*" and that his decision to withdraw was based on a risk versus rewards analysis, conducted with his advocate and with the benefit of legal advice.

[41] The Authority confirmed to the parties at 10.02am on 7 June 2023 that the IM set down for 10am on 8 and 9 June 2023 had been vacated. This was 24 hours before the IM was due to start.

[42] In a without prejudice except as to costs email dated 14 April 2023 the Applicant proposed withdrawing his wage arrears claim on a "*costs lie where they fall*" basis. The Respondent rejected that offer,

[43] The Respondent claimed the Applicant presented and pursued his wage arrears claim in a “*shambolic*”, “*wildly fluctuating and often factually incorrect*” manner, that unreasonably and unnecessarily increased his actual legal costs. He sought a contribution to his costs to reflect that.

[44] The wage arrears claim in the Applicant’s first witness statement was too vague for the Respondent to be able to check against his records. The Authority informed the Applicant that what he had lodged was insufficient, and it set out the specific evidence it expected to see in support of his wage arrears claim.

[45] The Applicant’s second statement did not comply fully with the Authority’s direction about the information it needed to cover, but it did enable the Respondent to check claims that had been made against his records. The Applicant’s first wage arrears claim was made after he had seen those records.

[46] The Respondent paid his employees the same amount each week, regardless of whether they left work early, were absent for personal reasons during normal work hours or had arrived late to work. Employees recorded their absences from work in the workshop diaries, which the Respondent produced during the Authority’s investigation. The diaries were also made available to the Applicant to inspect, had he wanted to do so.

[47] The workshop diaries showed the Applicant was away from work for 76.5 hours which he had been paid his normal wages for, meaning there was no adverse impact on his statutory entitlements due to him working less than his contractual hours in some weeks.

[48] The Authority pointed out to the Applicant that if he accepted it was his handwriting in the diary pages the Respondent had provided and that the information he had written was accurate, then even if all of his (the Applicant’s) evidence was accepted about the extra hours he claimed he had worked (which was disputed by the Respondent) then based on his own evidence he had still been overpaid by 76.5 hours.

[49] The Authority invited the Applicant to clarify whether he disputed the diary notes he had written in his own handwriting about times and days he did not work but was paid his normal wages without deduction. He was also asked to produce evidence that supported his wage arrears claim, if he did not accept the information provided by the Respondent was accurate.

[50] On 18 May 2023 the Authority indicated it had no questions for three of the Respondent's witnesses, so inquired whether the Applicant wanted to question them, and if so, for approximately how long they would be required, for witness scheduling purposes. The Applicant said he wanted to question all of the Respondent's witnesses but he did not say for how long they would likely be required.

[51] The Respondent sold the business the Applicant was employed to work in. The Respondent's witnesses (former co-workers of the Applicant) were also no longer employed by the Respondent, so they were inconvenienced by the late withdrawal.

[52] The Respondent said the Applicant should have been well aware of the weaknesses in his wage arrears claim many months before it was withdrawn.

[53] The Applicant's wage arrears claim went from \$9,271.26 to \$12,035.79 to \$15,245.33 to \$1,171.56 and was then withdrawn the day before the two-day IM was due to start.

[54] The Applicant appeared to have known since 14 April 2023 that his claim did not have merit because he proposed withdrawing it on that date, but did not do so only because the Respondent did not agree that costs would lie where they fell.

[55] The particular facts of this matter make it appropriate for the Applicant to be ordered to contribute towards the Respondent's actual legal costs, namely:

- (a) Early receipt of wage and time records;
- (b) Repeated requests to clarify his claim went unheeded;
- (c) Timetable directions were breached;
- (d) Failure to provide specific evidence the Authority had identified in support of his claim;
- (e) Providing evidence that fundamentally undermined his own claim because it established he had been overpaid;
- (f) Not addressing or explaining that discrepancy when invited to do so;
- (g) Delay in withdrawing his claim when he knew that caused the Respondent to incur additional costs;
- (h) Incorrectly and misleadingly claiming he had been "*forced to withdraw his claim*" (which had to be investigated) when he had not;

- (i) Saying he wanted to question all witnesses, so requiring them to be personally present at the IM when they were no longer employed by the Respondent;
- (j) Not clarifying the circumstances of his withdrawal until the morning before the two-day IM was due to start. and

How much should the Applicant have to pay the Respondent?

[56] The parties were put on notice about the costs consequences associated with Authority proceedings during the CMC that was held on 5 December 2022. The Authority's costs regime was also set out in the Directions of the Authority dated 6 December 2022.

[57] The Applicant is therefore ordered to contribute \$900 towards the Respondent's actual legal costs, consisting of \$750 towards the wage arrears claim and \$150 towards this costs application.

Costs order

[58] Within 28 days of the date of this determination, the Applicant is ordered to pay the Respondent \$750 towards his actual legal costs.

Rachel Larmer
Member of the Employment Relations Authority