New Zealand Employment Relations Authority Decisions

Barzegari v Little Turkish Café Limited [2011] NZERA 274; [2011] NZERA Auckland 194 (11 May 2011)

Last Updated: 20 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 194 5308303

BETWEEN ZAHRA BARZEGARI

Applicant

AND LITTLE TURKISH CAFE

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions:

Rachel Larmer

David Flaws, Advocate for Applicant Richard Harrison, Counsel for Respondent

On the papers

3 February 2011 Applicant's costs submissions

2. March 2011 Respondent's costs submissions
3. May 2011 Respondent's additional submissions 6 May 2011 Respondent's additional submissions

Determination:

11 May 2011

COSTS DETERMINATION

[1] In *Barzegari v Little Turkish Cafe Limited*[1] the applicant succeeded on her wage arrears claims. Costs were reserved.

[2] The parties were encouraged to resolve costs by agreement, but that has not been possible so both parties have now filed costs memoranda.

[3] The principles relating to costs in the Authority can be found in *PBO Limited (formerly Rush Security Limited) v da Cruz*[2]. The Authority's discretion in this matter is exercised in light of those well established principles.

[4] This matter involved a three day substantive investigation, which at the request of both parties, was compressed into two extremely long days. The investigation meeting started early both days, lunch breaks were no more than half an hour and the meetings ran much later than usual, for example the second day of the investigation did not finish until after 9pm at night.

[5] I heard from eleven witnesses all of whom had English as a second language and some of whom had limited English language skills. Two translators were required and some witnesses required almost full translation of questions, answers,

and documentation.

[6] Three witnesses were summonsed, so there was no advance notification of the content of their evidence in chief. The applicant and her husband gave evidence on her behalf. The respondent called six witnesses. Extensive documentation, including documents that were not in English, was provided, and some of these were translated during the investigation meeting.

[7] The respondent put the applicant to proof in respect of every aspect of her claim. Its position was that since the applicant was first employed on 21 March 2009 her husband had masterminded the fabrication of documentation over the entire period of her employment to support her case. After carefully reviewing the evidence I did not accept the respondent's view about that.

[8] The way the respondent defended this matter meant the veracity of every document the applicant produced and every statement she made was put in issue.

[9] The respondent conceded it owed the applicant wages for her last week of work and it had not paid her annual holiday pay upon termination or public holiday entitlements, including time and a half for the hours it admitted she had worked on public holidays or alternative days off in lieu of working on public holidays.

[10] Despite knowing it had not fully complied with its obligations, at least in relation to the matters identified above, the respondent did not take steps to remedy these errors. It only made these concessions during the investigation meeting, which meant the applicant still had to provide evidence to prove and quantify these claims.

[11] The respondent is entitled to put the applicant to proof of every element of her claim in the manner it did, but the risk of it doing so is that when the applicant's claim has been upheld there may be costs consequences if its conduct unnecessarily increased costs to the parties. I find that was the case here because the respondent's actions in the way it defended this matter put the applicant to unnecessary additional cost.

[12] The parties were directed to attempt to resolve remedies by agreement but, despite attempts to do so, remained $1,314.20 apart in their calculations.

[13] The Authority informed the parties the formula in section 9(3) of the Holidays Act 2003 should be used to calculate the applicant's RDP, but notwithstanding that the respondent did not use the formula. It then failed to explain why it had not used that formula and it also failed to respond to the Authority's invitation to identify which section in the Holidays Act 2003 is relied on as the basis for the calculations it had made.

[14] I find the respondent's actions in this regard increased the applicant's costs because a determination on quantum was required and the applicant incurred the additional cost of providing quantum submissions.

[15] The applicant seeks her actual costs of $9,200 GST inclusive plus disbursements of $1,419.

[16] The respondent submitted that the applicant was in effect self represented, assisted by Mr Flaws and referred to *IR Thompson Associates Limited v Petro -Tech Services Limited*[3] in support of a submission no costs should be awarded.

[17] I find this matter was not analogous to *IR Thompson* which involved a representative who became an applicant by filing a Statement of Problem to recover legal costs it was to be paid, but had not been paid, under the terms of a record of settlement reached between its client and the respondent with the assistance of the

Department of Labour Mediation Services. *IR Thompson* was not a party to the record of settlement in issue.

[18] Whilst the applicant and her husband had clearly put considerable time and effort in to presenting the applicant's case, Mr Flaws assisted with the preparation of their evidence and documentation and he took an active role as a representative during the investigation meeting and in respect of subsequent communications with the Authority. Both parties provided further submissions on quantum and costs.

[19] Mr Flaws provided copies of his invoices, and the applicant when questioned during the investigation meeting confirmed she was expected to pay for his representation. Mr Flaws advised the applicant has acknowledged her liability to pay the invoices he has rendered, his invoices have been entered into his debtor's ledger, and arrangements have been made by the applicant to pay this debt.

[20] I accept that the costs claimed have actually been incurred by the applicant.

[21] The respondent submitted that if costs were awarded a daily tariff of $2,5003,000 per hearing day of should be adopted. The applicant submitted a daily tariff of $3,500 should be applied.

[22] The applicant is only entitled to the costs she has actually incurred. She was invoiced $8,096 for the substantive investigation meeting and $1,104 for subsequent quantum and costs issues. These amounts were GST inclusive.

[23] The applicant's total costs of $9,200 are the equivalent of a three day investigation meeting at a tariff of $3,067 per day. This is very close to the top of the tariff suggested by the respondent and it is also within the range of the notional daily tariff which is often awarded by the Authority.

[24] After considering all relevant factors I consider an award of $9,200 costs is appropriate.

[25] In terms of disbursements, the information provided is limited. I have no way of knowing if the disbursements claimed were actually incurred by the applicant or whether they were for generalised office expenses. The disbursements were presented as if they were estimated as opposed to actual amounts.

[26] I am therefore only prepared to award disbursements for the amounts I know have actually been incurred; namely the filing fee of $70.00 and the hearing fee of

$306.66.

[27] I order the respondent to pay the applicant costs and disbursements of

$9,576.66.

Rachel Larmer
Member of the Employment Relations Authority

---

[1] [2011] NZERA Auckland 32
[2] *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808
[3] 20 June 2002, Member Cheyne, CA 61/02.
