

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 35
5577894

BETWEEN PAUL BLACK
 Applicant

A N D YANKEE BOURBON
 COMPANY LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Michael McDonald, Advocate for Applicant
 Paul King for Respondent

Submissions Received: Written submissions on 9 February 2017 for Applicant
 Written submissions on 21 February 2017 for
 Respondent

Date of Determination: 17 March 2017

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 17 January 2017¹ I determined that:

- a. Yankee Bourbon Company Limited (YBC) had acted unjustifiably and to the detriment of Mr Black's terms and conditions of employment by failing to make and account for employer deductions for KiwiSaver;
- b. YBC had not acted unjustifiably in making a deduction from Mr Black's final pay;
- c. YBC and Mr Black did have an employment agreement and YBC had not acted unjustifiably in connection with not having a signed employment agreement; and

¹ [2017] NZERA Christchurch 10

- d. YBC had unjustifiably dismissed Mr Black but due to his misconduct whilst employed, he was not entitled to any remedies.

Costs

[2] In my determination, I reserved costs in the hope that the parties would be able to reach agreement. They have been unable to reach an agreement and Mr Black seeks costs against YBC.

[3] Mr Black says:

- a. He was successful in his unjustified dismissal claim and in his unjustified action causing disadvantage claim relating to unpaid KiwiSaver deductions;
- b. Based on the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² I should award him costs based on a daily tariff of \$4,500.00 plus the filing fee of \$71.56.

[4] YBC says:

- a. On balance Mr Black lost his claim as he was not successful in two of his grievances, was not awarded any remedies on his unjustified dismissal grievance and the successful grievance relating to KiwiSaver deductions is flawed, as the Authority does not have jurisdiction over KiwiSaver³;
- b. Mr Black's conduct of his claim does not warrant an award of costs being made in his favour – he deleted evidence from his mobile phone that he knew would have been relevant to his claim, he lied on oath and fabricated evidence;
- c. Given the conduct of Mr Black and his advocate, YBC seeks an award of costs.

Principles

[5] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *Da Cruz*. The principles and the approach to be adopted by the

² [2005] 1 ERNZ 808

³ Relying on the Authority determination in *McAlister v Handley Francis Limited* [2012] Christchurch 143.

Authority have been reaffirmed recently by the Full Court in *Davide Fagotti v. Acme & Co Ltd*⁴.

[6] Based on clause 15 and *Da Cruz, Fagotti* and other relevant Employment Court and Court of Appeal decisions⁵, the approach to be adopted by the Authority includes:

- a. An award of costs is discretionary and the exercise of that discretion should be made in accordance with principle and not arbitrarily;
- b. The decision to award costs is consistent with equity and good conscience jurisdiction of the Authority but equity and good conscience should be considered on a case-by-case basis in terms of the award of costs;
- c. Costs will generally follow the event but in some instances this will not be the case.

[7] There are further principles the Authority should apply, to assess the level of costs once the Authority has decided to award costs in favour of one party. However, in this case I am satisfied that an award of costs should not be made in favour of either party and therefore I do not need to set out or consider those further principles.

Discussion

[8] Mr Black raised four grievances and was successful in two. For one grievance, I awarded payment of \$240.79 for KiwiSaver contributions and for the other, more substantial grievance, I determined that Mr Black was not entitled to any remedies.

[9] I place no weight on YBC's suggestion that Mr Black should not have been successful with his grievance relating to KiwiSaver. The short point is my determination stands and is the basis on which I will assess costs. If YBC believes I am wrong then it can challenge my determination but this has no influence over the assessment of costs.

[10] Whilst I do not accept YBC's categorisation of this result as Mr Black losing his claim, I cannot accept that he was, overall, successful.

⁴ [2015] NZEmpC 135

⁵ *Victoria University of Wellington v. Alton-Lee* [2001] ERNZ 305, *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28

[11] I do not accept that costs should follow the event where that event constitutes being awarded one remedy for four grievances. Or, put another way, where the event is not being awarded remedies for three out of four grievances.

[12] The application of equity and good conscience to this case dictates that Mr Black should not be awarded costs:

- a. First, Mr Black's misconduct as an employee disentitled him to any remedies for his unjustified dismissal grievance and I think, likewise, that conduct weighs against the award of costs;
- b. Second, whilst I do not accept YBC's categorisation of Mr Black's conduct of the claim as being as bad as it alleges i.e. that he is in essence guilty of perjury, I am troubled by the fact that he deleted relevant records from his mobile telephone at a time when he knew of the possibility of his claim.

[13] Considering Mr Black's behaviour as an employee and his behaviour in the conduct of his claim, I cannot in equity and good conscience award him costs.

[14] Finally, it follows that in exercising my discretion I do not think it is appropriate to award costs in Mr Black's favour.

[15] Turning to YBC's application for costs, I decline this also. YBC did not have legal representation for this claim and there is no evidence to show that it incurred any legal costs in defending the claim or any other costs for that matter. For this reason I cannot see a basis on which I can award costs in favour of YBC.

[16] In any event, applying the principle that cost should follow the event I conclude that YBC did not successfully defend all matters and it does not follow that it should get an award of costs. When I consider the discretion to award costs I believe it is inappropriate to award costs to YBC.

Determination

[17] I decline to make an award of costs. Each party shall bear their own costs.

Peter van Keulen
Member of the Employment Relations Authority