New Zealand Employment Relations Authority Decisions

Bould v Vehicle Testing Kapiti Limited [2019] NZERA 166 (21 March 2019)

Last Updated: 3 April 2019

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON		
I TE RATONGA AHUMANA TAIMAHI TE WHANGANUI-Ā-TARA ROHE		
		[2019] NZERA Wellington 166 3044451
	BETWEEN	SUE BOULD Applicant
	AND	VEHICLE TESTING KAPITI LIMITED Respondent
Member of Authority:	M B Loftus	
Representatives:	Dr Miriam Hughes, advocate for Applicant	
Paul McBride, counsel for Respondent		
Submissions Received:	12 February and 6 March 2019 from Respondent	
5 March 2019 from Applicant		
Determination:	21 March 2019	
COSTS DETERMINATION OF THE AUTHORITY		

[1] This is an application for costs in respect to a matter that was never heard by the Authority.

[2] On 14 November 2018 Ms Bould lodged an application alleging she had been unjustifiably dismissed by Vehicle Testing Kapiti Limited (VTK). The employment ended in February 2018 and while there was some interaction between the parties which appears to have commenced mid-September the application constituted the first formal notification of grievance. These early interactions are addressed in a letter from Mr McBride to Dr Hughes dated 25 October 2018.

[3] Amidst other things Mr McBride's letter of 25 October raised the 90 issue and advised VTK would not accept the raising of a grievance out of time.

[4] The application records the grievance had not been raised within 90 day as required by the Employment Relations Act (the Act) but was not accompanied by an application for leave to raise it out of time.1
[5] The Statement in Reply was filed on 27 November. Again issue was taken with the fact the grievance had not been raised as required by the Act. It was also asserted the alleged grievance lacked any substantive merit with the rationale being explained in an attached copy of the 25 October letter. A counterclaim was indicated and there was advice VTK would be seeking costs.

[6] A teleconference followed during on 13 December during which it was explained that absent an application pursuant to s 114(3) Ms Bould's claim could not proceed. The call ended with an undertaking Ms Bould would file an amended statement of problem addressing s 114(3) by 31 January 2019.

[7] There was no amended statement of problem and that led to a further teleconference on 5 February during which Dr Hughes could add little to her earlier assertion her client simply sought to have her claim heard. The impediments were discussed at some length with a reiteration the claim could not be heard sans a rationale that met the criteria in ss 114(4) and 115 of the Act. Dr Hughes advised she had spoken to her client who did not believe she could offer such a rationale and the call ended with an undertaking Dr Hughes would seek further instruction.

[8] That was followed later in the day with advice from Dr Hughes that Ms Bould had instructed her claim be withdrawn.

[9] VTK then sought, as it always indicted it would, a contribution toward the costs it incurred in addressing the claim. In particular it seeks a contribution of

$1,500 which is approximately half of the costs actually incurred. In support of the claim reference is made to the extent of work performed on VTK's behalf, the law, and the fact Ms Bould was incapable of giving any rationale as to why her claim might be allowed to continue.

[10] The reply, albeit received out of time due to difficulties contacting Ms Bould, reiterates she felt she had a legitimate claim and was distressed at the circumstances of her departure. Unfortunately Ms Bould makes no reference to what became the

1 Sections 114(1) and 114(3) of the Employment Relations Act 2000

fundamental issue which was her failure to raise the grievance as required by the Act. She closed with comments which indicate impecuniosity but there was no supporting evidence despite a claim it was available. There was also no comment about the amount sought by VTK.

[11] That a defending party may seek an award of costs when the claim it faces is withdrawn prior to hearing is well established in the employment jurisdiction.

[12] In determining the level of costs to be awarded in such situations there should be a consideration of issues such as the length of time between withdrawal and the scheduled hearing, the work already undertaken by the parties and the behaviour of the withdrawing party.

[13] An extreme example of the last point is Pars Transport Ltd v Lardelli*2* where the Court made an order of indemnity costs against the withdrawing party. It did so in a situation described in a later decision as one in which the withdrawing *...party has behaved badly or very unreasonably*.3
[14] The types of behaviours present in *Pars* are generally absent here. The withdrawal was early and there is no evidence of deliberate delaying tactics per se. That said there were various failures in respect to timetabling promises and those, along with the resulting telephone calls, led to VTK incurring costs it shouldn't have in a situation where Ms Bould proved totally incapable of advancing her claim.

[15] As Mr McBride said in his final response, Ms Bould appears to have *chanced her arm* and then withdrawn when difficulties arose. In doing so she imposed costs upon VTK which she now has an obligation to address. She has not helped herself by failing to address the quantum sought which I add I do not consider unreasonable.

[16] Finally there is the suggestion of impecuniosity. Aside from the fact that carries little weight in the absence of evidence her statement suggests the real issue is one of priorities, at least as Ms Bould sees them. In such circumstances I can only conclude this may become an issue if enforcement action is required but it cannot be considered now.

2EmpC Wellington WC25/06, 13 December 2006

3 *Thunderbird One Limited v Harrington* [2014] NZEmpC 66 at [10(e)]

[17] Having considered the law as it applies to costs where a matter did not proceed, the principles that apply to the setting of a costs award in the Authority4 and the submission I conclude an order in the amount sought appropriate.

Conclusion and orders

[18] For the above reasons I order the applicant, Sue Bould, pay the respondent, Vehicle Testing Kapiti Limited, $1,500 (fifteen hundred dollars) as a contribution toward the costs incurred in defending the original application.

M B Loftus

Member of the Employment Relations Authority

4 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135
