

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 68
3045211

BETWEEN

MAREE COOPER
Applicant

AND

PHOENIX PUBLISHING
LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Graeme Ogilvie, Advocate for the Applicant
Sean McAnally, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further Information Received : 08 February 2019 from Applicant

Determination: 12 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 14 November 2018 Maree Cooper applied to the Authority for a compliance order against Phoenix Publishing Limited. This application related to an oral determination delivered by the Authority on 27 September 2018, but recorded in a written determination of 28 September 2018,¹ and a costs determination dated 24 October 2018.² Mrs Cooper also applied for costs.

[2] No Statement in Reply was filed by Phoenix Publishing.

¹ [2018] NZERA Auckland 301.

² [2018] NZERA Auckland 308.

[3] Prior to the investigation meeting I issued a minute proposing that the investigation of Mrs Cooper's claim be heard on the papers. A proposed timetable was set for the filing of an affidavit from Mrs Cooper. The parties were advised that if they wished to oppose the proposed procedure they must provide written notification to the Authority within 7 days of the date of the Minute. No objection was received.

[4] The minute also advised that, pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000, Phoenix Publishing would require the leave of the Authority to reply or respond to Mrs Cooper's application. No application for leave was received from Phoenix Publishing.

[5] As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if Phoenix Publishing had duly attended or been represented.

[6] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination are:

- a) Has Phoenix Publishing failed to comply with the Authority's determinations dated 28 September 2018 and 24 October 2018?
- b) If so, should a compliance order be made under s137 of the Act?
- c) Should either party contribute to the costs of representation of the other party?

First issue: Has the Respondent failed to comply with the Authority's determinations dated 28 September 2018 and 24 October 2018?

The 28 September 2018 determination

[8] On 28 September 2018 I issued a written record of an oral determination in which I found Mrs Cooper had been unjustifiably dismissed by Phoenix Publishing. Phoenix Publishing was ordered to pay to Mrs Cooper the following amounts within 14 days of the date of the determination:

- a. \$1,884.61 gross for monies lost as a result of Mrs Cooper's personal grievance;
- b. \$4,000 under s 123(1)(c)(i) of the Employment Relations Act 2000;
- c. \$5,833.33 gross for unpaid wages;
- d. \$2,484.09 gross for unpaid holiday pay;
- e. \$989.16 for unpaid expenses.

[9] Phoenix Publishing was also ordered to pay \$10,000 by way of penalty under s 134 of the Employment Relations Act for breaching the employment agreement. 75% of that amount (\$7,500) was to be paid to Mrs Cooper. The remaining 25% (\$2,500) was to be paid to the Employment Relations Authority. Payment of the penalty was ordered to be made within 28 days of the date of the determination.

[10] On 5 February 2019 Mrs Cooper received payment from Phoenix Publishing of a sum of \$4,120.07 by way of direct credit into her bank account. The notation on her bank statement recorded the payment was for "wages". For this reason I deduct this sum from the amount ordered to be paid by Phoenix Publishing for wages (\$5,833.33 gross) leaving an amount outstanding for unpaid wages of \$1,713.26.

[11] No other payments have been received by Mrs Cooper in compliance with the Authority's determination.

The 24 October 2018 determination

[12] On 24 October 2018 I issued a determination in which I ordered Phoenix Publishing to pay to Mrs Cooper a sum of \$4,631.56 being made up of:

- a. The sum of \$4,500 towards Mrs Cooper's legal costs;
- b. The sum of \$71.56 for the filing fee Mrs Cooper paid to lodge her Statement of Problem.
- c. The sum of \$60 for photocopying and stationery costs incurred in preparing the common bundle of documents.

[13] Payment was ordered to be made within 14 days. To date no payment has been received by Mrs Cooper.

Finding

[14] In the foregoing circumstances I am satisfied Phoenix Publishing has failed to comply with my determinations dated 28 September 2018 and 24 October 2018. A compliance order is therefore necessary.

Second Issue: Should a compliance order be made under s137 of the Act?

[15] I make an order pursuant to s 137(2) of the Act that Phoenix Publishing comply with the Authority's determinations dated 28 September 2018 and 24 October 2018 by making payment of a sum of \$23,202.68 to Mrs Cooper within 7 days of the date of this determination. This sum is made up of the following amounts:

- a. \$1,884.61 gross for monies lost as a result of Mrs Cooper's personal grievance;
- b. \$4,000 under s 123(1)(c)(i) of the Employment Relations Act 2000;
- c. \$1,713.26 gross for unpaid wages;
- d. \$2,484.09 gross for unpaid holiday pay;
- e. \$989.16 for unpaid expenses;
- f. \$7,500 by way of penalty;
- g. \$4,500 towards Mrs Cooper's legal costs;
- h. \$71.56 for the filing fee Mrs Cooper paid to lodge her Statement of Problem;

- i. \$60 for photocopying and stationery costs.

Issue Three: Costs

The Claim

[16] Mrs Cooper claims costs in the sum of \$460 (including GST) plus the Authority's filing fee on the filing of the Statement of Problem in the sum of \$71.56.

The Authority's approach to costs

[17] The Authority may order any party to a matter to pay to any other party such costs and expenses as the Authority thinks reasonable.³

[18] In *PBO Ltd v Da Cruz*, a full Court set out the principles that are appropriate for the Authority to apply when considering an application for costs.⁴ These costs were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.⁵ The principles include:

- a) There is a discretion as to whether costs would be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.

³ Employment Relations Act 2000, Schedule 2 clause 14.

⁴ *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

⁵ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[19] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500.00 for the first day of an investigation meeting.⁶ The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

Analysis

[20] This matter was dealt with on the papers. A brief affidavit was filed by Ms Cooper. No telephone conference was held. I adopt a starting point of \$1,125 which is the daily tariff for one quarter day.

[21] I accept Mrs Cooper has been put to the expense of seeking the enforcement the Authority's determinations and that an award of costs is appropriate. The amount she claims for costs is less than the applicable daily tariff and is reasonable.

[22] Phoenix Publishing is ordered to pay to Mrs Cooper the sum of \$460 towards her legal costs. In addition, it must reimburse her the sum of \$71.56 for the filing fee that she paid to the Authority when filing her Statement of Problem. These amounts must be paid within 14 days of the date of this determination.

Outcome

[23] The following orders are made:

- A. Phoenix Publishing Limited has failed to comply with the Authority's determinations dated 28 September 2018 and 24 October 2018.
- B. Phoenix Publishing Limited must comply with the Authority's determinations dated 28 September 2018 and 24 October 2018 by making payment of a sum of \$23,202.68 to Mrs Cooper within 7 days

⁶ Practice Note 2, Costs in the Employment Relations Authority.

of the date of this determination. This sum is made up of the following amounts:

- i. \$1,884.61 gross for monies lost as a result of Mrs Cooper's personal grievance;
 - ii. \$4,000 under s 123(1)(c)(i) of the Employment Relations Act 2000;
 - iii. \$1,713.26 gross for unpaid wages;
 - iv. \$2,484.09 gross for unpaid holiday pay;
 - v. \$989.16 for unpaid expenses;
 - vi. \$7,500 by way of penalty;
 - vii. \$4,500 towards Mrs Cooper's legal costs;
 - viii. \$71.56 for the filing fee Mrs Cooper paid to lodge her Statement of Problem;
 - ix. \$60 for photocopying and stationery costs.
- C. Phoenix Publishing Limited must pay Maree Cooper the following sums within 14 days of the date of the determination:
- i. A sum of \$460 by way of contribution towards her legal costs of bringing these proceedings; and
 - ii. The Authority filing fee of \$71.56.

Jenni-Maree Trotman
Member of the Employment Relations Authority