

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 149
5382550

BETWEEN HAYLEY HEFFORD
 Applicant

A N D ANTMOORE WINEWORKS
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Luke Radich, Counsel for Applicant
 Heather Sorensen, for the Respondent

Investigation meeting: On the papers

Submissions Received 9 July 2012 from Applicant
 18 July 2012 from Respondent

Date of Determination: 24 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Hayley Hefford says that Antmoore Wineworks Ltd, her former employer, owed her \$10,317.50 gross as a remuneration bonus.

[2] She also claimed an unspecified amount of compensation for distress and her costs, including legal costs.

[3] Antmoore Wineworks Ltd filed a Statement in Reply on 11 June 2012. It did not dispute the claim that it owed Ms Hefford the \$10,317.50 bonus. Heather Sorensen, the respondent's human resources manager, wrote in the Statement in Reply *we believed a satisfactory outcome in regard to payment could be reached directly between the applicant and ourselves.*

[4] Clause 8.2 of Ms Hefford's employment agreement provided that:

A bonus of \$2.00 per case for every case of wine sold in New Zealand shall be payable as commission to the Employee. Such payment will be made upon receipt of funds from the sale by the Employer from the customer and will be made to the Employee's nominated bank account...

Telephone conference

[5] The Authority convened a telephone conference on Thursday 5 July 2012. In advance of that Mr Radich sent a memorandum in which he proposed that the most appropriate course of action was that I deal with the matter on the papers and proceed to make an order that the respondent pay Ms Hefford the amount owed plus interest and costs.

[6] Mr Radich, Ms Sorensen and I discussed that proposal at the telephone conference. Ms Sorensen suggested an order be made for the \$10,317.50 less PAYE to be paid by the respondent on Ms Hefford's behalf. Mr Radich agreed subject to an order for interest and costs Ms Hefford had already incurred.

[7] I have considered my duty under section 159 of the Employment Relations Act 2000 (the Act) to direct that the parties attend mediation before the Authority investigated the matter. However, in all the circumstances I consider that this matter can be dealt with more expediently by an Authority order, as agreed between the parties, than by a referral to mediation.

[8] I directed that the applicant file a memorandum on costs by 9 July 2012 and that the respondent file a memorandum in reply by 23 July 2012.

The parties' views on costs and interest

[9] I received the applicant's submissions on 9 July 2012. Mr Radich submitted that the respondent should pay the filing fee of \$71.56 as well as costs of \$1800.00 plus GST. Mr Radich attached a copy of his firm's printout of time spent on Ms Hefford's behalf in resolving the matter.

[10] Mr Radich submitted that full solicitor/client costs should be met by the respondent because it has never disputed that the amount of \$10,317.50 was due; it had no defence. The respondent did not engage a legal advisor and has only dealt

with the problem in a *perfunctory manner*. Mr Radich submitted that an award of less than full solicitor/client costs would be:

...an incentive for employers to refuse to pay small to moderate contractual entitlements in full or delay payment, knowing that employees will have to expend costs to obtain their contractual entitlement.

[11] Mr Radich also seeks interest on the net amount owed from 31 January 2012 until payment at the prescribed rate of 5% per annum.

[12] I received the respondent's submissions on 19 July 2012. The respondent made no submissions in relation to costs.

[13] In relation to my consideration of interest the respondent submitted that the commission bonus was only due once the respondent had received payment from the customers.

[14] The respondent also submitted that when I consider how much interest is due to Ms Hefford I needed to take into account that as at 31 January 2012 it had not been paid for approximately 430 cases of wine, which amounts to \$860.00 of the bonus payments owed. The respondent stated that it received payment for half (215) of those cases by approximately 20 February 2012 and for the remaining half (215) on approximately 20 March 2012.

What amount of costs should be paid?

[15] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Act. The principles the Authority follows in considering costs applications are as set out in *PBO Limited v Da Cruz* [2005] ERNZ 808, a judgment of the Employment Court, at page 819. These principles include:

- A discretion on whether to award costs and if so what amount.
- The discretion must be exercised in accordance with principle and not arbitrarily.
- The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience must be considered on a case by case basis.

- Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- Without prejudice offers can be taken into account.
- Awards of costs will be modest.
- Frequently costs are judged against a notional daily rate, which is currently \$3,500.00.
- Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

[15] The amount claimed is modest. Ms Hefford had made a number of attempts to have the respondent pay her the bonuses before she engaged Mr Radich. Mr Radich wrote to the respondent seeking payment prior to filing the Statement of Problem. Mr Radich's time spent on the matter and costs charged are reasonable. Ms Hefford would not have incurred the Authority's filing fee if the respondent had paid what it owed her in a timely manner. Therefore, the respondent must pay the full amount of costs and reimburse Ms Hefford for the filing fee.

What amount of interest should be paid?

[16] Schedule 2, clause 11 of the Act gives the Authority power to award interest in matters involving the recovery of money at the rate prescribed under section 87(3) of the Judicature Act 1908. The prescribed rate is currently 5% per annum.

[17] I have taken into account the respondent's submission that Ms Hefford's employment contract provided for bonus payments to become payable only once the respondent received payment from the customer.

[18] I consider it fair that Ms Hefford be paid interest on the gross sum of \$10,317.55 calculated as follows:

- Interest on \$430.00 from 21 February 2012 until 5 July 2012; plus
- Interest on \$430.00 from 21 March 2012 until 5 July 2012; plus
- Interest on \$9457.50 from 31 January 2012 until 5 July 2012.

[19] The gross interest payment should be also be subject to PAYE tax.

Determination

[20] The respondent paid the applicant \$7,187.58 which is the amount of the bonus payments owed of \$10,317.50 less PAYE tax of \$3129.92. That matter does not now need to be the subject of any order.

[21] Antmoore Wineworks Limited must pay Ms Hefford:

- legal costs of \$1800.00;
- filing fee of \$71.56;
- interest as ordered in paragraph 18.

Christine Hickey
Member of the Employment Relations Authority