

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 16
5628763

BETWEEN ALEXANDER HOGBEN
Applicant

A N D BIDVEST NEW ZEALAND
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Faith Kim, Advocate for Applicant
Jeff Goldstein, Counsel for Respondent

Submissions Received: 7 December 2016, from the Applicant
21 November 2016, from the Respondent

Date of Determination: 26 January 2017

COSTS DETERMINATION OF THE AUTHORITY

A. Alexander Hogben must pay Bidvest New Zealand Limited \$500.00 as a contribution to its legal costs reasonably incurred in responding to the claim against it.

[1] The respondent, Bidvest New Zealand Limited (Bidvest) seeks an order for the applicant, Alexander Hogben, to pay it \$500.00 plus GST as a contribution to the costs it incurred in this matter.

[2] Mr Hogben lodged a statement of problem on 22 June 2016. Mr Hogben claimed unjustified dismissal and he sought wage arrears.

[3] Bidvest lodged its statement in reply on 8 July 2016. It asserted that Mr Hogben had resigned and settled all matters, as recorded in a settlement agreement, including the wage arrears claimed.

[4] The parties could not agree to attend to mediation; in particular, Bidvest said there was a preliminary matter, whether Mr Hogben could in fact bring his claim because of the terms of settlement, which should be resolved before mediation.

[5] The parties discussed this in a case management conference and I decided I would hear the issue of whether Mr Hogben had settled his claim and therefore he was unable to pursue his statement of problem, as a preliminary matter.

[6] In that case management conference, I made directions to set the preliminary matter down for an investigation meeting, which included directions for the exchange of witness evidence.

[7] Before Mr Hogben's evidence was due, on 15 November 2016 he withdrew his statement of problem. This ended his claim and no further steps were required to resolve the employment relationship problem.

[8] After Mr Hogben withdrew his statement of problem, on 21 November 2016, Bidvest lodged submissions seeking a contribution to its costs. Bidvest's claim for costs was based on the following:

- (a) Mr Hogben's claim was prohibited by the settlement agreement that he had entered into. He was aware of the settlement agreement and knew that it prevented him from bringing his claim yet he chose to proceed with it in any event;
- (b) In responding to the claim and raising the issue as to whether the statement of problem could in fact be determined by the Authority, Bidvest incurred costs of \$3,022 plus GST;
- (c) Whilst the Authority must exercise its jurisdiction in relation to awarding costs in a fair and reasonable manner and not do so to punish a party, costs should be awarded in circumstances where a party has incurred costs particularly in relation to a matter which on the face of it was unreasonably brought;
- (d) Notwithstanding the significant amount incurred in defending the matter, a reasonable contribution to its costs would be \$500 plus GST.

[9] In response, Mr Hogben's advocate filed submissions on 7 December 2016. Those submissions stated:

- (a) There was no settlement agreement between the parties and Mr Hogben was entitled to pursue the employment relationship problem by lodging his statement of problem as he did;
- (b) Mr Hogben withdrew his statement of problem because of financial pressure he was incurring in respect of progressing the claim and not because of any alleged lack of merit to his claim;
- (c) Mr Hogben would not have filed a statement of problem if Bidvest had agreed to attend mediation;
- (d) The costs incurred by Bidvest are inflated and not supported by any documentary evidence such as time records or an invoice;
- (e) In all the circumstances, the Authority should make an order that the parties bear their own costs.

[10] The issue to determine is whether an order for costs is appropriate and if so what quantum I should award.

[11] Whether I should award costs or not is a matter of discretion and governed by the well-established principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*¹.

[12] I can make an award of costs in circumstances where a party withdraws a statement of problem before an investigation meeting².

[13] In determining whether it is appropriate to award costs and if so the quantum I am guided by recent decisions in the Authority³.

[14] In this matter, I have considered the conduct of the parties in filing and responding to the statement of problem and dealing with the preliminary matter.

¹ [2005] 1 ERNZ 808

² *Eden v Rutherford & Bond Toyota Ltd* [2010] NZEmpC 43

³ *Graham Kemp v Post Haste Ltd* [2014] NZERA Auckland 266; *New Zealand Guardian Trust Company Ltd v Katherine Mayne* [2015] NZERA Auckland 113; and *Lighthouse ECE Ltd* [2016] NZERA Wellington 2

[15] Bidvest has suggested that Mr Hogben should not have lodged the statement of problem because he had settled any claim when he agreed a payment and signed an agreement to this effect. Mr Hogben's advocate says there was no settlement and he was entitled to lodge his statement of problem. It is difficult to assess completely whether Mr Hogben's claim had any merit based on the asserted settlement because I have not heard any evidence on this. However, the documentary evidence does not support Mr Hogben's advocate's submission, that there was no settlement. There is a signed settlement agreement.

[16] Mr Hogben's advocate then attempts to support her submission, that there was a valid basis for the statement of problem, by stating that Mr Hogben did not withdraw his statement of problem because it was unmeritorious but because of financial pressure. There is no further information given regarding this financial pressure other than to say Mr Hogben is a beneficiary. There is no evidence as to the costs incurred by Mr Hogben or his financial position or even his ability to pay the costs associated with pursuing his claim. What is inconsistent with this is that I understand that the advocate for Mr Hogben operates on a contingency, no-win/no-fee, basis. It is difficult to see that there was any financial pressure sustained in continuing with a statement of problem where Mr Hogben would not pay anything unless and until, there was a successful result. Perhaps this was not the arrangement with Mr Hogben. The simple point is there is a lack of information and consequently the submission lacks some credibility.

[17] The submission made by Mr Hogben's advocate that Mr Hogben would not have filed a statement of problem if Bidvest had agreed to attend mediation is then somewhat confusing to his stated position. It seems to suggest that Mr Hogben's view or perhaps the advice was the employment relationship problem lacked sufficient merit to justify pursuing it to an investigation meeting.

[18] Further, it appears that the lodging of the statement of problem may have simply been to get a direction to mediation. I make no comment on whether it is the correct use of the Authority processes to lodge a statement of problem simply to obtain a direction to mediation. However, in adopting this course of action there was always the prospect that Bidvest would seek to have the preliminary matter resolved before mediation was considered and further the possibility that I would agree with that approach. Mr Hogben should have lodged his statement of problem with that

knowledge and on the basis that he was prepared to participate in the process for determining that before a direction to mediation was considered by me.

[19] So I have two main factors:

- (a) On the face of it, a possibly unmeritorious claim is lodged to get Bidvest to attend mediation and then it is withdrawn when Bidvest seeks to have a preliminary matter determined; and
- (b) Bidvest has been successful in dealing with the claim as it has been withdrawn and it has incurred costs in doing so – whilst those costs have not been detailed by way of an invoice or a breakdown of time spent I am satisfied that Bidvest would have incurred more than \$500.00 for the steps undertaken by its counsel.

[20] In these circumstances, Bidvest is entitled to an order for costs. And I am satisfied that \$500.00 is an appropriate sum.

[21] However, I will not award GST on that sum, applying the principles set out in *Keerithi Merennage v Ritchie's Transport Holdings Ltd*⁴ it is not appropriate to order Mr Hogben to pay GST on the contribution to Bidvest's costs.

Conclusion

[22] I determine that Mr Hogben must pay Bidvest \$500.00 as a contribution to Bidvest's legal costs reasonably incurred in responding to the statement of problem lodged against it.

Peter van Keulen
Member of the Employment Relations Authority

⁴ [2016] NZEmpC 22