

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 712
3048193

BETWEEN GARETH HUTTON
Applicant

AND WINIPAC LOGISTICS LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: The Applicant in person
Michael Pick for the Respondent

Investigation Meeting: On the papers

Submissions Received: 9 and 11 September 2019 from the Applicant
9 and 25 September 2019 from the Respondent

Date of Determination: 16 December 2019

SECOND DETERMINATION OF THE AUTHORITY

**A. Winipac Logistics Limited is ordered to pay Gareth Hutton within
21 days of the date of this determination the following sums:**

(a) \$2,500.00 as a contribution to his costs; and

(b) 71.56 for the Authority's filing fee.

Employment Relationship Problem

[1] On 22 August 2019 I issued a determination ordering Winipac Logistics Limited (Winipac or the company) to pay Gareth Hutton \$969.47 gross for deductions made from his

pay and \$2,692.31 gross for an unpaid notice period (the first determination).¹ Mr Hutton's claim that he was entitled to wages on the basis that he was a Winipac employee in October and November 2017, was unsuccessful.

[2] The parties were invited to attempt to resolve the question of costs between themselves. They were unable to do so. Submissions were received. In addition Mr Hutton raises that he has not been paid the full amount owing under the first determination.

Submissions from Mr Hutton

[3] Mr Hutton asks for a contribution to his costs on the basis that he was successful in getting two sums awarded to him. Although Mr Hutton was not represented at the investigation meeting he had received advice and assistance from a barrister through most of the period when his claim was before the Authority. He provided invoices from her. Mr Hutton seeks \$3,500 as a contribution to his costs.

Submissions from Winipac

[4] The company emphasises that Mr Hutton was unsuccessful in his claim regarding his employee status in October and November 2017 and the consequent claim for over \$13,000 gross in wages. Winipac argues that it was really the successful party as it succeeded in defending Mr Hutton's monetarily larger claims. It suggests that a reasonable person would not have entertained taking this matter to the Authority.

[5] Winipac also filed invoices from the advocate who represented it prior to and at the investigation meeting.

Conclusion on costs

[6] Under clause 15 of Schedule 2 of the Employment Relations Act 2000 the Authority has the power to award costs. The Authority's discretion is governed by principles set out by the full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.²

¹ *Hutton v Winipac Logistics Ltd* [2019] NZERA 496

² [2005] 1 ERNZ 808

These include that costs will usually follow the event and the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience. Also, costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

[7] Costs usually follow the event, that is, the unsuccessful party will be required to make a contribution towards the successful party's costs. Mr Hutton was only partially successful in his claim. Winipac successfully defended Mr Hutton's claim that his employment commenced earlier and he should have been paid for that time.

[8] The investigation meeting did not last the full day, finishing in the mid-afternoon. Less than the full notional daily tariff of \$4,500 would usually be considered on that basis.

[9] In *Coomer v JA McCallum & Son Limited*³ Judge Smith stated that a nuanced assessment of competing considerations is required in cases where parties have had mixed success. Reference was made to the Court of Appeal's statement that "... success on more limited terms is still success".⁴ In that case Mr Coomer could not have achieved his success, limited though it was, without lodging his claim in the Authority.⁵

[10] I have considered but am not prepared to award costs to Winipac. There is no evidence of the company making any offers to attempt to resolve this matter, despite the concession at the investigation meeting that the deductions should not have been made.

[11] On the evidence before me Mr Hutton had no choice but to pursue this matter through the Authority in order to get recompense from the amounts which were deducted from his pay in contravention of the Wages Protection Act 1983 and to ensure that he was paid for a reasonable notice period.

³ *Coomer v JA McCallum & Son Limited* [2017] NZEmpC 156

⁴ *Weaver v Auckland Council* [2017] NZCA 330

⁵ *Coomer* at [43]

[12] I do make an adjustment for the fact that he was only partially successful and also take into account that his representative did not attend the investigation meeting.

[13] The bills from Mr Hutton's barrister totalled over \$7,000 (incl GST). This included consideration of the statement in reply, drafting of his brief of evidence, some contact with the company's then representative, preparation for and attendance at mediation and some contact with the Authority. However, the largest invoice, equating to over half the total amount, included a substantial portion of fees incurred on preparation for and attendance at mediation, matters for which costs are not usually awarded.

[14] I order Winipac Logistics Ltd to pay Mr Hutton within 21 days of the date of this determination, the sums of \$2,500 as a contribution to his costs and \$71.56 for the Authority's filing fee.

Deduction

[15] Mr Hutton communicated to the Authority that \$360 had been deducted from the amount paid by Winipac in accordance with the first determination and that he is unhappy with that. Mr Pick responded that "[i]n order to expedite the conclusion of this matter it was decided that we should settle this matter by making one final transaction and net off the rent monies that Gareth acknowledges are owed by him...". Although Mr Pick described the matter as a settlement it is not evident on the information available to the Authority that Mr Hutton accepted any such settlement offer.

[16] Winipac has repeated its action of making deductions in circumstances where none are permitted. The amounts ordered to be paid in the first determination are required to be paid. In the event that they are not fully paid, Mr Hutton is entitled to apply to the Authority for a compliance order under s 137(1)(b) of the Employment Relations Act 2000. If such a compliance order is not complied with an application may be made to the Employment Court which is empowered to impose penalties for continuing non-compliance which include imprisonment, fines and the sequestration of property.

[17] An alternative procedure under s 141 of the Act permits a party to by-pass the compliance process by obtaining a certificate of determination from the Authority and filing it in the District Court so that it can be enforced using the remedies available under the District Court Act 2016. Those remedies have been described as more diverse and effective than those available through the Employment Court.⁶

Nicola Craig
Member of the Employment Relations Authority

⁶ *Broeks v Ross* Employment Court, Auckland, AC36A/09, 11 December 2009 at [5] and *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZEmp C 41 at [42].