New Zealand Employment Relations Authority Decisions

Knight Train Haulage Ltd v Dahl AA 373/07 (Auckland) [2007] NZERA 782 (29 November 2007)

Last Updated: 23 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 373/07 5102884

BETWEEN	KNIGHT TRAIN HAULAGE LIMITED Applicant
AND	REX DAHL Respondent

Member of Authority: Robin Arthur

Representatives: Richard Upton for Applicant Mark Nutsford for Respondent

Investigation Meeting: 26 November 2007 by telephone conference Determination: 29 November 2007

DETERMINATION OF THE AUTHORITY

[1] A preliminary issue has arisen in this claim by the Applicant for its former employee, the Respondent, to repay two weeks wages and to pay an allegedly outstanding fuel account.

[2] The Respondent says the claim should be dismissed as it was effectively dealt with in an earlier Authority determination that found he was unjustifiably dismissed and awarded lost wages and compensation. The Applicant argues its claim for wages and the fuel bill was not fully before the Authority on that occasion and must be decided now in order to identify whether any amounts may be, in effect, "set off" against remedies still due to the Respondent.

[3] By agreement with the representatives, the preliminary issue was heard by way of telephone conference. The issue, in short, is whether the Applicant's claim should be struck out because its subject matter is *res judicata* or whether it needs to be heard and determined.

The parties' submissions

[4] Mr Nutsford submits the wording of the Authority's substantive and costs determinations clearly show that the Authority took into account that the Respondent's wages were two weeks in advance at the date of his dismissal and reduced the overall level of remedies accordingly.

[5] Determination AA278/07 (10 September 2007) found the Applicant was unjustified in relying on a supposed resignation by the Respondent on 3 July 2006 so that the termination of his employment was a dismissal and he had a personal grievance requiring remedies.

[6] The Applicant sought 12 weeks' lost wages but the Authority awarded only six weeks' wages – comprising four weeks at his former full wages (of $1000 a week) and a further two weeks of the difference between the wages he earned in a job he found seven weeks later and that of his previous job (that difference being $380 a week). In making that award, the determination at [44] stated:

His claim for twelve weeks lost wages also does not properly account for the fact that his wages were still two weeks in advance when he stopped working for [Knight Train Haulage Limited].

[7] Mr Nutsford notes that the determination's next paragraph starts with the word "Accordingly" and submits that this clearly identifies the remedies as having been reduced by an amount that included a deduction for the two weeks wages in advance.

[8] He also points to a similar paragraph in the costs determination, AA278A/07 (26 October 2007), that refers to account being taken of those two weeks wages:

In this case [Mr Dahl] is entitled to costs as the successful party. The existence and rejection of the Calderbank offer does not require any reduction of those costs. ... It is also not proper to claim that the offer's value should be considered in light of two weeks's (sic) wages in advance retained by [Mr Dahl]. Firstly, that was a counterclaim never properly lodged by [Knight Train Haulage Limited], as determination AA 278/07 makes clear. Secondly, that amount was deducted in any event by the determination in assessing the period of wages actually lost by [Mr Dahl].

[9] Mr Nutsford relies on the last sentence of that paragraph. Mr Upton, by contrast, relies on the sentence before it to submit that the counterclaim was not

"properly lodged" so cannot have been conclusively adjudicated on by the Authority in determination AA278/07.

[10] As noted in paragraph [5] of that determination, Mr Upton had, shortly before the scheduled investigation meeting "*sought leave to lodge a revised statement in reply in order to formally raise a counterclaim for alleged overpayment of wages*". The Authority refused that request made five days out from the investigation meeting scheduled for 25 July 2007 because the employer:

had first raised that allegation in a letter to [Mr Dahl] dated 5 July 2006 and had not used ample opportunity to lodge a counter claim in the many months since [Mr Dahl] had lodged his claim in the Authority in August 2006. The issue of whether the Applicant was paid wages in advance was sufficiently well canvassed in background documents and witness statements already lodged.

[11] Nevertheless Mr Upton relies on *Irwin v Turner* [2003] NZEmpC 147; [2003] 2 ERNZ 557 (EC, Shaw J) to support his submission that the doctrine of *res judicata* cannot be applied to strike out the Applicant's claim in the present matter.

[12] Adopting the Court's shorthand definition of the doctrine in *Irwin*, Mr Upton says no final decision on the subject-matter of litigation between the parties – that is the two weeks wages and fuel account claim – has already been pronounced by the Authority. He submits these amounts were not dealt with by the Authority to the extent that the Respondent can rely on *res judicata* as a defence and that to apply that defence would amount to a 'strike out' of the Applicant's claim, a measure that must be cautiously and rarely applied..

[13] Further he says it is simply inequitable for the Respondent, who accepts he was paid the wages, to have that money without having done any work for it.

Determination

[14] I am satisfied that the Authority has already dealt with and taken account of the subject matter of the

Applicant's claim in such a way as to give it the benefit of the wages claimed and that it is proper, in all the circumstances, to dismiss its claim without further investigation.

[15] In coming to this view I have considered the principles for striking out a matter, as summarised in *NZ Shipwrights Union v NZ Amalgamated Engineering Union* (1989) ERNZ Sel Cas 516 at 521. I am satisfied that this is a clear case where the Authority can reach a certain and definite conclusion for the sparing exercise of a discretion in relation to what is a disputed legal point rather than disputed facts.

[16] My reasons are as follows.

[17] A plain reading of determinations AA 278/07 and AA278A/07 show that the Applicant's present claims, for the wages advanced and the allegedly unpaid fuel account, were the subject of evidence in the investigation meeting and were considere as part of the overall assessment of remedies.

[18] The fuel account was expressly addressed at [46] of AA 278/07 and the present Applicant's evidence found to be inadequate to "*conclusively*" establish that the Respondent still owed it money for those purchases. The Applicant could have challenged that finding but failed to do so within the prescribed statutory 28 day period and may not now do so by other means.

[19] While the employer's counterclaim for the wages was not formally lodged, the details of it, and the fact of the amount involved, was before the Authority – as paragraph [5] of AA 278/07 makes clear by referring to that issue being "*sufficiently well canvassed in background documents and witness statements already lodged*".

[20] The advanced wages were expressly addressed as a reason for limiting the length of time for which the Respondent was awarded lost wages. I am confident that a reasonable observer – that notional objective and informed citizen – would conclude from reading both determinations that the value of those wages was deducted from amounts which would otherwise have been awarded to the Respondent. Applying the statutory imperative at s157(1) of the Employment Relations Act 2000 ("the Act") to determine problems "*according to the substantial merits of the case, without regard to technicalities*", the liability for any advanced wages – objectively assessed and adopting the language used in the *Irwin* case – must be taken to have been a subject or matter finally decided in those determinations.

[21] The express reference to the advanced wages and the account taken of them in determining remedies is a factor which, I find, sufficiently distinguishes the present matter from the circumstances considered in the *Irwin* case. That is clear from considering this passage at [45] of that case:

The payment ... was raised at the personal grievance hearing but only in the context of the remedies and in no sense was it finally adjudicated. As Mr Cullen said, we do not know how much the Tribunal was influenced by what it considered to have been an overpayment when it made the compensation award of $2,000. He submits that, because it was so low, the overpayment must have been considered. This is hardly a conclusive decision on the point. ...

[22] Unlike that case, anyone reading the present determinations would know exactly how much the Authority was influenced by the amount of wages advanced to the Respondent because that amount was deducted from the lost wages awarded to him. For that reason there was "*a conclusive decision*" on that point.

[23] That deduction was also, I am satisfied, consistent with the Authority's jurisdiction in equity and good conscience (ss 157(3) and 160(2) of the Act). Because of the finding that the Respondent had a personal grievance for unjustified dismissal, he could expect an award of lost wages but did not get a "windfall" of having the award include those weeks for which he had already been paid wages in advance.

[24] Consistent with the equitable jurisdiction, I have also considered the overall justice of the outcome in this case. Standing back and making an overall assessment, assessment of remedies for a worker in the Respondent's circumstances typically start at the level of around 12 weeks wages and $5000 compensation. However in his case the award of lost wages was considerably reduced for reasons already examined above and the award of compensation for hurt and humiliation was at the lower end of the modest range typically awarded. Those remedies were subject to a substantial reduction – that is fifty percent – for the Respondent's contribution to the situation giving rise to his personal grievance. A claim made for some allegedly outstanding leave entitlements was also dismissed.

[25] Against that, the Applicant's claim for a small fuel account was dismissed and it was given credit for the advanced wages. Overall the amount it was required to pay in remedies for what were found to be unjustified

actions on its part – in breach of

statutory obligations to act as a fair and reasonable employer would have – must be seen as modest by any objective standards. It was an outcome, I am satisfied, consistent with the Authority's obligation to do practical justice between the parties according to the substantial merits of the case.

[26] The Respondent complains that the Applicant has not paid the sums awarded to him in the earlier determination. Mr Upton told me that the Applicant was committed to making those payments once the issues addressed in this determination were resolved. We have now reached that point.

[27] To the amount now owed to the Respondent must be added costs on the present matter. As agreed with the representatives during the telephone conference, I resolve that issue in this determination. For participation of his representative in a one-hour investigation meeting – applying an hourly rate of $200 and allowing a 2:1 preparation ratio – the Respondent is awarded $600 costs.

[28] The following sums are due to be paid by the Applicant to the Respondent without further delay:

(i) $2380 in reimbursement of wages lost as a result of the grievance, under s123(1)(b) and s128 of the Act (refer AA 278/07); and
(ii) $1500 in compensation for humiliation, loss of dignity and injury to feelings, under s123(1)(c)(i) of the Act (refer AA 278/07); and
(iii) $2000 in costs (refer AA 278A/07); and
(iv) a further $600 in costs (awarded in this determination).

Robin Arthur

Member of the Employment Relations Authority
