

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA327a/10
5159114**

BETWEEN HAE KYUNG LEE
 Applicant

AND HYOUNGRO YOON AND
 JIYEUN KIM t/as GOLD COIN
 Respondents

Member of Authority: R A Monaghan

Representatives: A Vujnovich, counsel for applicant
 E Kuo, counsel for respondents

Memoranda received: 18 August 2010 from applicant
 11 August 2010 from respondents

Determination: 1 October 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 20 July 2010 I found Mrs Lee was not dismissed, but that the respondents owed her various amounts as unpaid wages and holiday pay. Costs were reserved. The parties have since filed memoranda on the matter.

[2] The determination also reserved leave to Mr Yoon and Ms Kim to apply under s 131(1A) of the Employment Relations Act 2000 for an order that any payments owed to Ms Lee be paid by instalment. Accordingly the respondents have also sought an order that, 'if the total payment due to the applicant is substantial', they be permitted to make payments by instalments. Financial details in support were filed.

Legal aid

[3] On information that had been provided to the Authority, as at the date of the investigation meeting Mrs Lee was in receipt of a grant of legal aid. Ms Vujnovich advised in her memorandum on costs that the grant was withdrawn because of a

'change in Mrs Lee's circumstances'. No other details were provided, except for the bare information that Mrs Lee now owes \$4,611.05 to her solicitor and \$1,520 to the Legal Services Agency.

[4] Accordingly I do not apply the limits on awards of costs against an aided person in civil proceedings set out in the Legal Services Act 2000.

Costs

[5] In her memorandum Ms Kuo sought an order for costs against Mrs Lee on the ground that two settlement offers were made and rejected prior to the investigation meeting. The amount sought was \$5,606.63, being the costs incurred from the date of the first offer.

[6] The parties attended mediation on 29 July 2009, but were unable to reach a resolution. The first written settlement offer was dated 7 August 2009 and read:

Our clients are aware that statutory entitlements claimed can be independently determined – presumably by the Labour Department.

Apart from any such payment finally calculated due from them, they would entertain an ex gratia payment of \$3,000.

[7] The offer then referred to the expectation that Mrs Lee would receive a grant of legal aid, which proved accurate until Ms Vujnovich provided the advice set out above. Otherwise there was no mention of costs.

[8] The offer was rejected on the ground that it would not cover Mrs Lee's legal fees. There were no details of the amount of the fees that had actually been incurred at the time, and there was no information about the extent to which any grant of legal aid applied to those fees at the time.

[9] It is not clear what was meant by the reference to 'statutory entitlements' in the 7 August offer, or what was covered by the payment of \$3,000. Uncertainty of this kind is unsatisfactory in a settlement offer. If the offer meant Mrs Lee's claim for unpaid holiday pay was to be referred to a labour inspector and severed from the remaining claims, then this should have been specified. This is even more so because

while the labour inspectorate can bring claims for payments of holiday pay on behalf of employees, employees can and do pursue their own claims for holiday pay. Often they do so when they are dissatisfied with the findings of the labour inspectorate. As it stands the offer leaves the fate of the claim for holiday pay very open-ended.

[10] Clarification in other respects would have been achieved by a statement to the effect that \$3,000 was being offered in full and final settlement of all remaining matters arising out of the employment relationship (or some other suitable form of words), as well as an indication of whether or not the sum included a component reflecting Mrs Lee's costs. Because one of the employment relationship problems concerned a personal grievance, an indication of whether all or part of the offer was being made under s 123(1)(c)(i) of the Employment Relations Act would also have assisted in clarifying the offer.

[11] Since I can address the offer only on the basis of the documents before me, I conclude that the 7 August offer is too imprecise to allow a finding that its rejection should sound in costs to the extent Ms Kuo now asks.

[12] The second offer was dated 14 October 2009. It read:

We hereby make a Calderbank offer of \$3,000 to settle the dispute between you and our clients. The issue relating to holiday pay will be independently determined by the Department of Labour later and is not part of this offer.

[13] The offer also detailed the respondent's view of the matters in dispute. These encompassed the personal grievance and the claim for unpaid wages. The inclusion of this material went some way towards addressing the vagueness in the reference to 'the dispute,' although it did not address whether all or part of the payment was intended to be made on a compensatory or reimbursing basis.

[14] Again the offer was rejected, although no reason was given.

[15] This offer, too, was not worded as clearly as it should have been and I do not apply it in the manner sought by Ms Kuo.

[16] For her part Ms Vujnovich submitted that these offers should not be taken into account because: they did not include any reference to costs; costs expended as at the

dates of the offers were 'considerable' (although no details were provided); and the total amount awarded by the Authority was considerably more than the amount offered. There were additional submissions regarding the failure to offer an apology and allegations of bad faith which I do not accept.

[17] I approach costs on the basis of the well-known principles in *PBO Limited (formerly Rush Security Limited) v da Cruz*.¹ In particular a notional daily rate may be applied but the rate may be adjusted depending on the circumstances.

[18] Regarding the respective degrees of success enjoyed by the parties, Mrs Lee was unsuccessful in her personal grievance and successful in her claim for unpaid wages in the sum of \$1,860 (gross), less an overpayment of \$648. She was also successful in her claim for holiday pay, although that matter was expressly excluded from the offers of settlement and the respondents acknowledged in the Authority that a payment was owed. Further, despite her overall success in the claims for wages and holiday pay I did not accept some of Mrs Lee's allegations and calculations associated with the claims.

[19] I also take into account that the substantial majority of the time taken in investigation meeting concerned the personal grievance. Similarly the statements of evidence focussed substantially on the personal grievance. Costs would have been incurred correspondingly. On balance, the respondents were the more successful party and that is reflected in an award of costs in their favour. At the same time since their success was less than complete, I would not apply the full notional daily rate.

[20] Next, I consider the effect of the settlement offers.

[21] In that holiday pay was to be dealt with separately, Mrs Lee has actually recovered less than half of the amount otherwise offered in settlement. Although it is not possible to be precise about the matter I do at least assess it as likely that because Mrs Lee was not successful in the most significant and probably expensive of her claims - namely her personal grievance - she would have been better off if she had accepted the offer of \$3,000 in settlement of the grievance and the wage claim and

¹ [2005] ERNZ 808

pursued only the claim for holiday pay through the labour inspectorate. I give that a small weighting.

[22] If I take as a starting point a notional daily rate of \$2,000 for a part-day meeting, and apply the above weightings, I return to the view that \$2,000 is an appropriate costs figure.

[23] Mrs Lee is therefore ordered to contribute to the respondents' costs in the sum of \$2,000.

Order for payment by instalments

[24] The threshold for an order for payments by instalment is a high one. Such an order may be made 'only' if the financial position of the employer 'requires' it.

[25] I received financial information in support of the application and note that a budget ostensibly prepared by the North Shore Budget Service - which should have been supported by an affidavit but which for present purposes I will accept - indicates that the respondents' weekly outgoings exceed their income. However that is not the end of the matter because the respondents have equity in a significant asset and I have no information about their ability to borrow against that to raise an amount of the kind in question here.

[26] For that reason I am not persuaded that the respondents' financial position requires an order for payment by instalment and decline to make the order.

[27] I note in addition that the order for costs set out in this determination means Mrs Lee now owes the respondents \$2,000. Although she is entitled to approach as separate matters the respective orders of the Authority in her favour and against her, in all of the circumstances an off-set of one against the other would be regarded as an act of good faith on her part.

R A Monaghan

Member of the Employment Relations Authority