New Zealand Employment Relations Authority Decisions

McGrath v A2Z Auto Dismantlers Limited (Christchurch) [2017] NZERA 1130; [2017] NZERA Christchurch 130 (26 July 2017)

Last Updated: 4 August 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 130
3000157

BETWEEN ANTHONY MCGRATH Applicant

AND A2Z AUTO DISMANTLERS LIMITED

Respondent

Member of Authority: Helen Doyle

Representatives: Wendy Christie, Advocate for Applicant

Philippa Tucker, Counsel for Respondent

Submissions received: No submissions received from Applicant

18 July 2017 from Respondent

Determination: 26 July 2017

COSTS DETERMINATION OF

THE EMPLOYMENT RELATIONS AUTHORITY

A. **There is no award of costs to A2Z Auto Dismantlers Limited. Costs are to lie where they fall.**

Substantive determination

[1] In my determination dated 28 June 2017 I found that the applicant was not unjustifiably dismissed from his employment with the respondent. The respondent was ordered to pay a penalty to the applicant for failing to provide an employment agreement. Costs were reserved and failing agreement the applicant had until 10 July 2017 to lodge and

serve submissions as to costs, and the respondent until 24 July 2017 to lodge and serve submissions in response.

[2] No submissions were received on behalf of the applicant within the timeframe stipulated in the determination. The respondent provided submissions on 18 July 2017. The Authority intends to proceed to determine the issue of costs.

The respondent's submissions

[3] Ms Tucker, on behalf of the respondent, submits that costs should be awarded to the respondent in the sum of $4,500 which is the recognised daily tariff for matters lodged in the Authority after 1 August 2016.

[4] Ms Tucker submits that the basis for seeking the full daily tariff is that the most substantive claim put forward by the applicant was an unjustified dismissal and that the respondent has been successful in defending that claim. Ms Tucker

submits that the $700 penalty awarded reflects a very minor breach and one that was unintentional.

[5] She submits that it was not clarified until the day of the investigation meeting that a claim would be advanced in relation to the employment agreement not being provided and a penalty sought. I do note that there was a claim in the statement of problem for a penalty for failure to provide an employment agreement.

Determination

[6] There is a fundamental principle that costs follow the event. The applicant had a measure of success. It is not uncommon for cases to come before the Authority where both parties achieve a measure of success.

[7] In this case I accept that the more significant claim the respondent was facing was an unjustified dismissal and that claim was successfully defended.

[8] It was observed by the Court of Appeal in *Health Waikato Limited v Elmsly1*

It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made....

[9] In my determination I noted that directions the Authority made at a telephone conference, including the lodging of a statement in reply, were not complied with by the respondent despite having a representative attend the telephone conference.

[10] Ms Tucker was only instructed at a very late stage in the process and it was not until she lodged a statement of evidence on behalf of the respondent that its view was available. Had the respondent participated earlier in the Authority process then the applicant may have had a better opportunity, with the assistance of his representative, to properly assess his claim before the Authority.

[11] Taking those matters into account I do not find that an award for costs should be made in the respondent's favour.

[12] Costs should lie where they fall and I so order.

Helen Doyle

Member of the Employment Relations Authority

1 [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [39]
