

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 182  
5362730

BETWEEN                      GRAHAM MILLIGAN  
Applicant

A N D                              BROADWAY                      GENERAL  
CARRIERS LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:              Richard Peters, Counsel for Applicant  
Marisa Brugeyroux, Counsel for Respondent

Submissions Received:        29, 30 September and 31 October 2014 from Applicant  
29 September and 10 October 2014 from Respondent

Date of Determination:        11 November 2014

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**DETRMINATION OF THE AUTHORITY ON REOPENING AND COSTS**

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- A.     The investigation is reopened.**
  
- B.     The holiday pay ordered payable to the applicant in my  
determination of 15 September 2014 is reduced by \$1,000.**
  
- C.     The respondent is ordered to pay to the applicant the sum of  
\$1,750 costs and disbursements in the sum of \$71.56.**

[1] This determination deals with two matters arising from the substantive determination of the Authority dated 15 September 2014 [2014] NZERA Christchurch 144.

### ***Reopening***

[2] After receipt of the determination Ms Brugeyroux by way of memorandum dated 29 September 2014 said that the Authority had not dealt with two payments made to the applicant by the respondent in the determination of holiday pay owing to the applicant. The first payment was made by the respondent on 12 February 2008 in the sum of \$800 and the second on 18 March 2011 in the sum of \$1,000.

[3] The Authority considered Ms Brugeyroux's memorandum and issued a Minute dated 2 October 2014 to counsel. In that Minute, the Authority recorded amongst other matters the following:

*The Authority in para [65] of its determination dated 15 September 2014 sets out the basis for a finding on the balance of probabilities that payments were received by Mr Milligan in respect of holiday pay. That is that they have either H pay or advance H pay beside them.*

*One of the payments Ms Brugeyroux refers to in her memorandum appears to have juniorh pay beside it. The Authority was not able to read that on the bank statements it was provided with. Now however that that has been referred to the Authority can make the h out. That is the payment on 18 March 2011.*

*The other payment referred to by Ms Brugeyroux does not appear to have any notation beside it of H pay, advance H pay or h.*

*The Authority under clause 4(1) of the second schedule to the Employment Relations Act 2000 has the power to re-open its investigation of its own volition. Obviously that power must be exercised judicially and in accordance with the statutory role of the Authority. This means that all the parties potentially affected by the exercise of this power are fully and fairly informed of what is considered and given a proper opportunity to respond.*

*At this point I am minded to consider reopening the investigation under clause 4(1) of Schedule 2 of the Employment Relations Act 2000 about the payment made to Mr Milligan of \$1,000 on 18 March 2011 only.*

*Ms Brugeyroux had until 10 October 2014 and Mr Peters until 17 October 2014 to respond with their views.*

**Costs**

[4] The second issue this determination will deal with is the issue of costs.

**The Issues**

[5] The issues for determination are as follows:

- (i) Should the investigation be reopened on the basis proposed?
- (ii) Should an order be made for costs and the reimbursement of the filing fee?

**Should the investigation be reopened on the basis proposed?**

[6] Mr Peters acknowledges in a memorandum dated 30 October 2014 that reopening is a matter for the discretion of the Authority. Ms Brugeyroux, in her memorandum dated 10 October 2014, whilst accepting that there was no notation accompanying the payment made by the respondent to the applicant on 12 February 2008, submits that this was not an ordinary salary payment although she accepts that it is silent as to its nature. Ms Brugeyroux says nevertheless that the Authority should determine the nature of the payment made to the applicant on 12 February 2008, whether it is a holiday pay, an advance or otherwise.

[7] I am satisfied that all parties had a proper opportunity to be heard about the two payments made and whether the investigation should be reopened.

[8] I shall start with the payment made of \$800 on 12 February 2008 and whether the investigation should be reopened into that payment. The Authority has set out in its determination dated 15 September 2014 a basis for finding that some payments made to the applicant by the respondent were for holiday pay. This first payment falls outside of that. The respondent failed to keep holiday and leave records. It is not the role of the Authority to speculate as to what that payment may have been made for. I am not satisfied that a miscarriage of justice would occur if there was no reopening of the investigation in respect of the payment made in February 2008. I do not reopen the investigation in respect of the first payment.

[9] The second payment was made to the applicant on 18 March 2011 in the sum of \$1,000. Copies of the bank statements showing the various payments were only provided after the investigation meeting. The reason that payment was not included on the same basis as the other payments was because the Authority was unable to read the *h* at the end of *junior* on the photocopy that it received.

[10] On closer inspection I suspect the payment has been highlighted on the original statement and then photocopied for Mr Peters and the Authority. It is important that the best evidence is before the Authority which in this case would have been the original statement. If the statement had been available at the investigation meeting that would also have been helpful. The statement however does support that there is reference to an **h** after junior which was what Mr Milligan was known as. The Authority has found that other payments made with notations supported the payment was for holiday pay. I am satisfied that a miscarriage of justice would occur if the reopening of the investigation was not granted for the limited purpose of addressing the one payment made to the applicant on 18 March 2011 in the sum of \$1,000.

[11] In all the circumstances I am satisfied that I should reopen the investigation about one day's payment on 18 March 2011 for \$1,000 which has, as the bank statement annotation, *juniorh* pay.

### **Determination on reopening**

[12] Paragraph [65] of determination [2014] NZERA Christchurch 144 (the determination) is to include the payment made by the respondent on 18 March 2011 of \$1,000.

[13] Paragraph [66] of the determination is to include the payment made by the respondent on 18 March 2011 of \$1,000.

[14] Paragraph [70] refers to the net amount that the respondent was ordered to pay Mr Milligan for holiday pay being \$5,821.30 net. The net amount for holiday pay is reduced by \$1,000 to \$4,821.30.

[15] In all other respects, the determination, including findings and other orders made, remain the same.

## **Costs**

### ***The applicant's submissions***

[16] Mr Peters submits that the actual costs incurred by the applicant are \$3,800. He submits that the applicant was successful in his claim for unjustified dismissal and holiday pay. Although the claim for damages for non-return of personal items and the claim for lost wages was unsuccessful, the applicant was successful on his main claims.

[17] Mr Peters refers to an offer of settlement made by the respondent on 12 June 2014 which was open for one day of \$3,000. He submits that this was for less than was ultimately awarded and submits that payment of one half of the daily notional tariff of \$3,500, being \$1,750 plus the filing fee of \$71.56, should be ordered.

### ***The respondent's submissions***

[18] Ms Brugeyroux submits that costs should lie where they fall because the applicant was only partially successful in his claim. If the Authority considers that an award of costs should be made she submits that a lesser award is appropriate on the basis that the applicant pursued claims for compensation that lacked merit and failed in relation to a number of his claims for compensation.

[19] Ms Brugeyroux submits that the notice of personal grievance provided no particulars of the alleged personal grievance or remedies and neither did the applicant's Statement of Problem. She submits that the applicant failed to realistically assess and set out claims for compensation and refers to an allegation of a loss as a result of two vehicles being repossessed. That claim was never particularised.

[20] Ms Brugeyroux also submits that the applicant was seeking compensation of \$13,000 in lost wages but did not provide details of earnings so any loss could be assessed. Further there was a claim that the personal items were returned and were damaged but there were no specifics. Finally, in relation to taking of unpaid leave, the respondent was put to cost providing evidence that the applicant had taken leave.

**Determination on costs**

[21] The fundamental principle is that costs follow the event. The applicant was successful in both his personal grievance and holiday pay.

[22] The award Mr Peters seeks is moderate.

[23] There were some claims in which the applicant was not successful but I do not consider the lack of success in those should deprive him of a contribution towards his costs when he was successful with his main claims. I also note that some of the difficulties in particularising the claims were because of a failure to respond about matters to the applicant and then his legal advisors at or about the time of termination. I do not, in the exercise of my discretion, consider that is a matter that should reduce costs in all the circumstances.

[24] The failure to provide evidence for lost wages has already been dealt with by the fact no award was made for lost wages in the determination. The applicant should not be penalised further in costs.

[25] Only a limited part of the investigation was concerned with the applicant's possessions which were allegedly damaged or not received. The respondent had already taken photographs of the possession to be transported to the applicant and although that claim was unsuccessful I do not see that there should be any adjustment on that basis to what is a very moderate claim for costs. I also take into account that the possessions were only returned to the applicant approximately two years after the relationship ended.

[26] The respondent faced a considerable claim for holiday pay. It was required to keep records of holidays but did not. I am not minded to reduce the cost award on the basis proposed by Ms Brugeyroux when the respondent was responsible for recording holiday and payment. Any cost in establishing payment flowed from that failure to keep records and should not be visited on the applicant by way of deduction of a cost award.

[27] The amount claimed by the applicant for costs is both fair and reasonable. I am not minded in the exercise of my discretion as to costs to make any adjustment.

[28] I order Broadway General Carriers Limited to pay to Graham Milligan the sum of \$1,750 together with disbursements in the sum of \$71.56.

Helen Doyle  
Member of the Employment Relations Authority