

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 79  
5352332

BETWEEN                      FAE OSBORNE  
   Applicant  
  
AND                                THE FARMERS' TRADING  
   COMPANY LIMITED  
   Respondent

Member of Authority:      Rachel Larmer  
  
Representatives:            Penny Swarbrick, Counsel for Respondent  
  
Investigation meeting:      On the papers  
  
Submissions Received      27 January 2012 from Respondent  
   No submissions from Applicant  
  
Determination:              01 March 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A      Ms Fae Osborne is ordered to pay The Farmers' Trading Company Limited \$6,000 towards its legal costs.**

[1]      In a determination dated 22 December 2011<sup>1</sup> the Authority held that the applicant's dismissal was justified. The parties were encouraged to resolve costs by agreement but if that was not possible a timetable was set for costs to be dealt with by an exchange of memoranda.

[2]      The respondent applied for an extension to the costs timetable. That request was granted on 20 January 2012. The respondent filed and served its costs submissions on 27 January 2012. Mr Nicholson<sup>2</sup> withdrew on 31 January 2012. The

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<sup>1</sup> [2011] NZERA Auckland 552

<sup>2</sup> He had represented the applicant during the disciplinary process and the Authority's investigation.

Authority asked him to provide it with the applicant's contact details but he was unable to do so.

[3] No costs submissions were received from the applicant in accordance with the Authority's costs timetable. No communications have been received from the applicant subsequent to Mr Nicholson's withdrawal.

[4] The respondent stated it had incurred actual costs in excess of \$15,000 and it sought an order that the applicant contribute \$10,000 towards its costs.

[5] The general principles relating to costs in the Authority are set out in the Full Employment's Court's decision in *PBO Ltd (formerly Rush Security) v Da Cruz*<sup>3</sup>. Those principles are so well known I do not need to set them out here. I have been guided by those principles when assessing costs in respect of this matter.

[6] The Employment Court in *Carter Holt Harvey v Eastern Bays Independent Industrial Workers Union & Others*<sup>4</sup> observed that a notional daily tariff approach, which is to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. I therefore adopt that approach.

[7] This matter involved a one day investigation meeting followed by written submissions filed after the investigation meeting. I have adopted a notional daily tariff of \$3,000 as a starting point and now consider whether there are any factors which would warrant adjusting that notional tariff.

[8] I do not have any information about the applicant's means, but note that some hardship as a result of a costs award is an expected and acceptable consequence of a decision by a party to engage in unsuccessful litigation.<sup>5</sup>

[9] I am not aware of any factors which would warrant a decrease to the notional daily tariff.

[10] I consider that the notional daily tariff of \$3,000 should be increased to \$6,000 on the grounds the applicant's conduct unnecessarily increased the respondent's legal costs because:

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<sup>3</sup> [2005] ERNZ 808

<sup>4</sup> [2011] NZEmpC 13

<sup>5</sup> *Gates v Air New Zealand Limited* [2010] NZEmpC 26

- (a) She declined to accept a reasonable settlement offer;
- (b) The manner in which she conducted her case put the respondent to additional cost;
- (c) She elected to pursue arguments during the Authority's investigation that she should have known were devoid of merit.

[11] I now address each of these factors in more detail.

[12] The respondent made a "without prejudice except as to costs" settlement offer on 21 September 2011 which proposed that if the applicant withdrew her claim it would not seek costs.

[13] At the time it made this offer the respondent had filed its Statement in Reply and the parties had attended mediation but the applicant had not filed her evidence<sup>6</sup>, and the respondent had not at that point incurred the costs associated with preparing its evidence.

[14] The respondent's offer set out why it considered that the applicant's dismissal claim was without merit. The Authority in its substantive determination agreed with all of the matters the respondent had identified in its settlement offer as justifying its dismissal of the applicant, so I find that the applicant had been put on notice of the deficiencies in her claim.

[15] I consider that the respondent's settlement proposal was a realistic offer which if accepted would have saved both parties the costs associated with proceeding to an Authority investigation. I consider the applicant's failure to accept this offer was unreasonable and therefore put the respondent to additional and unnecessary cost.

[16] I find that the applicant elected to pursue her claim in a manner which resulted in the respondent being put to unnecessary additional cost. In particular:

- (a) She failed to prosecute her claim promptly. It was almost three months before she raised her grievance and 14 months before she filed her claim with the Authority. The respondent submitted this delay adversely impacted on its ability to brief Mr Phil Morley, a key

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<sup>6</sup> It was due on 23 September 2011.

witness, who had left the respondent's employment before his evidence was briefed;

- (b) The applicant changed some aspects of her evidence subsequent to the disciplinary process which the respondent submitted required it to address her new and unexpected explanations;
- (c) She advised the Authority (in response to its request for clarification) that she did not intend to pursue her disadvantage claim regarding the final written warning then attempted to challenge the warnings during the investigation and in her closing submissions, which the respondent said caused it to incur costs in responding to the points she had raised;
- (d) Although the applicant had advised the Authority during the investigation meeting that she was only claiming three months' lost remuneration she claimed full lost wages in her closing submissions, so the respondent addressed that claim in its submissions.

[17] I also find that the applicant pursued claims which she should have known were devoid of merit. This included her allegations that:

- (a) Mr Ken Manual had demanded she immediately respond to the allegations when he had first handed her the disciplinary letter and that her responses at that time had prejudiced him against her. That was inherently unlikely when she had never raised that concern during any of the four disciplinary meetings;
- (b) Mr Ken Manual lead her to believe he was withdrawing her final written warning which had been imposed (in lieu of dismissal) by another manager only 16 days previously. That was not only inherently unlikely but it had also never been raised at any of the four disciplinary meetings, despite the respondent's specific advice to her that it would be relying on the final written warning when assessing what outcome was appropriate;
- (c) She was not aware of the requirements of the staff discount or holds policies and could not reasonably have been expected to have known this in circumstances where:

- (i) Her employment agreement required her to familiarise herself with relevant policies and procedures;
- (ii) Her final written warning dated 10 November 2009 expressly stated that she had to familiarise herself with all relevant policies and procedures;
- (iii) She had already admitted at the first disciplinary meeting that she had been aware of the requirements of these policies;
- (iv) She had signed that she had read and understood the staff discount policy on three separate occasions, the most recent being 25 May 2009;
- (v) As a manager she was responsible for ensuring her direct reports had read, signed, and understood the staff discount policy;
- (vi) She had personally obtained the sign off of her direct reports to the most recent changes to the staff discount policy, which was the very same policy at issue in this case;
- (vii) She had attended a managers' meeting at which the changes made to the staff discount policy had been discussed.

[18] I also find that it should also have been obvious to the applicant that her claim she had not put goods on hold was unlikely to be successful in light of her admissions that:

- (a) She had removed items from the sales counter to a reserve area for around 45 minutes before purchasing them;
- (b) She had done so because the deal was "*too good to miss*";
- (c) Her moving of the items into the reserve area meant they were no longer available for purchase by customers, or anyone else.

[19] I also consider that the applicant should have been aware that she was unlikely to be able to establish that her dismissal was substantively unjustified because:

- (a) She was subject to a final written warning, which she had not challenged, and which was in place at the material time;
- (b) Her final written warning also related to a breach of policy;
- (c) She had been warned that any further misconduct within six months of the final written warning could result in the termination of her employment and the conduct for which she was dismissed was similar misconduct which had occurred within that six month period;
- (d) Her misconduct involved policies which related to stock and money handling, which were of the utmost importance to the respondent given the nature of its business so a sanction was likely to be justified;
- (e) Her management and leadership role within the business meant misconduct relating to stock and money handling was particularly serious, so a sanction was likely to be justified.

[20] Whilst the applicant is entitled to challenge her dismissal, she should have known from the outset that her claim was unlikely to be successful and that there was a high risk she would be required to contribute towards the respondent's legal costs. As the Employment Court observed in *Ogilvy & Mather (NZ) Ltd v Darroch*<sup>7</sup>:

*“There is merit in the suggestion that a plaintiff wishing to play lotto should not expect to do so with the defendant's money.”*

[21] For the forgoing reasons, I consider it appropriate that the notional daily tariff be doubled.

[22] The applicant is ordered to contribute \$6,000 towards the respondent's legal costs.

Rachel Larmer  
Member of the Employment Relations Authority

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<sup>7</sup> [1993] 2 ERNZ 943

