

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Brett Peary (Applicant)
AND ME & SE Transport Limited (Respondent)
REPRESENTATIVES Tania Waikato, Counsel for Applicant
Mark Beech, Counsel for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 16 September 2005
DATE OF DETERMINATION 11 April 2006

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

&
DETERMINATION ON COSTS

Background

On 1 December 2005 I issued a determination finding that the applicant had been constructively dismissed by his employer, the respondent and that he had personal grievance. I also found the respondent owed the applicant a small amount of holiday pay.

Having made these findings I addressed the matter of remedies. I found that remedies were limited because there had been a genuine superfluity in the employment relationship and the applicant had contributed to the events giving rise to the grievance. The applicant was awarded \$456 gross in lost remuneration, \$1500 pursuant to s.123 (1) (c) (i) and \$46 in arrears of holiday pay.

The applicant brought a number of other claims against the respondent. He was unsuccessful in those claims.

The respondent had pursued a number of counterclaims against the applicant. In my determination I recorded:

“I understood these claims have been withdrawn by the respondent. If I am wrong in this understanding I reserve the right for the respondent to return to the Authority on this matter”.

The respondent wrote to the Authority on 12 December to advise that it had only waived one of its counterclaims against the applicant i.e. the cash payment made to the applicant in January 2003. This claim depended on the Authority finding a payment made to the applicant in January 2003 was not a payment of holiday pay (as alleged by the respondent) but that it was a bonus paid to the

worker. In the event the Authority found that Mr Peary took paid leave in January 2003. In that event the respondent withdrew its counterclaim against the applicant for repayment of the alleged 'bonus'.

However, there were a number of counterclaims made by the respondent in respect of sums of personal expenditure he charged to the respondent without authorisation. The respondent asks that the Authority direct the applicant to repay sums totalling \$988.31¹.

The respondent also asks the Authority to resolve the matter of costs.

The Authority apologises for the delay in finalising this matter. It has partly been a result of difficulty experienced in attempting to contact the applicant and a delay in receiving submissions.

Counterclaims

As part of his claim for lost remuneration the applicant claimed his remuneration included a \$50 per week non-taxable allowance. In reliance on this 'allowance' the applicant had charged items for his personal use to the respondent's accounts with suppliers. The fact Mr Peary incurred these charges to the respondent's accounts was not in dispute.

- South Pacific Tyres NZ Ltd tax invoice 22768 for \$259.20 plus GST (\$291.60).
- Beaurepaires tax invoice 59002 for \$174.00 plus GST (\$195.75).
- Beaurepaires tax invoice 64393 for \$145.30 plus GST (\$163.46).
- Performance Diesels tax invoice 22443-1 for \$300.00 plus GST (\$337.50).

In my determination I found that Mr Peary was not entitled to \$50 per week as a tax-free payment. As a result the respondent seeks the sums incurred in its name and without its authority to be repaid by Mr Peary.

Determination

Mr Peary had no right to book the above sums up to his employer's accounts and I direct that he pay to the respondent the sum of \$988.31 to reimburse it in respect of the charges incurred by him without authorisation.

Costs

In my 1 December determination I reserved costs and directed the parties to resolve the question between them reserving the right to come back to the Authority if they were unable to resolve the matter of costs between them.

The respondent advises that it wrote to the applicant on 7 December 2005 offering to settle all matters including costs. There was no reply and on 8 December the applicant was advised the respondent would seek timetable directions to determine the costs matter. On 22 February 2006 respondent was advised by counsel for the applicant that they no longer acted for the applicant.

¹ Minor corrections made to respondent's submitted figures.

The Authority too has been trying to contact the applicant with a view to allowing him to make submissions on the counterclaim and costs issues. Efforts to contact the applicant were made on 22, 23, 27, 28 February and 8 March 2006. The applicant has not responded to messages left for him.

The Authority must now proceed to determine the outstanding matters.

Respondent's Position on Costs

The respondent submits that in all the circumstances this is a case where the applicant should be directed to pay costs to the respondent because:

- The respondent had only limited success in 3 out of 8 of his claims.
- The conduct of the applicant in mediation, during discovery and at the Authority hearing all increased costs to the respondent.
- The applicant's unsuccessful claims increased the costs to the respondent in defending the matter.
- The respondent is a small and vulnerable employer.
- The applicant was earlier offered monetary amounts (including Calderbank offers of 4 May 2005 and 4 August 2005) to settle all claims and the applicant has recovered less than what was offered.

The respondent submits it has incurred costs in the sum of \$16,940.73 and disbursements of \$193.61 in defending this matter. It submits that in fairness and equity costs should be awarded to the respondent and that such an award should be higher than normal given:

- The applicant's conduct.
- The Calderbank letters and other attempts by the respondent to settle the applicant's claims.
- The applicant's untenable demands.
- Two attempts to settle at mediation.
- The limited success of the applicant in the Authority.
- The level of costs expended by the respondent.

In all the circumstances the respondent seeks an award in its favour of \$6000.

Discussion

The principles governing an award of costs in the Authority were most succinctly put by my colleague Leon Robinson in AA 39/06 (Unreported) and I adopt them here.

"The principles and rules conventionally applied to applications for costs in traditional adversarial or trial litigation do not fit with the Investigative role of the Authority and the objects of the legislation which establishes it. Those principles and rules continue to remain relevant however

and the overall question is to determine what is a fair and reasonable contribution as between the parties. The Authority adopts a principled approach taking into account relevant matters and having no regard for irrelevant ones. (Emphasis mine).

The Employment Court has held that the following principles are appropriate where the Authority is exercising its discretion in relation to costs²:-

There is a discretion as to whether costs should be awarded and what amount.

The discretion is to be exercised in accordance with principle and not arbitrarily.

The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

Equity and good conscience is to be considered on a case by case basis.

Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increase costs unnecessarily can be taken into account in inflating or reducing an award.

It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

That costs generally follow the event.

That without prejudice offers can be taken into account.

That awards will be modest.

That frequently costs are judged against a notional daily rate.

The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances."

The substantive matter before the Authority was relatively simple matter of alleged disadvantage and constructive dismissal. It was easily capable of being settled in mediation between parties acting in good faith and making realistic assessments of the issues and attendant risks.

That is where the difficulty in the applicant's claims lies. The applicant sought to construct a capital case against the respondent. It was accompanied by an obdurate refusal to recognise and factor in his own contribution to the events that led to the breakdown in the employment relationship. Neither did he give any credit to the respondent, running a small and vulnerable business, who made every endeavour to maintain Mr Peary in his employment after being directed by Mainfreight to remove him from the Wellington run (at the risk of losing the only contract the business had).

While the applicant was successful in his personal grievance and arrears claims the remedies awarded in respect of the grievance did not support the level of harm the applicant claimed had been visited on him. Further the claim for arrears of holiday pay – whilst it did yield a small adjustment in the applicant's favour – can only be said on examination to have been an unmeritorious claim.

In spite of the claims against it and its own view of the merits of those claims the respondent made offers to resolve all matters with the applicant. The respondent's settlement offers, including offers

² *PBO Ltd -v- Da Cruz*, unreported, AC2A/05, 9 December 2005

made in valid Calderbank letters, were reasonable and realistic (particularly the first offer made at a time the applicant would have incurred little in the way of costs). The applicant recovered less through persisting with his claims in the Authority than he would have received had he accepted either of the respondent's offers.

Conclusion

This matter has been difficult to decide. On the one hand the applicant was successful if only to a limited extent in his claim of constructive dismissal. And while the applicant was technically successful in his arrears claim (because the examination of the claim revealed a small adjustment to his holiday pay was warranted) the substantive claim brought by the applicant on this point was entirely unsuccessful.

On the other hand the numerous other claims brought by the applicant were unsuccessful and there exist Calderbank offers in sums greater than those recovered in total by the applicant. I also accept given the large number of claims to be defended that the costs incurred in defending the claims were reasonably incurred.

I was minded to let costs lie where they fall. On the other hand it is inconceivable that the applicant, who attended two mediations in this matter, would not have been fairly apprised of the overall merits of his claims. Mr Peary's failure to accept reasonable offers to resolve matters has led me to the view that he must bear an award of costs in favour of the respondent. However I consider that award should be modest in all the circumstances.

Determination

I direct the applicant to pay \$1000 to the respondent to reimburse it for the costs incurred in defending the applicant's claims.

Summary of Orders

I direct that the applicant to pay to the respondent the sum of \$988.31 to reimburse it in respect of the charges incurred by him in the respondent's name and without the respondent's authorisation.

I direct the applicant to pay \$1000 to the respondent to reimburse it for the costs incurred in defending the matters before me.

Janet Scott
Member of Employment Relations Authority