New Zealand Employment Relations Authority Decisions

Petterson v Pact Group (Wellington) [2017] NZERA 2115; [2017] NZERA Wellington 115 (22 November 2017)

Last Updated: 1 December 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 115
3013771

BETWEEN TRACEY-JANE PETTERSON Applicant

AND PACT GROUP Respondent

Member of Authority: Trish MacKinnon

Representatives: Michael Smith, Counsel for the Applicant

Barry Dorking, Counsel for the Respondent

Submissions Received: 27 October 2017 for the Respondent

7 November 2017 for the Applicant

Investigation Meeting On the papers

Determination: 22 November 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] This matter concerns an application to the Authority that was withdrawn by Tracy- Jane Petterson before an investigation meeting was held. The respondent, Pact Group (Pact), seeks a contribution to its costs.

[2] Ms Petterson's view is that an award of costs is inappropriate in the circumstances but that, if an award is made, it should be for a lesser sum than that sought by her former employer.

Relevant Facts

[3] The applicant lodged a statement of problem on 23 June 2017 relating to a personal grievance arising from an unjustifiable action by her employer that had disadvantaged her. The action she referred to was the issuing to her of a first written warning on 17 February

2017.

[4] The warning followed an investigation carried out by her employer into performance issues it had raised with her in January 2017. In Ms Petterson's application to the Authority she claimed her employer's adverse findings were made against the weight of evidence, or in the absence of evidence.

[5] She sought compensation of $6,000 under s. 123(1)(c)(i) of the Employment

Relations Act 2000 (the Act) for her grievance.

[6] Pact provided a statement in reply on 10 July 2017 denying the warning was an unjustified action that had disadvantaged Ms Petterson in her employment. It said its actions, and how it acted throughout, were what a fair and reasonable employer could have done in all the circumstances at the time.

[7] The employer stated that Ms Petterson had tendered her resignation on notice from Pact three days before she had been notified of the employer's decision to issue the warning. Pact noted Ms Petterson left work early on the day it notified her of its decision regarding the warning and had worked only three of the six remaining days of her notice period.

[8] The parties attended mediation on 21 August 2017 but were unable to resolve the matter.

[9] A case management conference took place by telephone with the Authority on 29

September 2017, in the course of which a one-day investigation meeting was scheduled to take place on 23 November 2017. A timetable was established for the filing of witness statements leading up to the investigation. Ms Petterson and one other witness were to give evidence for the applicant, while four witnesses were to give evidence for the respondent.

[10] Under the timetable Ms Petterson's witness statements were scheduled to be filed and served on Pact by 20 October 2017. Pact would then have three weeks to file its witness statements which were due on 10 November, and Ms Petterson would have one week from that date to file any reply statements.

[11] On 17 October 2017 counsel for Ms Petterson notified the Authority and Pact that the applicant wished to withdraw her application. He noted no agreement had been reached with Pact on costs with respect to the withdrawal.

Submissions

[12] In submissions for Pact, counsel referred to Ms Petterson being on notice from the date of the case management conference of the difficulties she would face in successfully prosecuting her claim and the risk she faced of having an award of costs made against her if her application failed.

[13] Counsel submitted that from the time Ms Petterson lodged her claim in the Authority on 23 June until 6 October 2017 his client incurred costs in defending the claim totalling

$14,127.50 excluding GST. Invoices were supplied to verify the amounts. In the week following the telephone conference with the Authority his client incurred costs of $4,547 excluding GST.

[14] In its submissions Pact referred to the well-known and long-established principles applicable to an award of costs in the Authority1, including that awards generally follow the event; are modest; and are usually awarded by reference to a notional daily tariff, which is currently $4,500 for the first day of hearing.

[15] Counsel for Pact submitted that in the current instance there is good reason to award higher than usual costs. He cited *Goodalls Manufacturing Limited v Wilkes2* as authority for the proposition that an "*unmeritorious try on*" in circumstances where its lack of merit must have been known to the person advancing it will justify an uplift in costs.

[16] Pact submitted that, while Ms Petterson did not withdraw her claim at the last minute, she could not be said to have withdrawn it expeditiously following the case management conference.

[17] In response, counsel for Ms Petterson rejected the claim that her application to the Authority was without merit or could be described as a "*try on*" and submitted the legal costs incurred by the respondent were excessive. He noted that Ms Petterson had legal representation from the time of the employment investigation undertaken by Pact into the

allegations about her performance and conduct.

1 As set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 (EmpC), more recently confirmed by the Full Court of the Employment Court in *Fagotti v Acme & Co Ltd* [2015] EmpC 135.

2 [1998] 2ERNZ 513.

[18] In his submission this was evidence Ms Petterson was vigilant to protect her position rather than evidence of a "*try on*" by her.

[19] Counsel stated he had first notified Pact's representative of the possibility of discontinuance of the proceedings on 6 October 2017 and had sought the respondent's position on costs if that were to occur. No agreement was reached on costs and Ms Petterson withdrew her application on 17 October.

[20] Counsel for Ms Petterson queried the authority for, and relevance of, using the notional daily tariff for a costs calculation for a withdrawal. In his submission, an award of costs was inappropriate in this situation but, if one were to be made, the Authority was referred to a 2001 case in which an award of $300 was made in a situation where proceedings were withdrawn one month before a scheduled investigation of the matter.

Discussion

[21] The Authority's ability to award costs is discretionary and the discretion is to be exercised in accordance with principle

rather than arbitrarily. That is one of the principles from *Da Cruz*,*3* referred to by counsel for Pact in his submissions. I have taken those principles and the parties' submissions into account in determining this matter.

[22] Clause 14, Schedule 2 of the Act provides that, where any matter is before the Authority, it may at any time be withdrawn by the applicant. The withdrawal may give rise in some circumstances to an award of costs.

[23] The level of costs to be awarded, if any, in such circumstances depends largely upon the timing of the withdrawal of the claim. In *Eden v Rutherford & Bond Toyota Ltd* former Chief Judge Colgan held:

..... the closer in time that proceedings are withdrawn before a hearing, the greater will probably have been the time put into their preparation by the other party and, therefore, the costs which the other party will have incurred reasonably and which may be the subject of an order.4

[24] In this instance, Ms Petterson withdrew her application more than one month prior to the scheduled investigation meeting. The first witness statements, those of Ms Petterson and

3 n1 above.

4 [2010] NZEmpC 43 at [8].

one other witness, had not yet been filed and were not due for another three days. Pact was not required to file its witness statements for another three and a half weeks.

[25] Pact had forewarning 11 days before the withdrawal of proceedings on 17 October that possible withdrawal was a matter counsel for the applicant would explore with Ms Petterson. Counsel for Pact noted in submissions he had immediately ceased work on the matter from the date he had received that forewarning. Following the telephone case management conference of 29 September, at which Ms Petterson's claims were set down for investigation, Pact effectively incurred costs for only one week's work.

[26] Having considered counsels' submissions I find it is appropriate for an award of costs to be made to the respondent. However, I find costs incurred before 29 September 2017 should not be taken into account in the absence of evidence that Ms Petterson had an improper or ulterior motive for commencing proceedings. I do not accept counsel for Pact's submission that she had such a motive or that her claims were simply a "*try on*".

[27] I note the statement in reply filed by Pact on 10 July 2017 responded to Ms Petterson's claims but made no reference to their "*unmeritorious*" nature. Ms Petterson had legal representation throughout and I accept her counsel's submission that this is more likely to evidence vigilance on her part to protect her position than an intention to prosecute a claim regardless of its merit or lack thereof.

Determination

[28] Taking into account that parties were at an early stage in the timetabling process leading up to the scheduled investigation meeting, I find an appropriate contribution to the costs incurred by Pact to be $1,200. Accordingly, Ms Petterson is ordered to pay that amount to Pact Group.

Trish MacKinnon

Member of the Employment Relations Authority