

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 382
5639611

BETWEEN

BRIAN SAIPE
Applicant

A N D

TRUDE JEAN BETHEL (also
known as TRUDE JEAN
BETHEL-PACE)
Respondent

Member of Authority: T G Tetitaha

Representatives: S E Greening, Counsel for Applicant
R Hooker, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 27 July and 24 September 2018 from Applicant
13 July 2018 from Respondent

Date of Determination: 30 November 2018

DETERMINATION OF THE AUTHORITY

A. I remove the remainder of this matter to the Employment Court pursuant to s 178(2)(c) of the Employment Relations Act 2000.

B. I order Brian Saipe to pay \$4,500 towards Trude Bethel's costs in the Authority.

Employment relationship problem

[1] Following my determination declining leave to file Mr Saipe's personal grievances outside of the three year time limitation,¹ Ms Bethel made an application seeking costs. Her actual costs were \$22,100.

¹ *Saipe v Bethel* [2018] NZERA Auckland 180.

[2] Mr Saipe has appealed the decision. He seeks an order removing the remaining causes of action to the Employment Court on 21 September 2018 and “corrections to the preliminary determination”.

Costs

[3] Costs in the Authority are determined using the daily costs tariff of \$4,500 for the first day and \$3,500 for each successive hearing day.

[4] This matter proceeded partly upon a half day hearing that was adjourned then dealt with upon the papers. Both parties filed evidence and submissions.

[5] Normally an award of half the daily tariff would reflect a reasonable contribution towards parties costs for a preliminary matter, especially if the majority of the matter is dealt with on the papers. Therefore the starting point shall be 2,250.

[6] There are two matters that would increase costs. Firstly Ms Bethel made a reasonable settlement two weeks prior to hearing of \$7,500. The offer was clear as to its terms and gave a reasonable timeframe for acceptance. Even though the offer was only marked “without prejudice”, the letter stated this was a Calderbank offer that would be produced in support of any application for costs. The offer was rejected and the matter proceeded to hearing on 16 June.

[7] Secondly there was conduct by Mr Saipe that increased costs. Although the parties were directed to file submissions only, Mr Saipe sought to file further evidence instead. This required a telephone conference attendance by Ms Bethel’s lawyer to resolve.

[8] Mr Saipe then sought two further interlocutory orders for non-publication and exclusion of material from his 2015 matter. Ms Bethel provided submissions that were not substantial but incurred costs. Mr Saipe was also unsuccessful. These matters require an increase in costs.

[9] Mr Saipe seeks a reduction in costs because of financial hardship. I am not persuaded Mr Saipe cannot meet a modest award of costs. He has instructed private counsel and I assume he has sufficient funds to meet that cost. There is insufficient information on file to indicate he cannot meet an award of costs. He is also capable of applying to pay costs by instalments.

[10] Conversely costs awards in the Authority are not intended to reimburse parties for the entire legal fees incurred. This is not a situation warranting indemnity costs. The actual costs incurred are well in excess of what I would expect a party to have incurred in defending a preliminary matter largely dealt with upon the papers.

[11] There are no other matters warranting any further increase or decrease in costs. I have determined that an increase to the full one day tariff of \$4,500 is appropriate in the circumstances.

Removal to Court

[12] Mr Saipe seeks removal of the remaining matters to the Employment Court. This is because he has a de novo appeal. The removal is sought pursuant to s 178(2)(c) of the Employment Relations Act 2000 (“the Act”). The Authority has a discretion to remove matters or any part of it to the Court if “the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues”.

[13] Both personal grievances were dismissed given the refusal to extend time for filing these grievances out of time. The only remaining issues are:

- (a) Breach of contract – variation of hours – misrepresentation 30 May 2013; and
- (b) Arrears of wages claim.

[14] There were several findings in the determination that were relevant to the remaining issues. The whole determination is now the subject of a de novo appeal. In these circumstances it is appropriate that these matters be transferred to the Court as those factual findings are now under appeal.

Corrections to preliminary determination

[15] Mr Saipe does not seek correction of any material error. Rather he seeks to relitigate the refusal of leave. This matter has already been determined. If he wishes to pursue this he can do so by way of his de novo appeal.

[16] I decline to make any corrections to the Determination.

Orders

[17] In the circumstances I make the following orders:

- a) I remove the remainder of this matter to the Employment Court pursuant to s 178(2)(c) of the Employment Relations Act 2000.
- b) I order Brian Saipe to pay \$4,500 towards Trude Bethel's costs in the Authority.

Developments

[18] The parties should be aware since my original determination was issued there has been a full Court bench determination declining to extend the 3 year time limitation for filing a statement of problem for a personal grievance pursuant to s219 and 221 of the Act.² The parties may wish to take this into consideration for the appeal.

T G Tetitaha
Member of the Employment Relations Authority

² *Bluewater Hotel Limited v VBS* [2018] NZEmpC 128.