

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 190
5351254

BETWEEN NICHOLAS TEN HOORN
 BOER
 Applicant

AND REID RESEARCH SERVICES
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Emaleigh Walker, Counsel for Applicant
 Richard Harrison, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received 10 May 2012 from Applicant
 25 May 2012 from Respondent
 31 May 2012 from Applicant

Determination: 08 June 2012

DETERMINATION OF THE AUTHORITY

- A. Reid Research Services Limited (Reid Research) is ordered to pay
 Mr Nicholas Ten Hoorn Boer costs of \$4,418.06.**

Employment relationship problem

[1] Mr Ten Hoorn Boer's claims for unjustified dismissal, wage arrears, and breach of good faith succeeded and he was awarded total compensation of \$27,291.36.¹

¹ [2012] NZERA Auckland 142 and [2012] NZERA Auckland 189.

[2] Mr Ten Hoorn Boer is legally aided so he is required to repay his grant of legal aid from his compensation. Mr Ten Hoorn Boer seeks indemnity costs of \$4,418.06 which includes disbursements of \$551.76 which were incurred for copying, fax, telephone, postage and his filing fee. I accept these disbursements were actually incurred and do not reflect general costs associated with running an office.

Reid Research's submissions

[3] Mr Harrison submits indemnity costs are not warranted and would be unreasonably punitive because Reid Research complied with directions leading up to the investigation meeting. He says the cost of the proceedings was largely met by Ms Ngarie Reid, owner and director of Reid Research. He did not suggest what level of costs would be appropriate.

Outcome

[4] The principles relating to costs in the Authority were identified by the full Court of the Employment Court in *PBO Ltd v Da Cruz*.² I have adopted the Authority's usual daily tariff approach to costs in respect of this matter. The notional daily tariff in the Authority is currently \$3,500. That amount must then be adjusted, on a principled basis, to reflect the particular circumstances of the case.

[5] I find that there are no factors which warrant a decrease to the notional daily tariff.

[6] I find that the notional daily tariff should be increased to recognise that Reid Research's conduct unnecessarily increased Mr Ten Hoorn Boer's costs.

[7] Reid Research declined to accept two reasonable without prejudice except as to costs settlement offers, both of which were for considerably less than what Mr Ten Hoorn Boer was awarded by the Authority.

[8] The first offer was made on 17 June 2011, less than eight weeks after Mr Ten Hoorn Boer's dismissal. The second offer was made on 24 August 2011, less than two months after his dismissal. Mr Ten Hoorn Boer did not file his Statement of Problem until 31 August 2011 so if Reid Research had accepted either of his offers

² [2005] ERNZ 808.

then both parties would have avoided all of the costs associated with the Authority's investigation.

[9] Reid Research failed to make full disclosure of all documentation requested by Mr Ten Hoorn Boer's solicitor on 24 June; 13 July; and 06 October 2011 until after it was directed to do so. I accept Ms Walker's submission that increased Mr Ten Hoorn Boer's costs because it prevented him from fully or properly understanding why he had been dismissed at an early stage in the proceedings.

[10] Mr Ten Hoorn Boer's position has always been that he was legally entitled to work for Reid Research at the time it dismissed him. Reid Research did not accept that. That meant Mr Ten Hoorn Boer incurred additional time and expense because the Immigration New Zealand (INZ) file was obtained by the Authority and evidence was called from Mr Kevin Cameron, Branch Manager Auckland Central Branch Immigration Group Visa Services as to Mr Ten Hoorn Boer's immigration status.

[11] A preliminary investigation meeting to be held prior to the substantive investigation meeting was scheduled to obtain evidence from Mr Cameron in person. However, the preliminary investigation meeting was subsequently vacated after Mr Cameron responded to Ms Walker's cross examination questions in writing. Mr Cameron's evidence made it clear Mr Ten Hoorn Boer was legally entitled to work for Reid Research at the time he was dismissed.

[12] Mr Ten Hoorn Boer alleged in his Statement of Problem that Reid Research had breached its statutory duty of good faith because it had not provided him with warning that his ongoing employment was in jeopardy; information relevant to its decision about his ongoing employment; or any opportunity to respond to that information before he was dismissed.

[13] Reid Research stated in its Statement in Reply that it had acted in good faith.

[14] One week before Reid Research was due to file its witness statements the Authority asked it to ensure its statements identified:

- a. what information it had about Mr Ten Hoorn Boer's immigration status at the time his employment ended;

b. what if any information it provided to him before his employment ended; how and when that information was communicated to him; and

c. what if any opportunity he was given to comment on it before his employment ended.

[15] The Authority explained that information had been requested to enable it to assess whether the s4 duty of good faith in the Employment Relations Act 2000 (the Act) had been complied with. Reid Research did not file witness statements in accordance with the Authority's timetable directions which covered these matters.

[16] Reid Research continue to defend its summary dismissal of Mr Ten Hoorn Boer in circumstances where it knew:

a. Mr Ten Hoorn Boer was legally entitled to work for it at the time he was dismissed, when its sole reason for dismissing him was that he was not legally entitled to work for it;

b. Mr Ten Hoorn Boer was entitled to six weeks' contractual notice of termination, but no notice had been given;

c. That the reasons for summary dismissal set out in the employment agreement did not include the reasons Mr Ten Hoorn Boer was dismissed for;

d. It could not provide any evidence of compliance with its statutory good faith obligations under s.4 of the Act;

e. It could not provide any evidence of compliance with any of the four tests in s.103A(3) of the Act which relate to well established minimum natural justice and procedural fairness requirements;

f. The full Court of the Employment Court in *Angus and McKean v Ports of Auckland*³ had held in its decision dated 02 December 2011 that failure to meet any of these tests *is likely to result in a dismissal [...] being found to be unjustified*;

³ [2011] NZEmpC 160 at para [26].

g. Section 350 of the Immigration Act 2009 (IA) expressly provides that an employer does not commit an offence under the IA by allowing an employee to work out their contractual notice.

[17] The parties were not required to file any evidence until 23 January 2012. All of the matters identified above, relevant to a realistic assessment of the merits of the case, were known before the parties were required to incur the costs associated with preparing the evidence for the investigation meeting.

[18] Reid Research put Mr Ten Hoorn Boer to the cost of preparing evidence in respect of each of the above matters which I find was unreasonable in light of the information and legal advice available to it.

[19] Reid Research did not comply with the timetable directions. It did not include all relevant documentation into the joint bundle as it had been directed to do. It declined to provide typed versions of handwritten notes which were difficult to read. It filed its witness statements late. It failed to cover the matters it had specifically been asked to cover in its witness statements.

[20] Reid Research made numerous criticisms of Mr Ten Hoorn Boer which it alleged justified his summary dismissal, so he was required to address each of those matters. I find that these unreasonable criticisms unnecessarily prolonged the investigation meeting.

[21] I consider the notional daily tariff should be increased from \$3,500 to \$7,000.

[22] This increased tariff should be applied to two days of investigation meeting time. Whilst the substantive investigation took one day that does not accurately reflect the time involved, in particular;

- a. Considerable time was incurred prior to the substantive investigation associated with the Authority's investigation of INZ issues;
- b. Reid Research filed additional affidavit evidence after the substantive investigation meeting regarding the alleged unilateral reduction in wage rate claim;
- c. Written closing submissions and reply submissions were filed by Mr Ten Hoorn Boer after the substantive investigation meeting;

- d. Mr Ten Hoorn Boer filed a claim for the Authority to fix the amount of lost remuneration;
- e. Mr Ten Hoorn Boer has incurred the costs associated with this costs application.

[23] I therefore consider that costs should be assessed based on two days rather than a one day investigation meeting. This means that the starting point for a tariff based costs award⁴ is \$14,000.

[24] Costs are discretionary so I now stand back to review whether an award of \$14,000 does justice between the parties. I find it does not because that is more than the costs Mr Ten Hoorn Boer actually incurred. I therefore reduce the costs that would have been awarded to him down from \$14,000 to the amount he actually incurred, namely \$4,418.06.

[25] Reid Research is ordered to pay Mr Ten Hoorn Boer costs of \$4,418.06.

Rachel Larmer
Member of the Employment Relations Authority

⁴ Based on a daily tariff of \$7,000.