New Zealand Employment Relations Authority Decisions

Turner v Talleys Group Limited (Christchurch) [2012] NZERA 1226; [2012] NZERA Christchurch 226 (17 October 2012)

Last Updated: 18 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2012] NZERA Christchurch 226
5372667

BETWEEN LYNETTE TURNER Applicant

A N D TALLEYS GROUP LIMITED Respondent

Member of Authority: M B Loftus

Representatives: Angela Sharma, Counsel for Applicant

Maree Kirk, Counsel for Respondent

Submissions Received: 5 October 2012 from the Applicant

19 September and 15 October 2012 from the Respondent

Date of Determination: 17 October 2012

DETERMINATION OF THE AUTHORITY

[1] On 3 August 2012 I issued a determination regarding the preliminary issue of whether or not Ms Turner had raised a grievance in accordance with the requirements of the Employment Relationship Act 2000 (the Act). I concluded the answer was no.

[2] Costs were reserved and the successful party, Talleys, now seeks a contribution toward those incurred.

[3] Normally the Authority will use a daily tariff approach when addressing such a claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808). The normal starting point is $3,500 per day and from there adjustment may be made depending on the circumstances.

[4] The hearing took approximately half a day which would, applying the above formula, mean an award in the order of $1750. Talleys, however, seeks a greater amount - $3,000.

[5] In support of its claim Talleys refers to two points. The first is actual costs were considerably greater than the amount sought. The second is a submission it was

unclear what Ms Turner was actually claiming - that the grievance had been raised within the required 90 days (s.114(1) of the Act) or that leave should be granted for submission out of time (s.114(3)). As a result, submissions had to be prepared on a multiplicity of issues, which added to the cost.

[6] The response comes in two parts. The first is an application a decision in respect to costs be stayed given the substantive decision has been challenged. While Ms Sharma accepts it would be unusual for this application to be grant ed in such circumstances, she submits this case differs from the norm in that decisions on the issue tend to deal with fully determined applications while this determination related to a preliminary issue.

[7] In the event a stay is not granted it is submitted Ms Turner is of modest means and her situation has been exacerbated by her loss of employment. This limits her ability to pay. It is also submitted Talleys should bear some accountability given its

failure to immediately advice its belief the grievance was submitted out of time. Finally Ms Turner asks there be a stay on payment till the outcome of the challenge is known should an award be made against her.

[8] Section 180 of the Act provides an election to challenge does not operate as a stay unless there is a contrary order. The argument as to why a stay should be granted is the determination dealt with a preliminary issue as opposed to the substantive claim. I do not accept this argument. Where a decision on a preliminary matter effectively determines the matter in its entirety as has occurred here, the Authority ceases to have further involvement. A successful challenge will also see the substantive claim transferred to the Court (*Abernethy v Dynea New Zealand (No 1)* [2007] NZEmpC 83; [2007] ERNZ 271 at paragraphs 59 and 60).

[9] In other words the fact this was a preliminary matter as opposed to substantive is irrelevant. From the Authority's perspective, the matter has been disposed of. The second argument concerning Talleys failure to immediately raise the 90 day issue was discussed in the original determination (paragraph 33).

[10] I have some sympathy with Talleys submission their costs were enhanced by a lack of clarity in respect to the claim. This was raised during the investigation and Ms Sharma confirmed Ms Turner was claiming she had submitted the grievance within the required 90 days. Despite that, Ms Turner continued to give evidence and

submissions were proffered, which suggested a s.114(3) application was still being pursued (see paragraphs 34 to 40 of the substantive decision).

[11] That said, I must also recognise the suggestion Ms Turner is of limited means. Evidence proffered during the investigation would suggest it has some validity. That said, the evidence is circumstantial as opposed to explicit and I note Ms Turner can still afford to retain her own representation.

[12] On balance I consider Ms Turner's financial situation and Talleys enhanced

costs to cancel each other as arguments for departure from a scale award.

[13] That conclusion means the second stay application should be considered. Talleys response is, first, such applications are not normally granted. A successful party is entitled to anticipate closure to the Authority's investigation unless there is s compelling reason to decide otherwise (*Sandilands v Chief Executive of Department of Corrections,* WA67A/09, ERA Wellington). It is submitted there is no compelling argument in this case. I agree. Second, there is nothing to preclude the statement of claim before the Court being amended to include this conclusion should Ms Turner be dissatisfied. Again, I agree.

[14] For the above reasons I order the applicant, Ms Turner, is to pay the respondent, Talleys Group Limited, the sum of $1,750 (one thousand, seven hundred and fifty dollars) as a contribution toward Talleys costs.

Mike Loftus

Member of the Employment Relations Authority
