

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 52
5349813

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| BETWEEN | FIONA WALLACE Applicant | KATHRYN |
| A N D | G P AND S L GLAISTER LIMITED Respondent | |

Member of Authority: M B Loftus

Representatives: Ben Nevell, Counsel for Applicant
No appearance on behalf of the Respondent
David Polson, appearing as Counsel for Sonia Lee Harris

Submissions Received: 27 February 2012 from Sonia Harris
12 March 2012 from the Applicant

Date of Determination: 23 March 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] On 30 January 2012 I issued a determination dismissing Ms Wallace's wage arrears claim against GP and SL Glaister Ltd on the grounds that it was not her employer. I accepted that she had entered into an employment relationship but that it was with her partner, Mr Peter Glaister.

[2] The issue of costs was reserved and a third party, Ms Sonia Harris, who was present and represented at the investigation meeting now seeks a contribution toward the costs she incurred.

[3] That is an unusual situation but a reading of the substantive decision will explain why it has occurred. A quick summary is that:

- a. Ms Harris is the ex-wife of Mr Glaister and a director and shareholder in GP and SL Glaister Limited.

- b. She was initially cited as the respondent but that was subsequently altered with the consent of those involved; and
- c. Mr Glaister, citing his authority as a director of the respondent company, advised that it would not defend itself and that he would not authorise Mr Polson to act on its behalf.

[4] Ms Harris's costs total \$10,033.18 (including GST and disbursements). She seeks that amount in full.

[5] Normally the Authority will assess costs on a daily tariff basis: refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. In assessing that tariff a common starting point is \$3,500 per day: refer *Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)* [2008] ERNZ 73 adjusted for the fact that decision is now dated and costs have, in the intervening period, increased. From that point adjustment may be made depending on the circumstances.

[6] This matter took approximately one half day, so applying the above approach an award of \$1,750 would appear appropriate.

[7] As already said Ms Harris seeks a larger contribution and supports that request with reference to various precedents and then notes, amidst others facts, that:

- a. She was forced to incur costs by virtue of the initial citation;
- b. She was, in effect, totally successful;
- c. It would therefore be unreasonable that she incur those costs given her success and the *selfish interests associated with the application*; and
- d. She made two settlement offers which were rejected by Ms Wallace;

[8] By way of response, Ms Wallace's prime contention is that the Authority has no jurisdiction to award costs to Ms Harris as she was not a party to the proceedings. Here reference is made to *Kidd v Equity Realty (1995) Limited and Ors* [2010] NZCA 452 and the fact that Ms Harris was not joined as a party once the citation of the respondent changed.

[9] In the alternative it is submitted that *The Applicant's claim was to determine whether she should be paid by the Respondent company or by Mr Glaister personally*. It was, it is submitted, reasonable for her to have that issue determined and equally

reasonable to cite the company as a starting point. It is submitted that the claim was not without merit and the right to wages remains, even though the payee may now differ. As a result it is submitted that costs should therefore lie where they fall.

[10] Furthermore it is submitted that Ms Harris should bear her own costs given that she refused to attend mediation or even instruct a lawyer in the absence of an application to the Authority.

[11] Mr Nevell responds to the two offers by noting that the letters are headed *without prejudice* and not *without prejudice except as to costs*. Mr Nevell submits they can not therefore be relied upon but adds that they were also unreasonable. These submissions are followed by a detailed analysis of the principles enunciated in *PBO Ltd v Da Cruz* and an analysis as to why, in Ms Wallace's view, they would preclude an increased daily tariff.

[12] In essence there are two issues to be determined. The first is whether or not I am precluded for making an award in Ms Harris's favour. The second assumes the answer to the first is 'no' and is 'how much?'

[13] I am not swayed by the argument that Ms Harris can not be the recipient of an award of costs. This is not, in my view, an issue of joining her as a party – she was a party and there can be no contrary argument given that the claim initially identified her as the respondent. That she then had to address the issue and incurred costs can not be denied.

[14] The conclusion that Ms Harris can be a recipient of costs leads to a consideration of the second issue – how much.

[15] The above summary of the parties respective positions is somewhat simplistic, given what were detailed submissions. That said I am not convinced by either that I should depart from the normal tariff.

[16] Ms Wallace's argument that I ignore the request for a contribution exceeding the normal tariff is underpinned by an indirect reference to my conclusion that an employment relationship existed and therefore wages were owing. The claim, it is argued, was aimed at identifying where liability lay and Ms Wallace was entitled to pursue that enquiry.

[17] The problem with the approach and the arguments that then stem from it, is that its factual foundation is weak.

[18] The claim was initially taken against Ms Harris personally and was based on an assertion that she, as a bitter ex-wife, was impeding the payment of monies rightfully owing. Notwithstanding the change to the identity of the respondent I must conclude that approach never changed. The true identity of the employer was not a major issue to her; indeed I doubt it was an issue at all. Ms Wallace's evidence, and particularly the answers she gave to various questions lead me to conclude that she sought to have Ms Harris pay for the benefits of Ms Wallace's work that may have passed to her as a result of the matrimonial property process.

[19] Similarly Ms Harris's main argument for an increase is weak. It relies on the alleged offers of settlement which, even if a valid consideration (and that is debatable given Mr Nevell's argument about the entitling of the letters (11 above) and the decision in *Pauanui Publishing Ltd v Loh* EmpC Wellington WC43B/01, 20 December 2001), must be considered in their entirety. They address a multiplicity of issues including ones related to the matrimonial property dispute with Mr Glaister. These have nothing to do with Ms Wallace and undermine the letters value in respect to addressing her claim.

[20] Having considered the issues and arguments I conclude, as indicated earlier, that it is appropriate to apply the normal tariff. I therefore order Ms Wallace to pay Ms Harris the sum of \$1,750 (one thousand, seven hundred and fifty dollars) as a contribution toward costs.

M B Loftus
Member of the Employment Relations Authority