

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 36
5599767

BETWEEN DAVID WRIGHT
Applicant

A N D WEST AUCKLAND AQUATICS
INCORPORATED
First Respondent

A N D SUSAN TURNER
Second Respondent

Member of Authority: James Crichton

Representatives: Max Whitehead, Advocate for Applicant
Matthew McGoldrick, Counsel for Respondents

Investigation Meeting: On the papers

Date of Determination: 9 February 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Wright) filed a statement of problem in the Authority on 4 December 2015 seeking urgent compliance with a settlement agreement dated 4 September 2015 and other relief. An amendment to that application was then filed on 16 December 2015 and a statement in reply was filed on 23 December 2015.

[2] Mr Wright commenced employment with the first respondent, West Auckland Aquatics, on 1 May 2010 in the capacity as head coach and that employment was terminated on 2 December 2015. Susan Turner is the president of West Auckland Aquatics.

[3] West Auckland Aquatics says that Mr Wright's wages were paid on the termination of the employment but it is acknowledged that there was a delay in the payment of the holiday pay due to him on termination.

[4] In that regard, West Auckland Aquatics' lawyer engaged with Mr Wright's advocate with a view to agreeing the holiday pay calculation.

[5] That amount was agreed and was paid to Mr Wright by West Auckland Aquatics on 22 December 2015.

[6] Contemporaneously with those events, I held a telephone conference with the representatives on 16 December 2015 having granted the application for urgency and abridged the time for the filing of the statement in reply.

[7] As a consequence of the telephone conference with the representatives, it was agreed that there be an exchange of submissions on the outstanding matters (about which there continued to be some dispute) and that I would deal with the matter on the papers.

[8] Those submissions have now come to hand and this determination concludes the matter in the Authority.

The issues

[9] There is some dispute between the parties as to what issues are still in dispute between them but for the avoidance of doubt I propose to address the following questions:

- (a) Should a compliance order be granted; and
- (b) Should there be a penalty imposed; and
- (c) Are costs payable by West Auckland Aquatics to Mr Wright?

Should a compliance order be granted?

[10] I am not persuaded that a compliance order is required. The short point is that the gravamen of the complaint made by Mr Wright was that on the termination of the employment relationship he was owed wages and holiday pay which remained unpaid

but the evidence before me is that both wages and holiday pay have been paid and that that is accepted by Mr Wright.

[11] It is true that there was a delay in the payment of holiday pay; it appears that there was a miscalculation by West Auckland Aquatics which resulted in the first delay and then a recalculation was submitted on a representative-to-representative basis which resulted in an agreement about the revised amount of holiday pay due and owing and it is accepted by Mr Wright that the revised (and accepted) calculation of holiday pay was received by him on 22 December 2015.

[12] No doubt it could be said that because the employment of Mr Wright ended on 2 December 2015, a delay of some 20 days in the payment of holiday pay is unsatisfactory, but as I have indicated, part of the explanation for that delay is an entirely proper attempt by West Auckland Aquatics to agree the amount of the revised calculation with Mr Wright and the bottom line is that payment has now been made and acknowledged as such by Mr Wright.

[13] In those circumstances, there is nothing for the Authority to require compliance with.

[14] Whether or not Mr Wright is now saying that there is something wrong with the calculation he previously accepted, the fact is having accepted it, he is now estopped from arguing that there is something wrong with the calculation and in any event, counsel for West Auckland Aquatics has helpfully provided the Authority with extensive material disclosing how the holiday pay calculation was derived and I am satisfied that that calculation is accurate.

[15] For the sake of completeness I note also that I have the power to award interest under s.84 of the Holidays Act 2003, where the Authority is giving judgement for unpaid holiday pay or making a determination under s. 226 of the Employment Relations Act 2000 (the Act). Section 84 does not apply because I am neither giving judgment for an employee in an action to recover holiday pay or making a determination pursuant to s.226 of the Act in favour of an employee. That latter provision concerns objections filed to demand notices, clearly not on point in the present matter.

Should there be a penalty under the Holidays Act?

[16] This matter frankly could not be more straightforward; the only person who can bring a claim for a penalty in terms of s.75 of the Holidays Act is a Labour Inspector and Mr Wright is therefore unable to make such a claim.

[17] As West Auckland Aquatics makes clear in its submissions, Mr Wright was put on notice on 16 December 2015 that there was a statutory bar to his purported claim and the fact that he has persevered with the claim, notwithstanding the advice on 16 December 2015, ought, according to West Auckland Aquatics, to sound in costs in its favour.

[18] I do not accept the submission made by Mr Wright that, as an alternative, I can properly award a penalty under s.134 of the Act. That section, as Mr Wright correctly observes, entitles the Authority to impose a penalty for breach of an employment agreement. I am not satisfied that this is a situation where there is either a breach of the employment agreement or indeed there is any breach at all.

[19] The issue before the Authority, as pleaded, is an alleged breach in the payment of holiday pay immediately after the termination of the employment.

[20] I have already noted that the passage of time from the end of the employment down to the payment was 20 days and that part of the reason for the delay was West Auckland Aquatics' desire to obtain Mr Wright's agreement to the revised calculation.

[21] So there is a real question as to whether there has been any breach of any obligation and a further question as to whether there has been a breach of the employment agreement which is the basis on which I could award a penalty pursuant to s.134 of the Act.

[22] Despite the efforts of Mr Wright's advocate to persuade me otherwise, I have difficulty accepting that there has been, to use Judge Castle's words in *Ruapehu District Council v. Northern Local Government Officers' Union*, WEC54/92, "a wilful breach or default".

[23] The statement of problem before me identifies the claim as relating to a refusal "to pay any outstanding holiday pay after ending the applicant's employment". That

means that the complaint relates to the period from the termination of the employment on 2 December 2015 down to the date on which the payment was effected of 22 December 2014, a span of 20 days.

[24] In order for me to contemplate exercising my discretion under s.134 of the Act, I would need to be satisfied that there had been a breach of the employment agreement and that the breach was “*wilful*”. As I have been at pains to make clear, there is no element of wilfulness in what is before me given the passage of time from the ending of the employment relationship to the payment of the moneys owed. It follows that that aspect is simply not made out. Moreover, there are various dicta in decided cases against awarding penalties where the rights of the parties are not clear. These dicta are directly in point here where there appears to have been some uncertainty as to precisely what Mr Wright’s entitlement actually was.

[25] Those points which I rely upon to reject the suggestion I should levy a penalty, also do not take into account the observation that West Auckland Aquatics makes in its submissions, to the effect that the real breach is not of the employment agreement at all, but of the statutory entitlement to holiday pay. If that argument can be made out, then that also is a ground for rejecting Mr Wright’s submission. I do not decide that point either way; I am satisfied to rest my decision on the basis that as the argument is put before me, there is simply no wilful breach or default sufficient to justify a penalty, especially as there was some genuine doubt about Mr Wright’s entitlements.

[26] I am unable to consider the submissions made by Mr Wright which seek to go back in time to earlier employment relationship problems which, on their face, appear to have been resolved by agreement. As I have already noted, the statement of problem refers to the failure to pay holiday pay after the termination of the employment and I cannot properly consider submissions which concern other disputes, especially as those earlier disputes appear to have been resolved by agreement.

[27] If I were to investigate an earlier period of time, I would, of necessity, need to have evidence on the point and of course would also need to give West Auckland Aquatics an opportunity to provide evidence on that earlier period as well.

[28] Without commenting on it in any detailed way, it appears that the employment relationship has been an unhappy one of recent times and that there have been previous employment relationship problems between the parties, but as I keep emphasising, the matter that is before me is the failure to pay holiday pay after the employment ended and there is no basis on which I can take account of earlier difficulties which have already been dealt with.

[29] Nor am I much attracted by Mr Wright's contention that somehow the Wages Protection Act gives him an entitlement to penalties. I say again that I am not persuaded there was any ground for a penalty and I cannot see how Mr Wright can raise the Wages Protection Act penalty provision as a basis for his claim when the first occasion that statute is referred to is in his closing submissions. Moreover, there is no evidence before me that there is any breach of the Wages Protection Act so I cannot take that matter any further.

[30] Nor am I attracted by the suggestion Mr Wright makes that he is entitled to a penalty for breach of the 4 September 2015 settlement agreement. Insofar as holiday pay is concerned, the relevant provision in the settlement agreement is simply to confirm that Mr Wright is entitled to holiday pay and the provision requires the calculation of that holiday pay pursuant to the Holidays Act, so I am not persuaded that matter can be taken any further either.

Are costs to be awarded?

[31] There is a claim for costs from Mr Wright against West Auckland Aquatics where Mr Wright claims that he has expended a total sum of \$21,192.

[32] Conversely, West Auckland Aquatics claims costs against Mr Wright because it put Mr Wright on notice by letter dated 16 December 2015 that his claim for a penalty in terms of s.75 of the Holidays Act was statute-barred and could not therefore proceed but notwithstanding that early advice, Mr Wright persevered with that aspect of his claim, and indeed made other claims for penalty orders and so costs are sought by West Auckland Aquatics.

[33] I deal first with Mr Wright's claims for costs. I observe first that the bulk of Mr Wright's claim for costs is entirely misconceived in that the two settlement agreements entered into between these parties in September of 2015 both provided for costs to lie where they fell.

[34] Moreover, this application to the Authority, as I keep emphasising, is about the issues that arose as a consequence of the dismissal of Mr Wright from the service of West Auckland Aquatics, that is for the period from 2 December 2015 onwards. It is entirely inappropriate for the Authority to be asked to consider costs before the date from which the relevant events commenced.

[35] It follows from the foregoing observations that the total amount that Mr Wright could claim as falling within the costs that he has properly incurred in **this** proceeding amount to \$3,250 exclusive of GST. I adopt the figure identified by West Auckland Aquatics in its closing submissions.

[36] However, it is well known that parties cannot expect to have the totality of their costs paid even assuming they are completely successful. The Authority typically applies a notional daily tariff which at the moment is \$3,500; that figure then is the starting point for a full day's hearing and the Authority will either add to that figure or take away from it sums to represent the Member's consideration of the particular circumstances of the case.

[37] Of course this is a matter which was dealt with on the papers and on the face of it, given the findings that I have made, it is difficult to see how Mr Wright could maintain that he had had any measure of success at all. I have declined his request for a penalty under a number of different statutes.

[38] Conversely, West Auckland Aquatics could say that it have been completely successful in resisting Mr Wright's claims and indeed, more than that, could maintain that they are entitled to an uplift in the totality of the costs that might otherwise have been awarded because they put Mr Wright on notice that there was no basis on which he could claim a penalty in terms of the Holidays Act and therefore West Auckland Aquatics has been put to additional and unnecessary costs.

[39] Moreover, West Auckland Aquatics maintains that because Mr Wright's overall prosecution of his case argued propositions that were unlikely to find favour with the Authority, that also caused additional time to be expended which ought to sound in costs.

[40] It is undoubtedly true that West Auckland Aquatics has been completely successful in its resisting of Mr Wright's various claims. That means that West Auckland Aquatics is entitled to the benefit of the principle that costs follow the

event. What is more, West Auckland Aquatics warned Mr Wright that a central plank in his claim was statute-barred but he decided to proceed in any event.

[41] West Auckland Aquatics says that it has incurred total legal fees amounting to \$4,375 since the termination of Mr Wright's employment. While I am absolutely satisfied that the fees incurred by West Auckland Aquatics are reasonable, the starting point for any consideration about what sum Mr Wright should contribute to those fees must be a consideration of how the Authority's daily tariff rate ought to apply in the present circumstances. West Auckland Aquatics maintains that the starting point for costs ought to be equivalent to a half day investigation meeting, that is an amount of \$1,750. I do not agree.

[42] I do not consider that the amount of effort that the representatives would have to put into a half day's investigation would equate to the amount of effort that is necessary to deal with a matter such as this on the papers and I consider that the appropriate starting point in the present case is a figure of \$1,000.

[43] However, I think that figure ought to have some uplift applied to it because I accept the submission made for West Auckland Aquatics that much of Mr Wright's claim in this matter that I have dealt with is simply ill conceived. It is difficult to see how the Authority could have reached any conclusion that would have justified the imposition of a compliance order because the moneys owed to Mr Wright in respect of the end of his employment have been paid. Moreover, the central plank of the penalty argument was statute-barred and Mr Wright was advised of that on 16 December 2015. The balance of the claim around penalties simply seems to be a subsequent reworking of the matter to try to find another basis on which the same penalty could be sought but without a proper legal basis. And the attempt to obtain costs on matters where Mr Wright has already agreed that costs are to lie where they fall does Mr Wright little credit.

[44] I accept West Auckland Aquatics' contention that it was put to the cost of resisting Mr Wright's various claims in a robust fashion and that the costs thereby incurred were only necessary because Mr Wright persisted in his claim notwithstanding its futility.

[45] Accordingly, I consider that the appropriate contribution that Mr Wright should make to the costs incurred by West Auckland Aquatics is in the sum of \$2,000

being twice the notional daily rate amount I have assessed for a matter of this kind dealt with as it was, on the papers.

[46] Mr Wright is to pay \$2,000 to West Auckland Aquatics as a contribution to the legal fees that West Auckland Aquatics incurred in successfully resisting Mr Wright's various specious claims.

Determination

[47] Mr Wright's various claims are all unsuccessful and as a consequence, he is not entitled to any relief.

[48] Mr Wright is to pay to West Auckland Aquatics the sum of \$2000 as a contribution to their costs.

James Crichton
Chief of the Employment Relations Authority