**IN THE EMPLOYMENT COURT**
**WELLINGTON**

**[2012] NZEmpC 130**
**WRC 42/11**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | CPC (NEW ZEALAND) LTD<br>Plaintiff |
| AND | MICHAEL WILLIAM DUNLOP<br>Defendant |

Hearing: (on submissions received 1 and 23 April 2012)

Counsel: Dennis Parbhu, advocate for the plaintiff
John Tannahill, counsel for the defendant

Judgment: 3 August 2012

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**JUDGMENT OF JUDGE A D FORD**

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[1] The plaintiff has challenged a costs determination[1] of the Employment Relations Authority (the Authority) dated 23 November 2011. Initially, the plaintiff elected not to seek a hearing de novo and the challenge was confined to paras [4] and [5] of the determination which related respectively to the alleged failure of CPC (New Zealand) Ltd (the plaintiff) to participate in mediation and its failure to pay monies owed to Mr Michael Dunlop. Subsequently, Mr Parbhu, the plaintiff's managing director and representative in the proceedings, sought leave to challenge the whole of the determination by way of a hearing de novo. The application was not opposed and leave was granted accordingly. The scope of the challenge was confirmed in a minute issued to the parties on 20 March 2012.

[2] By way of background, Mr Dunlop was employed by the plaintiff as a salesperson specialising in the sale of cleaning and related products. He commenced

[1] [2011] NZERA Wellington 189.

his employment on or about 31 March 2008. On 1 June 2010, he received a text message from Mr Parbhu that his employment was terminated on the ground of redundancy. Mr Dunlop then raised an employment relationship problem with the Authority alleging that he had been unjustifiably dismissed. In a determination[2] dated 23 September 2011, the Authority agreed and held that the dismissal was unjustified. In terms of remedies, however, the Authority concluded that as Mr Dunlop had been able to obtain alternative employment almost immediately he had not suffered any economic loss nor had he provided any evidence of injury to feelings or other non-economic loss. No order was, therefore, made as to compensation but the Authority ordered the plaintiff to pay Mr Dunlop $3,658.81 as holiday pay and $2,307.69 as payment in lieu of notice. An additional claim for penalties was dismissed.

[3] In its costs determination, the Authority recorded that counsel had sought a contribution of $5,000 plus GST. The particular paragraphs in the determination which the plaintiff takes exception to read as follows:

> [4] Further to whether there is any reason to depart from the notional daily rate approach discussed in *da Cruz*, Mr Tannahill pointed to difficulties in arranging mediation and to Mr Parbhu's eventual failure to participate. In the absence of any response from Mr Parbhu I accept Mr Tannahill's account.
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> [5] Further, Mr Parbhu demonstrated in the Authority that his focus was on his view that Mr Dunlop has been guilty of a breach of duty to CPC, and he has maintained consistently that he will not pay the monies owed to Mr Dunlop pending the addressing of his concerns. He was advised prior to and during the investigation meeting that he was not entitled to withhold payment in that way, as well as of the procedure to be followed in order to pursue his concerns. He chose not to commence that procedure until after the issue of the determination in the present matter.

[4] The Authority noted that the investigation meeting had lasted for half a day and on a notional daily rate basis of $3,500, Mr Dunlop would have been entitled to a contribution of $1,750. The Authority then commented: "I increase this amount to reflect Mr Parbhu's failure to participate in mediation, but against that I take into account that Mr Dunlop was not successful in all of his claims." The plaintiff was

[2] [2011] NZERA Wellington 147.

then ordered to contribute to Mr Dunlop's costs in the sum of $2,500, plus the Authority's filing fee of $71.56.

[5] Both parties agreed that the hearing in this Court would be determined on the papers and a timetabling order was made for the filing of submissions. In relation to the observations made by the Authority member about difficulties in arranging mediation and about Mr Parbhu's eventual failure to participate, Mr Parbhu stated in his submissions:

> 3. We strongly dispute that there were any difficulties in arranging mediation; we had made it clear that mediation was always an acceptable option providing it was by teleconference due to the fact that I am Auckland based; it was the other party that clearly failed to agree to this.
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> In our statement of claim response to the employment court under our paragraph 14 we say the following: ~Mike Dunlop's lawyer has accused us of failing to turn up to mediations, I request that he provide evidence of this before making these accusations, they clearly are lies, and are totally unprofessional and again should not be supported by the system as acceptable tactics in these sorts of proceedings. ...

[6] In relation to the observations made by the Authority about the plaintiff's failure to pay monies owed to Mr Dunlop, Mr Parbhu submitted that the company had not denied liability for holiday pay and pay in lieu of notice but he maintained that:

> ... the balance was being withheld until the respondent assisted in the calculation of the correct holiday pay amount and the satisfaction of obligations outlined in our employment agreement by Michael Dunlop; The other party refused to honestly respond to concerns and to satisfy us that they were not breaching the terms of our employment agreement and our arrangements for a friendly exit. ... Therefore all the time and cost incurred for John [Tannahill] is a direct result of the other party's failure to provide information as requested, and of course a function of their attempt to succeed with a substantial alternative claim.

[7] Mr Parbhu also made a number of other allegations against Mr Dunlop and his counsel, Mr Tannahill, and he attached to his submissions numerous emails and other exhibits. The difficulty is that virtually all of those other allegations related to the substantive determination of the Authority dated 23 September 2011 and there was no challenge to any part of that determination.

[8] In his succinct submissions in response dated 22 April 2012, Mr Tannahill noted that the plaintiff had been given an opportunity to respond to submissions he had made to the Authority in relation to costs on behalf of Mr Dunlop but it chose not to do so. Mr Tannahill noted that Mr Parbhu had declined to attend mediation in person on a number of occasions. He said that "In view of Mr Parbhu's history..." his proposal to participate in mediation by way of teleconference would have been "a waste of time." In a letter to the Authority, Mr Tannahill made the observation: "Mr Parbhu's excuse that he was based in Auckland is rejected because he travelled to Wellington often. The company is based in Lower Hutt." Mr Tannahill confirmed: "The plaintiff continues to refuse to pay wages and holiday pay as ordered by the Employment Relations Authority."

[9] After receiving the written submissions from the respective parties it became clear that the conflict in some of the allegations made, particularly as they related to the issue of mediation, could not simply be resolved on the papers. The other problem was that the allegations were made in the form of submissions by the parties' representatives without supporting affidavit evidence. On 7 June 2012, therefore, I made a request pursuant to s 181(1) of the Employment Relations Act 2000 for the Authority to provide the Court with what is commonly referred to as a good faith report. In my minute dated 7 June 2012 requesting the report I stated:

> 2. I call for the report because, pursuant to s 181(2), I considered, from the Authority's determination dated 23 November 2011, that the plaintiff may not have participated in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

[10] The Authority's good faith report was received by the Court on 31 July 2012. It was informative and comprehensive. I found it most helpful. Under the heading "**Attempts at mediation**" the Authority stated:

> [7] The Authority's file in relation to the procedure prior to the investigation meeting shows:-
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> (i) CPC failed to file a statement in reply by the due date of 26 April 2011, was given an extension of time to 9 May, and following further prompting from a support officer a filed statement in reply on 10 May 2011;
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> (ii) The Authority referred the matter to mediation on 16 May;

(iii) The mediation service advised the Authority on 26 May that CPC would attend mediation only by telephone, while Mr Dunlop would attend only in person;

(iv) On 30 May the Authority took steps [to] convene a case management teleconference, but CPC asserted it was unavailable until mid-July;

(v) The Authority issued a direction to mediation on 1 June 2011;

(vi) The Authority continued efforts to convene a teleconference by proposing suitable dates, and the mediation service sought agreement on dates for mediation, but CPC did not reply to any approaches;

(vii) A teleconference was convened on 14 July, and the matter was scheduled for an investigation meeting although the members noted that there was time in the interim to attempt mediation.

[11] The good faith report then went on to outline the plaintiff's failure to file a response to the defendant's application for costs:

> **Failure to respond to application for costs**
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> [9] The substantive determination provided at [39] that any party seeking costs would have 28 days in which to do so, while the responding party would have 14 days from the date of receipt of an application for costs in which to file and serve a reply.
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> [10] Counsel for Mr Dunlop sought costs in the memorandum dated 21 October 2011. Any reply was due on 4 November 2011. Following prompting from a support officer Mr Parbhu for the respondent asserted on 11 November 2011 that he did not understand the associated correspondence and said further that he would reply on the following Monday, 14 November.
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> [11] No reply was received.

[12] Towards the end of its good faith report, the Authority made a number of relevant comments including comments on submissions it had received from Mr Parbhu on its draft report. I do not intend to refer to all the observations made by the Authority but its conclusions were very clear. It referred to:[3]

> ... numerous delays and failures to respond on the part of CPC through its managing director Dennis Parbhu regarding: the filing of a statement in reply; participation in a teleconference with the Authority; arrangements for mediation; and a response as to costs.

[3] At [13].

[13] The Authority's conclusions are probably best summed up in the following passage:

> [15] I take into account that CPC was not represented by a professional advocate, but there were delays and failures to respond at every step of the investigation process. I consider that the cumulative effect of these delays and failures to respond obstructed the Authority's investigation. ...

[14] The Authority Member also confirmed that during the investigation meeting on 1 September 2011, "When Mr Parbhu persisted in asserting that he would withhold payment owed to Mr Dunlop" she informed him "that he was obliged to make the payment, could not withhold it, and would have to pursue a claim of his own if he sought recompense from Mr Dunlop." Notwithstanding those clear directions, Mr Parbhu has continued to refuse to make payment.

[15] I have taken into account all of the submissions made by Mr Parbhu in support of the plaintiff's challenge, including his comments on the Authority's draft good faith report, but I have not been persuaded to the required standard of proof that there was any error in the Authority's costs determination. On the contrary, in adopting a notional daily rate figure of $3,500 and then in adjusting that figure to reflect both Mr Parbhu's failure to participate at mediation and Mr Dunlop's failure to succeed in all of his claims, the Authority correctly applied the principles set out by the full Court in *PBO Ltd v da Cruz*.[4]

[16] The challenge is dismissed. To avoid the successful defendant having to incur further legal expenses if submissions on the costs of this challenge were called for, I hereby fix those costs in favour of the defendant in the sum of $750.

A D Ford
Judge

Judgment signed at 9.30 am on 3 August 2012

[4] [2005] ERNZ 808; [2005] NZELR 808.