

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2012] NZEmpC 138
WRC 21/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN YEE T/A TURANGI CABINS &
HOLIDAY PARK
Plaintiff

AND TONY JAMES WALLACE AND
KATHLEEN AGNES MARAEA
HUDSON
Defendants

Hearing: (on the papers by way of memoranda filed 8 and 10 August 2012)

Counsel: Bill Bevan, counsel for the plaintiff
Graeme Ogilvie, counsel for the defendant

Judgment: 13 August 2012

SUPPLEMENTARY JUDGMENT OF JUDGE A D FORD

[1] In my substantive judgment¹ dated 24 July 2012, I dealt with a challenge by the plaintiff to a determination² of the Employment Relations Authority (the Authority) dated 27 May 2010. I upheld the challenge and found that the defendants had not been dismissed by the plaintiff. However, as the plaintiff had failed to participate in the Authority's investigation, I declined to make an award of costs in his favour.

[2] There was a separate claim that had been made by the defendants for arrears of wages and holiday pay which had not been disputed by the plaintiff at the hearing. In relation to that claim, the parties were directed to file a joint memorandum

¹ [2012] NZEmpC 117.

² WA 101/10.

confirming the figures to enable a consent order to be issued. In the course of that process some minor differences arose which have been outlined in helpful memoranda from each party. I now deal with those issues.

[3] There was no disagreement over the respective amounts payable by the plaintiff to the defendants. They can be summarised as follows:

Mr Wallace:

(a) Unpaid wages after tax for the period 5 June 2009 until 7 December 2009	\$4,800.00
(b) Holiday pay (net)	\$2,160.00
(c) Day in lieu (net)	\$142.86
	TOTAL: \$7,102.86

Ms Hudson:

(a) Unpaid wages after tax	\$2,840.00
(b) Holiday pay (net)	\$2,160.00
(c) Day in lieu (net)	\$142.86
	TOTAL: \$5,142.86

[4] Mr Ogilvie, counsel for the defendants, claimed interest in his memorandum but interest was not claimed in the pleadings and, as Judge Travis stated in *Ora Ltd v Kirkley*,³ unless interest is pleaded, there is no basis for the Court to make an award.

[5] Mr Ogilvie has applied for costs on the arrears of wages/holiday pay aspect of the claim in the sum of \$2,000. Mr Bevan, counsel for the plaintiff, has submitted that, as with the substantive hearing, costs should lie where they fall.

[6] I must say that I have some sympathy with Mr Ogilvie's application. Mr Yee had challenged the whole of the Authority's determination. If the challenge had specifically excluded that part dealing with the claim for arrears of wages and holiday pay then the situation would have been different. As it was, however,

³ [2010] NZEmpC 6 at [28].

Mr Ogilvie was required to brief and call evidence on these issues because it did not become clear until the hearing itself that the claims for arrears of wages and holiday pay were not in dispute.

[7] The principles relating to any award of costs in this Court are well established and need not be repeated - see *Binnie v Pacific Health Ltd.*⁴ Mr Ogilvie has provided no particulars of how the sum claimed of \$2,000 is made up but I am prepared to accept, for the reasons mentioned above, that it is appropriate to make some award and the amount I fix in this regard is \$750.

[8] The final matter relates to the sum of \$100,000 which was ordered to be paid into the High Court pending the outcome of both this proceeding and another claim between the parties presently pending in the District Court. Mr Bevan seeks an order allowing for the release of the \$100,000 plus interest into the trust account of Kapimana Legal Services Ltd on his undertaking to pay the amount awarded in respect of the defendants' wages claim from that fund to the defendants. Mr Ogilvie has correctly pointed out however, that the amount paid into the High Court arising out of Mr Yee's bankruptcy was to meet two pending claims. First, the matter which has now been dealt with by this Court and secondly a dispute over an alleged loan involving more than \$13,000 which Mr Ogilvie advises is still to be heard by the Disputes Tribunal.

[9] Mr Ogilvie has confirmed that there is no objection to the amounts payable to the defendants being paid through the Trust Account of Kapimana Legal Services but he requires the amount of \$15,000 to remain with the High Court until resolution of the claim relating to the alleged loan.

[10] I agree with Mr Ogilvie's proposal. Accordingly, subject to the consent of the High Court, I hereby order the total amount held by the High Court (including interest earned), less the sum of \$15,000, to be paid out to Kapimana Legal Services Ltd on Mr Bevan's undertaking to pay \$12,245.72 to the defendants and \$750 to Mr Ogilvie.

⁴ [2002] 1 ERNZ 438.

A D Ford
Judge

Judgment signed at 1.00 pm on 13 August 2012