

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 92
ARC 38/12**

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

BETWEEN ALLAN WEBB
Plaintiff

AND SAPPHIRE HOSE
Defendant

Hearing: By memoranda of submissions filed on 3 and 24 September
2012

Appearances: Garth O'Brien, counsel for plaintiff
Hamish Burdon, counsel for defendant

Judgment: 28 May 2013

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] In a determination of the Employment Relations Authority¹ at Auckland, the defendant Ms Sapphire Hose was found to have suffered a personal grievance by unjustified disadvantage and she was granted remedies against the plaintiff, her then employer. Her application for reimbursement of wages was not granted because of the nature of her employment as a casual employee with no fixed hours. In addition, because of a medical condition, she had been absent from the workplace for an extended period and was, at the time of the determination, unable to work. However, because of the findings she was awarded compensation in the sum of \$2,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). The determination stated that this payment was to “compensate her for the legally

¹ [2012] NZERA Auckland 162.

unsustainable disciplinary process". She was also held to be entitled to reimbursement of the filing fee which she had paid to the Authority of \$71.56.

[2] The Authority Member made it plain in the determination that while the employment relationship continued to exist between the parties, it was clear that would need to come to an end in the circumstances. Mention was also made in the determination of a sum of \$1,100 which the plaintiff had lent to Ms Hose. The Authority Member indicated that it would be sensible on the basis that the employment relationship was to come to an end for Ms Hose to repay that loan from the compensation she was awarded and that would then leave a balance of \$900 owing by the plaintiff.

[3] Insofar as costs are concerned, these were reserved in the determination. The Authority Member urged the parties to endeavour to resolve the issue of costs between themselves, and this would seem to have been a sensible suggestion in view of the total quantum of the awards. In the event, resolution appeared not to have been possible, and the parties then filed submissions with the Authority asking it to make a formal award of costs. The Authority Member had already indicated that costs would follow the event and in view of the fact that Ms Hose was successful in her application she could expect to receive a contribution towards her costs from the plaintiff.

[4] Following the receipt of submissions the Authority Member made an award of costs in a determination dated 31 May 2012.² The plaintiff has now filed a non-de novo challenge to this Court against that determination on costs.

Costs award in the Authority

[5] The determination notes that Ms Hose, through her advocate, sought an award of costs of \$3,000 having incurred total fees of \$4,882.55 inclusive of GST and disbursements. (The bundles of documents show the final fees may have been greater than this sum.)

² [2012] NZERA Auckland 185.

[6] The Authority Member noted that counsel for Mr Webb had alleged that the level of fees charged to Ms Hose was inappropriate by virtue of the fact that she was not represented by legal counsel, but an advocate. The member of the Authority dismissed that suggestion on the basis that advocates regularly appear, not only before the Authority, but also the Court and that traditionally there has been no differentiation made on this ground.

[7] Counsel for Mr Webb had also suggested in correspondence with Ms Hose's representative that an award of \$300 might be appropriate and that different principles should apply on the basis that Ms Hose was represented by an advocate rather than legal counsel.

[8] Following consideration of the legal authorities applying to such applications for costs, the Authority Member decided to apply a daily tariff approach to the matter and on that basis adopted a starting point of \$1,750. In addition a further sum of \$500 was added. The Authority Member considered \$1,750 was insufficient having regard to the total costs incurred proportionate to the remedies. The determination also ordered reimbursement of travel costs incurred by Ms Hose's advocate amounting to \$189.60.

The basis of the challenge

[9] Clearly this matter involves a relatively small amount of money. Having regard to the proceeding undertaken to obtain the substantive remedies it does not take too much imagination to see that the further costs that are now going to be incurred in respect of this challenge on costs alone are going to make this matter entirely uneconomic for the parties involved.

[10] Following the filing of the challenge with the Court, a telephone conference was conducted by Judge B S Travis with counsel and advocate. While initially Mr O'Brien, for the plaintiff, was proposing that in addition to written submissions there should be a further hearing so that oral submissions could be made, it has now been agreed that this matter can be dealt with on the papers. That is clearly the economic and sensible way to proceed with the matter. Mr O'Brien for the plaintiff has filed

submissions and Mr Burdon, advocate for the defendant, has filed submissions in answer. Mr O'Brien has indicated that he does not wish to file any further submissions in reply to those of Mr Burdon. In addition to the submissions an affidavit dated 4 September 2012 has been sworn and filed by the plaintiff. Mr Burdon has filed two bundles of documents to accompany his submissions.

[11] As indicated the plaintiff does not seek a full hearing of the matter by way of a hearing de novo, but seeks a hearing only in relation to the issues set out in the statement of claim.

[12] In his submission, on behalf of the plaintiff, Mr O'Brien has referred to *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.³ He has identified principles arising from that decision and related them to the circumstances of the present case. As to the costs award against Mr Webb, in summary Mr O'Brien submitted that in exercising the discretion, the Authority Member has not exercised the discretion in a principled way. He submitted that because there was no award for wages, the applicant was not fully successful in her claim. He pointed to the fact that there was also a reduction from the award to take account of the fact that the defendant, Ms Hose, owed money to the plaintiff and that this was deducted from the compensation. He further submitted that the Authority Member inappropriately related the level of costs finally awarded as further compensation rather than on proper principles. He also submitted that the daily rate tariff should not be applied in a rigid manner; that in this case the advocate for the respondent had not provided a proper breakdown of total costs alleged to have been charged to her in respect of the Authority's investigation. Finally he submitted that in view of the fact that the ultimate award in this case was only \$900 that the total award of costs was out of all proportion.

[13] Mr Burdon in his submission responded to these submissions. He emphasised that the award to Ms Hose was not \$900 but rather \$2,000. The fact that she owed money and that it was agreed that would be deducted from the compensation does not alter the level of award made under the provisions of the Employment Relations Act. Mr Burdon rejected the suggestion that because he was

³ [2005] 1 ERNZ 808.

an advocate rather than legal counsel, that in some way affected the quantum of the costs awarded. Some mention was made in Mr Burdon's submissions of an offer to settle, but of course this is a non-de novo challenge and that is a matter which is not raised in the pleadings. Nor is it a matter specifically referred to by the Authority Member in the determination on costs.

Conclusions and disposition

[14] This being a challenge by way of a non-de novo hearing, the Court is limited to considering those matters, which had been specifically raised in the pleadings. What is essentially required here is an assessment of whether the Authority Member's determination is an appropriate decision based on the principles applying.

[15] The allegation that Mr Burdon is an advocate rather than legal counsel, is not an acceptable basis for challenging the determination. Ms Hose has incurred costs of substantially more than the tariff rate generally applied by the Authority. Mr O'Brien has really put forward no basis for submitting that the fees charged to Ms Hose are unreasonable. Indeed having regard to the documents that are available in this matter Mr Burdon's charges in respect of the attendances, would appear to be reasonably modest.

[16] Mr O'Brien's submission that the employer in this case has been totally successful in his claims is hardly tenable. It is true that Ms Hose did not succeed for her wages claim, however, that is not because of any success in any claim by the employer. It was rather that, because of the nature of her employment and her illness, it was not appropriate to make an award of wages. Nevertheless the primary findings were made against the plaintiff because of the manner he dealt with Ms Hose and the inadequacies in the procedures he adopted to attempt to discipline her. The fact that money was deducted from the award of compensation so that an outstanding loan could be repaid is a matter which is totally irrelevant to the consideration of costs. I agree with Mr Burdon that one has to assess this matter on the basis of an award of compensation of \$2,000, rather than the balance of \$900 after the loan was deducted.

[17] Insofar as the addition to the tariff is concerned, if one considers the determination carefully it can be seen that rather than using a costs award to increase total compensation to Ms Hose or endeavouring to apply some punitive measure against the plaintiff, the Authority Member has related it to the issue of whether having regard to the total costs incurred by Ms Hose a contribution on the standard tariff is proportionally adequate. The Authority Member has referred to other factors surrounding the investigation which in this case have meant that the ultimate fees incurred by Ms Hose with her advocate have been increased.

[18] As the Authority Member has stated, in this case Ms Hose has been completely successful in her personal grievance claim. For reasons not associated with any blame on her part she has been unable to succeed on the claim for wages. That does not mean that the employer plaintiff has been successful in any respect in the proceedings.

[19] Mr O'Brien has presented the submissions in support of the non-de novo challenge on the basis that the Court should review the basis upon which the Authority Member made the costs award. It is, in effect, limited to that consideration because of the way the matter is pleaded and that this is a non-de novo challenge.

[20] The suggestion by Mr O'Brien that costs should be limited to \$300 is simply untenable. His submission that there should be some discounting by 50 per cent to take account of the fact that Ms Hose was not successful with the wages claim is, in the circumstances disclosed, not accepted. Similarly unacceptable is his submission that the real compensation in view of a deduction for the loan was only \$900 as opposed to \$2,000.

[21] In a small claim such as this it is not too difficult to make an assessment, having regard to all of the attendances which would be involved, to reach a decision on the level of fees which, in all the circumstances, would be fair and reasonable. As I have already indicated, I consider the fees actually charged to be quite modest. Having considered the determination of the Authority Member, I am unable to find

any basis upon which a submission could be made that the decision is in breach of principle.

[22] An award of costs, as Mr O'Brien has correctly accepted, is a discretionary matter. The Authority Member in the determination has referred to the leading authority of the Court in respect of costs issues such as are involved in this case. The Authority Member has had regard to special circumstances prevailing in this case. The Authority traditionally applies a tariff approach when assessing costs. That can be departed from, either by way of discount or addition to take account of the special circumstances existing in an individual case.

[23] In all of the circumstances I consider that the award of costs made in the determination is appropriate and that the overall discretion has been properly exercised. I also consider it reasonable that an allowance be made for costs incurred by Ms Hose in reimbursing her advocate for travel expenses of \$189.60.

[24] Accordingly the challenge is dismissed. The costs award by the Authority of \$2,250 is confirmed and ordered by this Court to be payable. In addition to that the plaintiff is ordered to pay the respondent the sum of \$189.60 being the reimbursement of actual travel expenses incurred by her in having her advocate attend on her behalf. I further note that in the substantive determination the plaintiff was also ordered to reimburse Ms Hose for the filing fee in the Authority of \$71.56. If that is a matter which is subject to this particular challenge, then I also order that award of a disbursement is reconfirmed and is payable.

[25] This being a challenge to this Court in which the plaintiff has been unsuccessful, an issue arises as to the further costs now incurred. I will reserve the question of costs on this challenge but hope, as the Authority Member did, that there might be some sensible resolution on costs on the challenge. However, if no agreement can be reached, then the defendant has 14 days to file a memorandum containing submissions on costs. The plaintiff shall have a further period of 14 days

thereafter to file a reply and the Court will then make a decision as to costs on this challenge.

M E Perkins
Judge

Judgment signed at 3pm on 28 May 2013