

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 532

5331757, 5333144, 5333154,
5333159

BETWEEN

HANA MERITO
Applicant in 5331757

TINAKA MERITO
Applicant in 5333144

RITA PEKA
Applicant in 5333154

VARLENE SNELL
Applicant in 5333159

AND

TE RUNANGA O NGATI
AWA t/as NGATI AWA
TERTIARY TRAINING
ORGANISATION
First Respondent

NGATI AWA TERTIARY
TRAINING ORGANISATION
TRUST
Second Respondent

Member of Authority: R A Monaghan

Representatives: S Austin, advocate for applicants
J Humphrey, counsel for respondent

Memoranda received: 18 November and 1 December 2011 from applicants
18 November 2011 from respondents

Determination: 15 December 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a set of four determinations dated 20 October 2011 I found that Hana Merito did not have a personal grievance as defined in the Employment Relations Act 2000, and found that Tinaka Merito, Rita Peka and Varlene Snell had personal

grievances in that they were dismissed unjustifiably. I rejected the claims of all four applicants for the payment of monies owed.

[2] In addition I found that NATTO was the sole employer party in the respective employment relationships.

[3] Costs were reserved in all four determinations, and the parties have filed memoranda on the matter. Although separate determinations were issued in respect of the substantive matters, and separate memoranda were subsequently filed, all matters were heard together and it is convenient to address the claims for costs in a single determination.

[4] Finally, in her memorandum on costs in respect of Tinaka Merito, Ms Humphrey pointed out an error in the associated determination and asked that the error be corrected. That matter will also be addressed in this determination.

The claims for costs

[5] Mr Austin mentioned the principles in *PBO Limited v da Cruz*¹, but asserted that a tariff-based approach was not relevant and that contributions of 66% of actual costs incurred should be awarded in favour of Tinaka Merito, Ms Peka and Ms Snell. He submitted that Hana Merito's costs should lie where they fell.

[6] Accordingly the amounts were quantified as:

- . a contribution of \$4,182.75 be made to Tinaka Merito;
- . a contribution of \$4,054.05 be made to Rita Peka;
- . a contribution of \$4,054.05 be made to Varlene Snell; and
- . no order be made in respect of Hana Merito.

[7] Ms Humphrey also cited the *da Cruz* decision, and:

- a. on behalf of TRONA, referred to actual costs of \$4,377.50;
- b. on behalf of NATTO, referred to actual costs of \$11,907.50.

¹ [2005] ERNZ 808.

[8] Ms Humphrey did not otherwise specify any particular amount of costs to be awarded, or suggest a method of allocation. Instead she asked that a contribution be made to the respondents' costs in respect of the time taken in discussing Robinson Law's authority to act for the respondents, the unsuccessful claims of all of the applicants for monies owing, and Hana Merito's entirely unsuccessful claims.

[9] Reference was also made to the parties' having embarked on settlement negotiations after the investigation meeting and before the issue of the determinations. Mr Austin made a settlement proposal in a letter dated 6 July 2011 – one month after the investigation meeting in the Authority. Ms Humphrey replied on behalf of both respondents in an offer stated to be without prejudice save as to costs, which was produced. The offer was dated 25 July 2011 and proposed a lump sum payment of \$20,000 to be distributed among the applicants as they saw fit. The offer was open for 7 days from the date of the letter or until the Authority's determination was received, whichever occurred first. It was not accepted.

[10] I do not take that matter into account in costs because, even if the respondents' offer was similar to or more than the total awarded by the Authority, by then the very substantial majority of all parties' costs in the Authority had already been incurred. Taking into account those costs, it cannot be said that the applicants would have been better off as a group if the offer had been accepted.

Determination of costs

[11] The investigation meeting took three days. On an overall notional daily rate, and with reference simply to the length of the meeting, an award of costs would be \$9,000 if a daily rate at the lower end of the range of awards was applied and \$11,250 if a daily rate at the higher end was applied.

[12] The total of the amounts proposed by Mr Austin in favour of the applicants was \$12,290.85, which is reasonably close to the range identified above. However while I acknowledge there are complications in assessing costs arising from the way in which this matter proceeded and its outcome, setting costs on the basis of 66% of costs actually and reasonably incurred is not usual in the Authority. I do not accept

that the circumstances here are sufficiently unusual to make the application of a notional daily rate irrelevant. The conduct of the matter and the substance of the problems were relatively straightforward, and an alternative approach to costs is not required.

[13] When assessing costs it is appropriate to consider the extent to which the parties were successful. I now turn to that matter.

1. Authority to act

[14] An unnecessary amount of time was taken with the attempt to challenge Robinson Law's authority to act in the employment relationship problem. This was particularly so as no factual basis for the concerns expressed was provided.

[15] In addition the applicants were unsuccessful in their claims that TRONA was the employer. It was necessary to hear evidence and argument on the identity of the employer, causing the respondents to incur costs that need not have been incurred.

[16] As a reflection of the time taken in addressing these matters during the investigation I allocate a notional half day for costs purposes. On a notional daily rate approach the adjustment falls in a range of \$1,500 - \$1,875. Bearing in mind evidence that the applicants have been unemployed between the termination of their employment and the date of the investigation meeting, so that their ability to pay is likely to be impaired, I make the adjustment with reference to the lower of these figures being \$1,500.

2. Claims for monies owing

[17] The applicants were also unsuccessful in their claims for monies owing. There were difficulties variously with the quantification of the claims and the production of documents when they were requested before the investigation meeting, although some of those difficulties were associated with the overall failures in management prior to mid-2010 and discussed in the substantive determinations. In a costs context, the above considerations lead me to decide on balance to make no adjustment in respect of costs flowing from the claims for monies owing.

3. The personal grievances

[18] Tinaka Merito, Rita Peka and Varlene Snell were successful in their personal grievances and are entitled to a contribution to their costs.

[19] I do not accept in principle that costs should lie where they fall in respect of Hana Merito's unsuccessful grievance. From a practical point of view however, a substantial proportion of the evidence relevant to Hana Merito's grievance was also relevant to the three other grievances in general and to Rita Peka's grievance in particular. Only a relatively small amount of time was dedicated to Hana Merito's unique circumstances so I make no further adjustment in that respect.

[20] I conclude that an order falling approximately in the mid-point of the range of notional daily rates is appropriate. As the employer party, NATTO's contribution to the costs of Tinaka Merito, Rita Peka and Varlene Snell in respect of a three day investigation meeting is \$10,000 before any adjustments are made.

4. Overall order for costs

[21] The effect of the above conclusions is that the employer's contribution to the costs of Tinaka Merito, Ms Peka and Ms Snell in the sum of \$10,000 is adjusted by \$1,500 to reflect the unsuccessful aspects of the claims of all four applicants. The balance is \$8,500.

[22] NATTO is therefore ordered to pay \$8,500 to the applicants as a one third share each to Tinaka Merito, Rita Peka and Varlene Snell, or \$2,833.33 each.

Application for correction of error

[23] The determination in *Tinaka Merito v TRONA and NATTO*² contained an error. It said at [60]:

Accordingly I calculate Ms Merito's loss as follows. The three-month period under s 128(2) commenced on 9 November 2010, when the employment terminated. Ms Merito was paid to 17 December, which was 6 weeks' pay.

² [2011] NZEmpC 450

The loss is:

$[13 - 6] \text{ weeks} \times \$1,000/\text{week} = \$9,000$

reduced to

$\$9,000 - (25\% \times \$9,000) = \$6,750$

[24] Thirteen weeks - 6 weeks = 7 weeks. The calculation should have been:

$[13 - 6] \text{ weeks} \times \$1,000/\text{week} = \$7,000$

Reduced to

$\$7,000 - (25\% \times \$7,000) = \$5,250.$

[25] In support of her request that the error be corrected - which I approach as if it incorporated an application for recall of the determination to make the correction - Ms Humphrey cited *Trotter v Telecom Corporation of New Zealand Limited* where the Employment Court said:

... I am functus officio ... This convenient Latin phrase refers to a rule that once a court has delivered judgment it cannot add to, amend, or detract from the judgment that has been delivered. There are recognised exceptions to the rule to enable the correction of an accidental slip or error resulting in the judgment not correctly stating what the Court actually decided and intended.³

[26] The exception to the functus officio rule was invoked here in that there was an accidental slip, so that the determination did not correctly state what had actually been decided. The Employment Relations Authority does not have any express power by statute or regulation to recall a determination, although the Employment Court has said more recently of its powers in matters of this kind:

[22] I agree with the Judges and commentators in other cases who say that the power for this Court to recall a judgment exists, is discretionary and must ultimately depend upon the interests and administration of justice and its exercise on a case by case basis. On the one hand, the certainty of a judgment delivered is an important element of the administration of justice. The process of appeal exists to correct errors in reasoning and findings. As against that, there will always be aspects of judgments, particularly complex judgments, that Judges get wrong from

³ [1993] 2 ERNZ 935, 941

*time to time and are obviously illogical or so obviously problematic that they should be corrected without putting the parties to the delay, expense and uncertainty of the appellate process. ...*⁴

[27] More recently still, a supplementary judgment of the Employment Court in *Muldoon v Nelson Marlborough District Health Board*⁵ set out a helpful discussion of the ‘slip or error’ cases.

[28] Although the court was discussing its own powers, the underlying point concerned exceptions to the *functus officio* rule so that the approach embodied in the judgments is appropriate for to the present matter. In that the Authority was *functus officio* save as to costs at the time the application was made, it retained a common law discretion of the same kind available to the court to recall the determination to correct a slip or error.

[29] Mr Austin submitted that the request should be declined because: it was not properly raised; it would in any event be opposed; granting the request now would materially alter the determination at a time that was outside the time limit on filing a challenge to the determination with the attendant prejudicial effect on the approach taken to the decision on whether to challenge; it was not raised in a timely way; and the respondents could have challenged the determination but did not do so.

[30] Presenting the application to recall as a separate application rather than in the text of a memorandum on costs would be preferable. On the other hand the covering letter drew attention to the presence of the issue, and the arguments in support were clearly set out in the memorandum. Mr Austin was able to and did answer them. Accordingly I do not consider the method of raising the application means the application was not properly raised and should not be addressed.

[31] In that the error was essentially arithmetic and could readily be identified from reading the determination, it is a slip or error of a kind that is best addressed by the recall and re-issue of the determination. Further to the submissions that the respondents could have challenged the determination in order to have the error

⁴ *Gilbert v Attorney General in respect of the CEO of the Department of Corrections (No 1)* [2006] ERNZ 1

⁵ [2011] NZEmpC 115

corrected, the decisions cited above make it clear that such an approach is not required.

[32] Mr Austin also indicated that a relevant factor in the decision on whether to pursue a challenge was the view that Ms Merito had been awarded \$1,500 more than was actually the case. Although the time limit on filing a challenge has passed, there is a procedure available for seeking leave to challenge out of time. Accordingly I do not accept that the point counts against the Authority recalling the determination and correcting the error.

[33] Finally I do not accept that the application should be declined on the ground that it was not made in a timely way. The determination will be recalled to correct the error. The calculation set out at [60] of the determination will be replaced with that set out at [24] of this determination.

Summary of orders

1. Costs

[34] NATTO is ordered to contribute to the costs of Tinaka Merito, Rita Peka and Varlene Snell in the sum of \$8,500, as a one third share or \$2,833.33 each.

[35] NATTO is further ordered to reimburse Tinaka Merito, Rita Peka and Varlene Snell for the filing fees of \$71.56 each.

2. Recall of determination

[36] The determination in *Tinaka Merito v TRONA and NATTO* is recalled and is to be replaced by a determination containing the following correction: the calculation set out at [60] of that determination is to be replaced with the calculation set out at [24] of this determination.

R A Monaghan

Member of the Employment Relations Authority