

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 344  
5361439**

BETWEEN

JAYA KINGI, GRANT  
HUGHES, KARINA KAU  
KAU, HANNA AKURANGI,  
ROBYN BOYNTON,  
JANETTE HUNT, BARBARA  
ALLISON, ANNE  
O'HALLORAN, DAYLE  
WILLIAMS  
Applicants

BAY OF PLENTY DISTRICT  
HEALTH BOARD  
Respondent

Member of Authority: R A Monaghan

Representatives: S Austin, advocate for applicant  
G Bingham, counsel for respondent

Memoranda received: 11 September 2012 from applicants  
27 September 2012 from respondent

Determination: 10 October 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 14 August 2012 I addressed various claims in respect of meal and rest breaks including matters of statutory interpretation, whether or not certain employees were correctly classified as casual employees, a rostering issue, and various related matters arising out of the parties' cea, and a claim for penalties.

[2] Costs were reserved and the parties have filed memoranda on the matter. Both the applicants and the respondent cited the principles in *PBO Limited (formerly Rush Security Limited) v da Cruz*.<sup>1</sup>

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<sup>1</sup> [2005] ERNZ 808

[3] Mr Austin sought an order for full costs in the sum of \$11,651.80 plus the filing fee of \$71.56. He submitted that the applicants should be regarded as the successful party overall, and relied on what he called a Calderbank offer.

[4] Ms Bingham said the respondent considers itself the successful party overall, but does not seek costs and requests that costs lie where they fall. She says the Calderbank offer is not a valid offer.

### **Which party was successful**

[5] There was a wide set of issues before the Authority for determination. I found in favour of the applicants in some matters, and for the respondents in others.

[6] In assessing which was the successful party overall I do not merely add up the numbers of successes and failures on each side and award costs to the party with the most successes. The question of who was successful in the various matters is relevant, but so is an assessment of the time and effort required to address each matter. In general if a party is successful in a significant and time-consuming matter that is likely to carry more weight in an assessment of costs than success in a minor or straightforward matter dealt with quickly.

[7] The meal and rest break matter was significant and time-consuming. The applicants were successful on the matter of statutory interpretation and in securing orders for the payment of penalties, although not in securing an order for the payment of penal rates under the cea.

[8] The respondent's position on this matter suffered from undue reliance on the terms of the cea, without taking proper account of the statutory requirements. The applicants' success was substantial and the respondent's, which on the claim for payment of penal rates turned on a simple issue of interpretation, was relatively minor. Had this matter been the sole matter before the Authority I would have awarded costs in favour of the applicants, with a small reduction to reflect the respondents' success.

[9] Resolving the status as casual employees of three of the applicants was also significant and time-consuming. Two of the applicants were successful and one was not. Further, the affected applicants were unsuccessful in obtaining many of the remedies they sought, although by the same token the respondent should have made its position regarding the accruing of annual leave clear far sooner than it did. Had these matters been the sole matters before the Authority I would have awarded costs in favour of the applicants, with a reduction to reflect the respondents' success in respect of one applicant and in respect of overall remedies.

[10] The rostering issue eventually centred on whether - as a matter of interpretation of the cea - agreement was required before a roster was changed. Although the applicants were successful, they could have dealt with the matter more efficiently than was the case by the time of the Authority's investigation, and in that respect their conduct of it contributed unnecessarily to the time taken to prepare for and investigate it. Had it been the sole matter before the Authority I would have awarded costs in favour of the applicants, with a small reduction to reflect their conduct of it.

[11] Finally the applicants were unsuccessful in obtaining a number of the remedies sought, and only one of the heads of claim for penalties was successful. For the most part these matters were not in themselves time consuming because they flowed from findings made in respect of the substantive issues. I have taken them into account in the above assessments.

[12] Overall, the applicants can be regarded as the successful parties and are entitled to an order for costs, with adjustments as indicated above.

### **The Calderbank offer**

[13] The offer which Mr Austin described as a Calderbank offer, but which is better described as a pre-meeting offer of settlement, was contained in a letter dated 16 January 2012 headed 'without prejudice save as to costs'. The offer was presented as a package and encompassed the issues which were the subject of the determination of 14 August 2012, together with one further issue between the same parties which is currently scheduled to be heard in the Authority.

[14] The package took the form of a series of proposals associated with each of the principal issues namely: the meal and rest breaks; the rostering provisions; and the status of employees as casual employees. I do not for now take account of the proposal regarding the further issue yet to be heard. Because of the overall structure of the proposal, and the nature of the issues between the parties, it is possible to sever the proposal regarding that issue and address it later if necessary.

[15] The proposals relevant to the present issues were:

- a. Regarding meal and rest breaks,
  - i. that the respondent undertake to use its best endeavours to comply with Part 6 of the Employment Relations Act, but that penalty payments would be made under the cea when this was not possible; and
  - ii. in return, that the applicants would refrain from seeking penalties and refrain from bringing claims for arrears of wages in respect of the penalty payments; and
- b. Regarding the casual status of the three employees, that,
  - i. all be classified as permanent part time employees,
  - ii. the respondent provide a minimum of 1 shift per week each for Ms Allison and Ms Williams and 2 shifts per week for Ms O'Halloran, and
  - iii. all receive credit for annual leave entitlements from the commencement of their employment, and that no recovery of the 8% loading paid to them in error be sought; and
- c. Regarding rosters,
  - i. that the respondent use its best endeavour to comply with its duties of good faith and to be a good employer,
  - ii. that the parties seek to establish and maintain good rostering practices and hours of work arrangements by consultation, and agreement where required under the cea, and
  - iii. in return, the applicants would refrain from seeking penalties.

[16] There was a further general provision under which the applicants would refrain from pursuing claims for penalties and a claim for the payment of interest.

[17] Pre-meeting offers of settlement are usually taken into account in a costs setting on the basis that they are relevant to whether the actions of a party have contributed unnecessarily to the costs of resolving a problem. Thus if a reasonable offer is rejected, it is likely to sound in costs.

[18] The reasonableness of an offer is assessed with reference to: the amount offered; whether and how costs to the date of the offer are provided for in the offer; whether the offer addresses other elements arising in the employment relationship problem, for example a wish for vindication if such a wish was known to be present; whether the offer is clear in its terms and enough time was given to consider it; what new or further costs were incurred after the offer was rejected; and the outcome in the Authority, with particular reference to whether the party who rejected the offer would have been better off if the offer had been accepted.

[19] With reference to the financial elements of the offer, although the payments and liabilities in question were not quantified in the offer nor in the evidence, I have enough information to consider it likely that the respondent is better off as a result of the Authority's determination than it would have been if it accepted the corresponding proposals in respect of the applicants as a group.

[20] Secondly, the respondent dealt with the matter internally and for the most part by its managers. I do not regard the lack of reference in the offer to costs as a relevant consideration. Similarly I do not take into account the effect of any pre-offer or post-offer costs, and in any event these were not identified.

[21] Thirdly, it is unusual to see an offer addressing elements other than financial elements to the extent this one does. In essence it requires the respondent to provide undertakings as to its future conduct, make concessions about matters of interpretation of the cea arising in connection with each of the three principal issues as I have identified them, and agree to new or clarified terms of employment for the three employees whose status was in question. Its scope makes it far more than an offer made in settlement of litigation solely or substantially on a financial basis, and it extends deeply into other elements arising in the employment relationship.

[22] This aspect of the offer, together with the applicants' mix of significant success in their substantive arguments but relatively less success in obtaining the remedies sought as a result, complicate the assessment of whether the respondent would have been better off if it had accepted the applicants' offer.

[23] Finally, the offer was clear in its terms, and sufficient time was given to consider it.

[24] The extent and complexity of the matter, together with the parties' mixed degrees of success, mean I do not consider an order for the payment of full costs is appropriate.

[25] On balance I find, too, that an assessment of the proposal as the package it was intended to be does not support a conclusion that the respondents would have been better off to have accepted the proposal. Accordingly I make no adjustment for it in costs.

### **Determination**

[26] I determine costs with reference to the fact that the investigation lasted for the equivalent of 1.5 days, so that at a notional daily rate of \$3,500 the starting point is \$5,250.

[27] I have concluded that the applicants should be considered the successful party overall, and that they are entitled to a contribution to their costs.

[28] I have also concluded that some adjustments should be made to reflect the respondent's successes. Applying those adjustments I conclude that the respondent should contribute to the applicants' costs in the global sum of \$4,500.

[29] Payment is ordered accordingly.

R A Monaghan

Member of the Employment Relations Authority