

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 28  
5342658

BETWEEN                      NICOLA FLEURY  
   Applicant

A N D                              ASHBURTON      PASTURES  
   LIMITED INCORPORATING  
   HELLABY      MEATS      (SI)  
   LIMITED      t/a      RAEWARD  
   FRESH  
   Respondent

Member of Authority:      Helen Doyle

Representatives:              Janie Kilkelly, Counsel for Applicant  
   Penny Shaw, Counsel for Respondent

Submissions Received:      19 December 2012 from Applicant  
   24 January 2013 from Respondent

Date of Determination:      11 February 2013

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

**A      Ashburton Pastures Limited are to pay costs to Nicola Fleury of \$5200  
         and disbursements of \$1018.06**

[1]      In my determination dated 6 December 2012 the respondent was ordered to pay the applicant the sum of \$16,770.98 under clause 17 of her 1996 employment contract in the event of redundancy together with an amount for reimbursement of uniforms that she had purchased for other employees in the sum of \$1,103.47. Two personal grievances were found not to have been raised within 90 days. The issue of

costs was reserved and a timetable was set for an exchange of submissions by counsel. Submissions have now been received from both counsel.

### **The applicant's submissions**

[2] Ms Kilkelly submits that the actual costs for the applicant excluding mediation are \$22,888.72 and that 85 to 90% of the costs were in relation to the redundancy claim. Ms Kilkelly submits that the existence of the earlier 1996 employment contract should have been known to the respondent. She submits that had the respondent not mislaid the document then the entire case including the personal grievance situation would not have arisen.

[3] Ms Kilkelly submits that the following matters call for an award of a higher percentage of actual costs to Ms Fleury:

- That the applicant had to prove the existence of the 1996 employment contract.
- Affidavits from witnesses relevant to the existence of the employment contract were required.
- There was provision of other collective employment agreements that had to be obtained from union sources.
- A telephone conference to discuss the prospect of resolution after affidavits had been provided.
- Costs of bringing witnesses from elsewhere to the hearing with respect to the authenticity of the 1996 employment contract.

[4] Ms Kilkelly submits that a contribution to costs of \$15,000 would be appropriate in the circumstances. She provided details to the Authority subsequently about travel expenses for two Rangiora based witnesses summonsed to give evidence in Dunedin about the 1996 employment contract.

### **The respondent's submission**

[5] Ms Shaw submits that the sum of \$5,000 as a contribution to costs was originally claimed in the statement of problem and if there are to be costs awarded to the applicant then they should not exceed that amount.

[6] She submits that at the time the applicant was made redundant she was offered the sum of \$10,476 as redundancy compensation in addition to other contractual and statutory entitlements but refused that offer. I do record here that it was subsequently raised by the applicant on receipt of Ms Shaw's submission that the sum of \$7,846 was offered to her as redundancy compensation in a letter dated 18 February 2011. I shall return to that matter.

[7] Ms Shaw submits that the respondent was successful in its argument about the personal grievances not being raised within the time frame and therefore both parties had an element of success. Ms Shaw refers to the leading judgment of the full Court of the Employment Court in *PBO Limited (formerly Rush Security Limited) v da Cruz* [2005] ERNZ 808 and submits that the Authority should take as its starting point in the exercise of its discretion as to costs the relevant daily tariff now recognised as \$3,500. Ms Shaw submits that taking into account the daily tariff, that the respondent successfully defended significant parts of the applicant's claim and made a reasonable offer at an early stage which was rejected, costs should lie where they fall and she further places emphasis on the fact that there was no evidence of the costs incurred aside from Ms Kilkelly's reference to them in her submission.

### **Determination**

[8] Costs usually but not always, follow the event. Ms Shaw in this case has submitted that costs should lie where they fall because the respondent also had success in arguing that the personal grievance claims were not raised in time and made a reasonable offer at an early stage.

[9] The applicant I find was successful on the most significant claim before the Authority for payment of redundancy under her 1996 employment contract. It would be wrong in those circumstances to deprive her of costs although the fact that she was unsuccessful with her personal grievances as they were not raised within time may be taken into account by the Authority in the exercise of its discretion as to the amount of an award of costs.

[10] I turn to the offer to pay redundancy compensation which was contained in a letter from the respondent dated 18 February 2011 and handed to Ms Fleury when she was advised that her position was redundant. The offer was withdrawn on 15 March 2011 after Ms Fleury advised that she wished to be paid what was the amount under

her 1996 employment contract. It was withdrawn therefore before the statement of problem was lodged with the Authority. The sum that Ms Shaw has referred to as having been offered for redundancy of \$10476.61 includes an amount of \$2630.61 described as 8% gross earning. There is an element of confusion because there is another amount in the letter referred to as outstanding annual leave but nevertheless the additional \$2630.61 amount does appear to be a holiday payment rather than redundancy compensation. The amount besides the words redundancy payment is \$7846. That is less than what the applicant was entitled to under her 1996 employment contract. For all of the above reasons I am not satisfied that the offer made on 18 February 2011 is a persuasive factor for costs to lie where they fall.

[11] I now turn to the actual costs incurred and the witness expenses. The Authority asked for and was provided with copies of the invoices sent to the applicant for costs. Ms Shaw also received copies. Ms Kilkelly queried the request for invoices. Ms Shaw in her submissions said that in the absence of any evidence as to costs incurred it was not open to the Authority to award the applicant any costs. The Authority thought that in light of that submission and the amount sought for costs the most appropriate action was to simply call for copies of the invoices.

[12] The invoices provided are as follows:

- 28 September 2011 for \$1,879.94 included GST and a disbursement for the filing fee of \$71.56 and copying. The invoice was for costs related to attendance on the applicant, preparation and lodging of statement of problem and accompanying documents.
- 31 October 2011 for \$229.31 included GST and a disbursement for copying. The invoice was for costs related to attendances on the applicant by email and receipt of the statement in reply.
- 22 December 2011 for \$163.88 included GST. The invoice was for attendances with applicant by email and emails with Authority to arrange teleconference.
- 31 January 2012 for \$412.50 included GST plus disbursement for copying. The invoice was for attendances with applicant and one witness by email,

attendance on a directions conference with the Authority and subsequent advising of outcome and notice of hearing.

- 29 February 2012 for \$1782.50 included GST and disbursements for courier and copying. The invoice was for email attendance with the applicant and emails to Barry Blackmore who gave evidence that it was his signature on behalf of the employer on the 1996 contract and job offer letter. It also included the drafting of an affidavit for Mr Blackmore, forwarding sworn affidavit to Ms Shaw and a copy of the 1996 employment contract and appointment letter requesting reconsideration of employer position.
- 31 March 2012 for \$1265 included GST and copying disbursements. The invoice was for email attendance with the applicant and drafting an affidavit for Duncan Clarke who was the General Manager of Hellaby Meats at the time Ms Fleury was employed. It was also for subsequent attendances by email with Mr Clark relating to having his affidavit sworn and email attendances with Ms Fleury with respect to obtaining other relevant documents.
- 30 April 2012 for \$6,632.49 included GST and disbursements for courier and witness expenses. The invoice was for attendances regarding preparation of briefs of evidence, email attendances with Ms Shaw, collation of documents and preparing witness summons for Mr Blackmore and Mr Clark.
- 31 May 2012 for \$9,153.55 included GST and disbursements for copying and witness expenses. The invoice was for emails attendances, attendances in person, investigation meeting preparation and investigation meeting itself and completion of closing submissions.
- 30 June 2012 for \$1129.60 included GST and disbursement for copying. The invoice was for considering respondents submissions and preparation and finalisation of submission in reply.
- 31 January 2013 for \$575 included GST. The invoice was for cost related matters and submissions.

[13] There are the following witness expenses:

- Airfares for Mr Clark and Mr Blackmore from Christchurch in the combined sum of \$424.
- Money payable on service of the witness summons to each witness by way of conduct money for mileage from Rangiora to Christchurch and return of \$120.
- Car parking of \$45
- Two shuttle fares from Dunedin airport to the meeting room and return. At \$20 each way that is a total of \$80 for both witnesses.
- A meal allowance for up to two meals for each witness as set out in clause 7 of the Witness and Interpreters Fees Regulation 1974 at \$14.00 each meal for each witness in the sum of \$56.00 for both witnesses.
- Process server's fee for serving witness summons – account provided \$149.50.
- Witness fees for each witness in the combined sum of \$100.

[14] I arrived at a total for expenses of \$974.50 but Ms Kilkelly's figure for the expenses was \$946.50. The \$28 difference I believe is accounted for because the sum tendered by way of conduct money to each witness was \$114. That amount tendered of \$114 only included an allowance for one meal. On that basis then the witness expenses are as set out by Ms Kilkelly in the sum of \$946.50.

[15] The applicant in this case expended a greater amount in costs than she recovered. She was not entirely successful and other than the issues around the 1996 employment contract this was not a complex case legally or factually that would support an approach other than starting with a daily tariff and making any adjustments called for.

[16] In *PBO* the full Court of the Employment Court set out some basic tenets that the Authority had held to when considering costs. Amongst these principles were that awards in the Authority would be modest and that frequently costs are judged against a notional daily rate. It was recognised in *PBO* that the principles set out were

consistent with the functions and powers of the Authority recognising that each case has to be considered in light of its own circumstances. To avoid any unfairness with a daily tariff it can be adjusted by the Authority in a principled way up or down.

[17] The investigation meeting occupied one day. I start therefore with the usual daily allowance now recognised as \$3500. I accept that there were some additional expenses in this case where affidavits rather than statements of evidence were prepared for two witnesses on behalf of the applicant in an early attempt to resolve the matter without the need for an investigation meeting. They were provided before the investigation meeting to establish primarily that the 1996 employment agreement was in existence and authentic. That is an unusual requirement on an employee.

[18] Ms Kilkelly's charge out rate is \$275. That is a reasonable charge out rate for counsel of her experience. I find that there should be an adjustment upward of the tariff to reflect preparation of the affidavits, additional work with organising couriers and explaining to the deponents of the affidavits how to have their affidavits sworn, attempting to see if resolution could be reached short of the investigation meeting with Ms Shaw and an extra telephone conference with the Authority to discuss that as well. I take into account that statements of evidence may well have had to be prepared in any event for Mr Clark and Mr Blackmore and preparation for those would fall within the usual tariff.

[19] I have to balance the costs of trying to establish the authenticity and indeed existence of the 1996 contract with my finding that the applicant did not clearly advise the respondent about her earlier contract until 9 March 2011 notwithstanding negotiations for a new employment agreement with her took place in 2010. I also have to take into account the fact that although the respondent was not prepared to resolve matters about the redundancy payment on receipt of the affidavits from Mr Clark and Mr Blackmore there was an additional argument that there had been agreement by the applicant to a later employment agreement. I accept though that if there had been agreement as to the authenticity of the 1996 agreement then the issues would have been more confined and additional work could have been avoided or indeed the matter may well have been resolved altogether.

[20] Looking at that matter overall therefore it would be fair to allow an upward adjustment of five additional hours at \$275 which is \$1375. The expenses thereafter

are the witness expenses set out earlier for which the applicant is entitled to reimbursement.

[21] I also make an upward adjustment to the daily tariff for three hours work for final submissions in the sum of \$825. I do then make a downward adjustment of \$500 to reflect the respondent's success about whether the personal grievances were raised within time.

[22] In conclusion therefore I find a fair and reasonable award of costs to the applicant is \$5200.00.

[23] I find that the applicant is entitled to recovery of the witness expenses set out in paras. 10 and 11 of the determination above in the sum of \$946.50 together with the filing fee of \$71.56. I have also checked the other disbursements in each of the invoices but I am not satisfied that they involved the payment to third parties as opposed to office costs and make no award for those.

[24] I order Ashburton Pastures Limited to pay to Nicola Fleury the sum of \$5200 costs and \$1018.06 being disbursements.

Helen Doyle  
Member of the Employment Relations Authority