

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 112
5598859

BETWEEN PERFORMANCE CLEANERS
 ALL PROPERTY SERVICES
 WELLINGTON LIMITED
 Applicant

AND IOANA CORINA CHINAN
 Respondent

Member of Authority: Michele Ryan

Representatives: Barbara Buckett, Counsel for Applicant
 Mark Lawlor, Counsel for Respondent

Submissions received: 21 March 2017 from the Respondent
 1 May 2017 from the Applicant
 17 May from the Respondent

Determination: 16 November 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] In its application to the Authority, Performance Cleaners Wellington Ltd (PCW) alleged Ms Chinan had made unauthorised wage and holiday payments to herself and her mother, Iustina Chinan, reimbursed fictitious expenses, altered accounting records and misappropriated company funds. It sought to recover \$311,080.48 plus interest from Ms Chinan and property (or the value of it) said to be owned by the company.

[2] PCW's claims were dismissed in their entirety.¹

[3] The Authority has now received fulsome submissions from both parties on the issue of costs. Ms Chinan seeks an order for payment of actual costs of \$50,124.50 plus GST - in effect an award of indemnity costs. Alternatively, she seeks an uplift to

¹ *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZERA Wellington 15

the Authority's daily tariff to \$11,000. This is said to reflect unnecessary additional costs incurred due to the nature of the claims, the complexity of the issues and the conduct of the applicant throughout the Authority's investigation. Disbursements of \$2,421.04 are also sought.

[4] PCW says Ms Chinan's claim for indemnity costs is without merit. By inference it accepts that costs follow the event and submits the Authority's tariff approach should apply. PCW challenges the disbursements Ms Chinan has claimed.

The law

[5] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[6] Both parties in the matter referred to *PBO Ltd v Da Cruz*.² which provides guidance to the Authority when assessing costs. The principles set out in that judgement are so well known that it is unnecessary to restate these in full.

Should indemnity costs be awarded?

[7] In the courts of ordinary jurisdiction the imposition of indemnity costs is made only in exceptional circumstances where a party has behaved exceptionally badly. The misconduct must be flagrant.³ The same threshold is equally applicable in the Employment Relations Authority.

[8] In *Bradbury v Westpac Banking Corp*⁴ the Court of Appeal set out categories of cases where indemnity costs may be awarded, including where a party commences or continues with proceedings for some ulterior motive. Ms Chinan says PCW's

² [2005] ERNZ 808

³ *Bradbury v Westpac Banking Corp* [2009] NZCA 234 at [28]

⁴ *Ibid*

claims were constructed as a means to lawfully harass her where a Protection Order against Mr Barron exists.

[9] As noted in the substantive determination, concurrent to the employment relationship between the parties, Mr Peter Barron, the sole director of PCW, and Ms Chinan began a domestic relationship soon after she was employed. Both relationships ended in early 2012. There has been ongoing litigation between them in the Family, District and High Courts since that time.

[10] Counsel referred the Authority to a 2014 District Court order for indemnity costs against Mr Barron. His conduct (in those proceedings) was found to have unnecessarily increased Ms Chinan's costs and was intended to intimidate and harass her.⁵

[11] An award of indemnity costs in one proceeding, based on conduct in another, is not, of itself, a basis for awarding indemnity costs.⁶ I accept however that Ms Chinan does not rely solely on conduct in prior litigation. She points also to the history between herself and Mr Barron, service of these proceeding at her family home despite being legally represented, and Mr Barron's behaviour at the Authority's investigation meeting and subsequently, as matters that are relevant to an assessment for indemnity costs.

[12] Counsel for PCW asserts that Ms Chinan's reliance on circumstances between herself and Mr Barron did not involve PCW and should not be considered in an indemnity costs assessment.

[13] Liability for costs will rest with PCW as the legal entity that commenced proceedings. It would be artificial however to separate PCW from Mr Barron where, he acts as the controlling mind of PCW and must be taken to have resolved for PCW to pursue the claims the way it has.

[14] Whilst insensitive, I am not satisfied that service of proceedings at Ms Chinan's family home is sufficient to award indemnity costs. During the investigation meeting I asked counsel to remind Mr Barron of his obligations under the Protection

⁵ *Chinan v Barron* District Court Wellington, CIV 2012-032-000419 at [44]

⁶ *Ben Nevis Forestry Ventures Ltd & Ors v The Commissioner of Inland Revenue* CA51/2014 [2014] NZCA 348

Order, but his behaviour during proceedings could not be objectively construed as harassment.

[15] I have given careful consideration to the history between Ms Chinan and Mr Barron. I accept there is an appearance that PCW's claims were constructed for an ulterior purpose. For example, in the substantive determination I noted PCW sought wages from Ms Chinan where these had been paid to another individual, albeit her mother. Against that impression I am mindful of the threshold required to make an order for indemnity costs. Whilst I consider the matter finely balanced, the evidence concerning Mr Barron's conduct falls marginally short of demonstrating misconduct to such a flagrant extent that indemnity costs would be an appropriate consequence. I am unwilling to order indemnity costs in these circumstances.

The application of the Authority's daily tariff

[16] The generally accepted approach to assessing costs in the Authority is to begin by applying the notional tariff (\$3,500 per day at the statement of problem was lodged) and then assessing whether there are any factors which would warrant an uplift or downwards adjustment to the tariff. I have given particular regard to the following principles:

- the statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority; equity and good conscience is to be considered on a case by case basis;
- an award of costs should not to be used as a punishment or as an expression of disapproval of a party's conduct, although conduct which increased costs unnecessarily can be taken into account in terms of an award;
- the nature of the case can also influence costs.

The nature of the case

[17] The nature and volume of the allegations against Ms Chinan was significant particularly where there was an underlying inference that Ms Chinan had behaved fraudulently.⁷ The context in which the claims have arisen has put this matter outside the range of employment relationship problems generally lodged at the Authority, and the case was factually complex.

⁷ Submissions on behalf of PCW, 2 September 2016, pg 35.

[18] Ms Chinan was required to account for over 300 transactions involving PCW's payroll and accounting records, two other companies, two family trusts, and her personal accounts and credit cards. A significant proportion of evidence dating back over 10 years before PCW's application was lodged at the Authority.

Did the respondent's conduct unnecessarily increase costs?

[19] Counsel for Ms Chinan alleges PCW caused additional and unnecessary costs.

[20] First, PCW's initial statement of problem contained allegations (equating to approximately \$150,000) that were time-barred.⁸ I note also that the statement of problem made no reference at all to the domestic relationship between Mr Barron and Ms Chinan. Counsel for Ms Chinan was required to respond to those matters.

[21] There were also considerable difficulties throughout the Authority's investigation with PCW's provision of information as follows:

- The statement of problem also alleged Ms Chinan had characterised personal or fictitious expenses and had PCW reimburse her the cost of those items. The Authority requested PCW amend its statement of problem and quantify the claim. An amended statement of problem was furnished but the claim not quantified. Counsel then sought directions to have PCW particularise the claim including the sum sought, provide MYOB records identifying the expenses that were of concern, and evidence of expenses reimbursed.
- PCW's second amended statement of problem calculated the claim at \$72,180.05 but did not comply with the Authority's directions to provide MYOB records and/or evidence of reimbursement of expenses.
- In the absence of that information Ms Chinan was required to produce a volume of personal financial information including bank and credit card statements and cross reference individual transactions against PCW's records (which appear to have contained all of PCW's consumable and business related expenses incurred over an 18 month

⁸ Regarding alleged actions that occurred more than 6 years before the statement of problem was lodged.

period) to establish the expenses were legitimate.⁹ PCW's failure to provide the information specifying what expenses were at issue or any evidence of inappropriate reimbursement substantially increased Ms Chinan's preparation costs.¹⁰

- The timetabling for the exchange of evidence five months prior to the investigation meeting and was largely complied with. Part-way through the morning of the first day of the investigation PCW sought to produce further documentation. I requested both parties to hand up any additional written material it wished to rely on. PCW produced 14 more documents. Approximately half of those documents did not advance PCW's claim and were not admitted. None of these documents concerned MYOB data and I do not accept PCW's submission on the matter. I note PCW, purportedly to assist the Authority with document management, placed the inadmissible material into a supplementary bundle containing the admissible evidence the following day.
- On no less than 5 occasions over days 2 and 3, PCW sought to produce further documentation not previously furnished. No explanation was given as to why this material was not declared at the time of my request. The purpose of having parties exchange information prior to an investigation meeting is so that the Authority member and each party is able to review and consider the material before the testing of evidence begins. It is not acceptable for a party to hold back documents and seek to introduce these during cross-examination.
- The Authority's meeting was scheduled for 3 days. The second and third days were each incrementally extended with earlier start and later finish times. Overall the investigation meeting required a further 4.5 hours (in total) than generally allocated to a 3 day investigation meeting.¹¹ The extended time required to conclude the investigation was a direct result PCW's persistently disruptive methods to introduce

⁹ I accept also that these statements had been furnished to Mr Barron in prior litigation.

¹⁰ Over the course of the meeting PCW conceded that more than 80% of the alleged fictitious expenses were business expenses.

¹¹ Based on 7.5 hours per day.

evidence (as set out at [21] and [22]) and unnecessarily increased Ms Chinan's costs.

- In final submissions PCW expanded two claims beyond that set out in the second amended statement of problem¹² which counsel was required to respond to.
- A further 27 pages of documents not seen by the Authority were attached to PCW's final submissions as evidence. Counsel for Ms Chinan objected to that material.

[22] PCW appears to accept there was increased complexity to this matter but attributes that as "*mostly*" due to the accounting records created by Ms Chinan during her employment.¹³ PCW misrepresents the Authority's findings on that issue, and the submission understates or ignores the nature and volume of claims, the factual complexities of this case and the sums of money at stake. PCW's conduct regarding the provision of information and evidence over the entire course of the Authority's investigation was unacceptable.

[23] Taking all the above into account I am satisfied that additional work well beyond that required or expected in the Authority was necessary to defend the allegations. I find a significant uplift to \$9,500 (plus GST) per day of investigation is warranted and justifiable in the unique circumstances of this case. The addition of GST to a costs award is appropriate where a successful party is not GST registered but incurred costs that attract the payment.¹⁴

Disbursements

[24] PCW vigorously challenges the disbursements Ms Chinan has claimed (\$2,421.01. in total).

[25] Ms Chinan (and her family) was living and working in Auckland at the time her employment ended in 2012 and she continued to reside there when the statement of problem was lodged with the Authority's Wellington registry in December 2015. With the exception of fees corresponding to a summonsed witness who did not appear

¹² Regarding holiday pay, alleged confidential information

¹³ PCW Final submissions 1 May 2017, para [40]

¹⁴ *Judea Tavern Limited v Patricia Jesson* [2017] NZEmpC 120

at the Authority, I find the expenses associated with travel (taxis and flights), accommodation and photocopying were verified, reasonable and are recoverable.

[26] I do not accept that it would have been reasonable for Ms Chinan to “attend[ed] the Investigation meeting via telephone/video conferencing technology” as is suggested by PCW. Given the scheduled length of the investigation and the need to carefully assess credibility Ms Chinan’s attendance was necessary and important. I note the cost associated with video conferencing over the material timeframe is generally well in excess of the quantum of disbursements at issue. Nor do I accept that attendance by Iustina Chinan was unnecessary. PSW sought \$8,332.26 from Ms Chinan in a claim that directly concerned Iustina. PCW’s characterisation of the claim for as “minor” in submissions seems at odds with its challenge to the cost of Iustina’s expenses (approximately \$600). The need for Ms Chinan and Iustina to book additional accommodation and alternative flights were a direct consequence of the late conclusion of the final day of investigation caused by PCW. PCW must bear those costs also.

[27] It was appropriate and reasonable for Ms China to continue to engage the services of Auckland based counsel where counsel had acted for Ms Chinan in the civil matters between Ms Chinan and Mr Barron. I consider it likely that a change of counsel would have increased overall expenditure beyond the disbursement costs at issue.

Order

[28] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act I order Performance Cleaners All Property Services Wellington Limited to pay Ms Ioana Chinan:

(a) \$2,276.04 for disbursements in this matter; and

(b) \$32,775 (GST inclusive) as a contribution to Ms Chinan’s costs.

Michele Ryan
Member of the Employment Relations Authority