

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 640  
3064592

BETWEEN	ANET MARCE PECK Applicant
AND	GARDX NEW ZEALAND LIMITED First Respondent
AND	SHAUN GEOFFREY FLETCHER Second Respondent

Member of Authority: Michael Loftus

Representatives: David Oliver, counsel for the Applicant  
Shaun Fletcher, for the Respondents

Investigation Meeting: On the papers with input up to and including  
7 November 2019

Date of Determination: 8 November 2019

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This started as an application seeking the payment of outstanding wages, annual holiday pay and kiwisaver contributions. Penalties were also sought.

[2] While the respondents initially offered various arguments as to why nothing was due the moneys were paid prior to the occurrence of a telephone conference which had been scheduled by the Authority.

[3] The telephone conference was held give the penalty claim then remained though the respondents did not participate. During the call Mr Oliver advised his client was, perhaps as a matter of expediency, considering withdrawing that claim provided she could still pursue costs.

[4] She subsequently confirmed she had chosen to adopt that approach and it is costs this determination addresses.

## **Discussion**

[5] Ms Peck's costs amount to \$3,146.56 including GST. While she seeks full recompense her application appears to recognise that is unlikely. Invoices were provided.

[6] In support of the claim various arguments are offered with two warranting comment. The first is an assertion that while Ms Peck initially attempted to pursue the arrears herself these efforts were stymied by the respondent(s) who forced her to seek legal assistance. This allegation is evidenced by a message from Mr Fletcher which advises *I suggest you have your lawyer contact us should you have further questions as we would prefer to not deal with you directly.*

[7] The second is a claim proceedings were required to convince GardX to resile from spurious defences and pay moneys which were always going to be found due.

[8] Mr Fletcher's response revisits the grounds upon which payment was originally delayed – namely claims there was a dispute over the amount due; claims unreasonable costs had been incurred by GardX as a result of Ms Peck's behaviour during a handover which followed her resignation and a further imposition of cost when recovering items GardX claims Ms Peck inappropriately retained.

[9] GardX responds to the allegation Ms Peck was forced to seek legal assistance by asserting she did so of her own accord. There is also an allegation it paid an amount which it says Mr Oliver said would result in *the end of this case*. There is also a claim the amount finally paid was excessive and there has been no response to attempts to recover an overpayment of \$1,558.28. Finally it is said that from the point of resignation Ms Peck *made this as difficult as possible* though once again the supporting assertions reiterate the claims which underpinned the original refusal to pay.

[10] That a contribution toward costs can be awarded in respect to a matter that did not proceed is well established. There are many examples and the ability to make such awards is authorised by the Act.<sup>1</sup>

[11] The difficulty with the respondents position is that while they assert there is evidence for their various claims none has been provided. Furthermore I find it difficult to ignore the continuing reference to the original arguments as to why payment had not been made. While these were never tested a perusal of the papers would suggest they may well have faced difficulties.

[12] Finally there is the argument Ms Peck sought legal assistance of her own accord. That simply does not accord with the documentation I have seen which raises another significant point. Unlike the respondents' who have not evidenced their assertions, Ms Peck has.

[13] Added to the fact she was essentially forced to use legal representation by the respondents refusal to deal direct is my acceptance it was not till after she commenced proceedings that the respondents conceded. In other words it required a step that incurred cost to convince the employer to pay monies due. That means recompense of those costs is warranted. The question is how much.

[1] I have already commented on the fact that while Ms Peck seeks full reimbursement her submission indicates she is aware that is unlikely. The reason is an award of costs is a contribution. It is not indemnity costs except in rare occasions where it can be shown the respondents conduct in respect to addressing the claim amounted to *flagrant misconduct*.<sup>2</sup>

[14] While there are indications the respondent's made it difficult for Ms Peck I have no evidence their approach amounted to flagrant misconduct, at least as envisaged in *Bradbury v Westpac*. Similarly, and while I observed they may have struggled with their defensive arguments, that was never put to the test and in any event costs are not to be used to punish a substantive offence.

[15] A contribution based on the Authority's normal tariff is almost impossible to calculate given the stage at which this matter came to an end. Given that and a perusal of the

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<sup>1</sup> Section 15(1) of Schedule 2 to the Employment Relations Act 2000

<sup>2</sup> *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400

documents I conclude the best approach is to use the old standard of 2/3 of cost actually incurred as guidance. From there I add an increase to recognise the fact Ms Peck was, according to the documents before me, left with little choice but to seek professional assistance.

[16] Finally I note there is no evidence on my file of issue ever having been taken with the citation of Mr Fletcher as a respondent with the statement in reply commenting about the views and knowledge of the first and second respondents as if they were one and the same. That leaves me in a position whereby the question of who employed Ms Peck, and therefore who is responsible for paying the costs which are about to be ordered, has never been decided or argued. As a result I shall hold both respondents jointly liable.

### **Conclusion and Orders**

[17] For the above reasons I find the respondents, GardX New Zealand Limited and Shaun Fletcher, jointly liable and order them to pay Ms Peck \$2,400.00 (two thousand, four hundred dollars) as a contribution toward costs.

[18] Payment is to be made no later than 4.00pm Friday 22 November 2019.

Michael Loftus  
Member of the Employment Relations Authority