

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2020] NZERA 511  
3071772

BETWEEN                      TONY GORE  
   Applicant  
  
AND                                COLOR IT (2010) LIMITED  
   Respondent

Member of Authority:    Michele Ryan  
  
Representatives:            Adrian Plunket, advocate for the Applicant  
   Ben Sheehan and Joshua Pietras, counsel for the  
   Respondent  
  
Investigation Meeting    On the papers  
  
Submissions Received:    28 October 2020 from the Respondent  
   10 November 2020 from the Applicant  
  
Date of Determination:    9 December 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     Between October 2011 and January 2015 the respondent, Colour It (2010) Ltd, failed to make required payments to Tony Gore’s KiwiSaver account.

[2]     On 23 October 2020 the Authority ordered the respondent to pay to Mr Gore’s KiwiSaver account arrears of \$3,212.55 comprising employer and government KiwiSaver contributions and interest.<sup>1</sup>

[3]     A meeting to investigate Mr Gore’s claims was scheduled for 15 April 202 but the matter was ultimately determined on the papers following several case management conference calls (CMCs) with the parties.<sup>2</sup>

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<sup>1</sup>        *Tony Gore v Color It (2010) Ltd* [2020] NZERA 441

[4] Over the course of the CMCs:

- (i) a number of Mr Gore's claims were withdrawn,
- (ii) the probable cause for the non-payment of KiwiSaver contributions was established, and
- (iii) remedies appropriate to resolving the dispute were identified.

[5] The parties were then able to agree (although not entirely) to a resolution of their differences.

[6] Each now seeks from the other a contribution to costs.

### **The law**

[7] The Employment Relations Act authorizes the Authority to "order any party to pay to any other party such costs and expenses as the Authority thinks reasonable"<sup>3</sup>. The principles which apply to costs issues in the Authority are so well established it is not necessary to set out each of these in full<sup>4</sup> but the following are relevant:

- the Authority has a discretion as to whether costs should be awarded and in what amount;
- orders for costs in the Authority are modest and generally follow the event;
- offers made on a without prejudice basis except as to costs may be taken into account;
- costs are not to be used as a punishment or an expression of disapproval for an unsuccessful party's conduct, although conduct that increases costs unnecessarily can be taken into account in inflating or reducing an award.

### ***The parties' positions***

[8] The respondent says the applicant's success was limited and suggests the Authority should make a 'wasted costs' order in its favour where the applicant

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<sup>2</sup> Four in total; 3 October 2019; 8 November 2019, 17 January 2020; 24 February 2020

<sup>3</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>4</sup> See *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

pursued a number of unarguable claims. It says the applicant caused it to incur costs on matters that provided no benefit to the case.<sup>5</sup>

[9] In response, the applicant says his claim was successful and costs of \$3,204.55 including disbursements were reasonably incurred. He points to several without prejudice offers save as to costs which, he says, alongside the respondent's delayed acceptance of a valid claim, warrants an uplift to an order in his favour and suggests an award of 75% of his costs is reasonable.

[10] Both parties allege the other was obstructive to the progress of this matter.

## **Discussion**

### *Wasted costs*

[11] To determine this aspect of the respondent's application it is necessary to briefly record the progress of Mr Gore's claims before the Authority.

[12] Mr Gore's initial statement of problem<sup>6</sup> sought compensation linked to a personal grievance regarding the failure to pay KiwiSaver contributions, reimbursement of both employer and employee contributions for the period that KiwiSaver contributions went unpaid, and penalties.

[13] In the first case management conference call the Authority noted the respondent's refusal to consent to the asserted personal grievance, as it had not been raised for over four years since Mr Gore (and the respondent) had become aware of the matter.<sup>7</sup>

[14] The Authority independently noted that the period over which Mr Gore sought payment of employee and employer contributions, and penalties, were both subject to temporal limitations which either constrained or precluded a material cause of action.<sup>8</sup>

[15] In an amended statement of problem lodged shortly afterwards,<sup>9</sup> Mr Gore withdraw the personal grievance and that seeking payment of his KiwiSaver contribution where that sum not been deducted from his wages in any event. His

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<sup>5</sup> Counsel referred to *Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 12 at [6]

<sup>6</sup> Lodged with the Authority on 21 August 2019

<sup>7</sup> See Employment Relations Act, s 114

<sup>8</sup> See above at s 142 Limitation period for actions other than personal grievances, and s 135(5) limiting the recovery of penalties.

<sup>9</sup> Lodged on 16 October 2019

claim for recovery of arrears (employer's contribution and the sum equal to the Government subsidy) was confined to the time frame statutorily available. The claim for a penalty persisted and was addressed by the respondent in an amended statement in reply.

[16] I accept some costs were expended by the respondent in answer to claims that could not successfully be advanced, and is a factor I must consider in my assessment. I note that no invoices or timesheets were produced to indicate the level of resources spent by the respondent in addressing those matters. This suggests associated costs are likely to have been modest where claims and arrears that were time-barred were withdrawn at a relatively early juncture.

*Offers made without prejudice save as to costs*

[17] Mr Gore's representative asks the Authority to consider offers, made on 2 December 2019 and 24 February 2020 respectively, as providing cause for an uplift to a costs award.

[18] The February 2020 offer sought \$2,000 in compensation under s 123(1)(c)(i) and \$2,000 in costs. The offer cannot be regarded as valid where the requested remedy misrepresented the nature of the payment and, in particular that the payment is subject to income tax. It was reasonable for the respondent to reject it.

[19] However the December 2019 offer requires some attention. In this, Mr Gore sought \$3,508.87 to settle the substantive claim (along with \$2,500 plus GST as a contribution to costs, and advised Mr Gore would seek an uplift to \$8,000 - \$10,000 if the matter was investigated). The offer was said to expire on 11 December 2019. Notably, it appears the respondent did not reply to the offer.<sup>10</sup>

[20] There is some precedent for an uplift to an award where the remedy contained in an offer, made well before the parties' incur substantial expense preparing for litigation, is close to (but does not exceed) the outcome.<sup>11</sup>

[21] This offer to settle, at not quite \$300 above what was ultimately awarded, can fairly be characterised as so close to the outcome that it should be considered. I am unwilling to find that costs incurred after the offer extinguished should be fully

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<sup>10</sup> The respondent makes no mention of this correspondence in its submissions.

<sup>11</sup> See *Watson v New Zealand Electrical Graders Limited t/a Bray Switchgear* [2006] 4 NZELR 59 at [8]

reimbursed where Mr Gore has not supplied invoices to indicate his expenditure going forward. I find however that the December offer reflected a reasonable compromise to resolve the dispute and some weight should be given to it in my assessment.

### ***Conduct***

[22] Each party alleges the other's approach towards the dispute impeded the progress of Mr Gore's claim. Other than the matters canvassed in this determination there is no evidence of conduct which increased costs unnecessarily such that this is a factor that requires consideration.

### **Conclusion**

[23] In *Coomer v JA McCallum & Son Limited* Judge Smith reiterated a statement by the Court of Appeal concerning a party who did not succeed to the full extent of their claim, that "... success on more limited terms is still success".<sup>12</sup> As the successful party Mr Gore should receive a contribution to his costs.

[24] Weighing up the various considerations set out above, including that Mr Gore's substantive claim was not complex, a modest award cost of \$2,000 is an appropriate sum to contribute to Mr Gore's actions to recover arrears of KiwiSaver contributions.

### **Orders**

[25] Within 14 days of the date of this determination, Color It (2010) Ltd must pay \$2,000 towards Tony Gore's costs plus \$71.56 for the Authority's filing fee.<sup>13</sup>

Michele Ryan  
Member of the Employment Relations Authority

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<sup>12</sup> *Coomer v JA McCallum & Son Limited* [2017] NZEmpC 156 at [31]

<sup>13</sup> Employment Relations Act, Schedule 2, clause 15