

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-006621

BETWEEN ORA LTD
 Applicant

AND SONJA KIRKLEY
 Respondent

Hearing: On the papers

Appearances: GHJ Brant for Applicant
 L Ponniah for Respondent

Judgment: 9 March 2009 at 4:30 pm

COSTS JUDGMENT OF CHRISTIANSEN AJ

*This judgment was delivered by me on 9 March 2009 at 4:30 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors:
Stace Hammond, PO Box 19-101, Hamilton
Corban Revell, PO Box 21-180, Waitakere City

[1] This is a judgment for costs claimed upon the applicant's application to set aside the respondent's statutory demand.

[2] The respondent's statutory demand claimed \$44,455.90, being:

- a) The sum of \$33,455.90 for compensation in lost wages; and
- b) The sum of \$10,000 for costs.

[3] The claim is based upon a determination of the Employment Relations Authority dated 19 February 2008. It is apparent from that determination that although the respondent received an award of "four months lost wages", the amount of compensation in question was not otherwise detailed in the determination. Further, the determination provided the costs were reserved.

[4] Before service of the statutory demand the applicant initiated the process for appeal of the determination by first filing the determination with the Employment Court on 10 July 2008 and on 6 August 2008 filing a statement of claim. On 11 September 2008, the respondent filed a statement of defence thereto and cross-claimed claiming the Authority's award was inadequate.

[5] On 18 September 2008 the applicant filed and served its statement of defence to the cross-claim.

[6] Four days later the respondent's statutory demand was served.

[7] Often in cases of this kind where a statutory demand has issued and in due course the issuer accepts it is appropriate the statutory demand be withdrawn, the Court will order costs upon an application to set aside a statutory demand, lie where they fall. This is not one such case.

[8] On 30 September 2008, the applicant's solicitors wrote to the respondent's solicitors stating:

- a) No dollar figure had been settled in the Authority's decision;

- b) No costs award was issued by the Authority;
- c) An application to the Employment Court was being made for a stay of the Authority's decision pending the "appeal" process;
- d) The applicant was prepared to pay the sum of \$33,455.90 into a trust account pending appeal;
- e) There was a request that the statutory demand be withdrawn.

[9] On 6 October 2008, the applicant paid the said sum of \$33,455.90 into its solicitors' trust account. Subsequently it provided its solicitors with an irrevocable instruction regarding payment of the funds held in trust.

[10] On 7 October 2008, the applicant's solicitors wrote to the respondent's solicitors advising that the funds in question were held in trust and were subject to an irrevocable instruction.

[11] At this point had the respondent conceded that her statutory demand ought to be withdrawn, likely the Court would have adopted the view that costs should lie where they fall. However, the respondent's solicitors replied, insisting the funds were still payable and invited the applicant to file the present application.

[12] It is apparent from respondent's counsel's submissions that there is a misconception about the statutory demand process system. Had the statutory demand not been answered, the applicant would have been presumed to have been insolvent. In this case an answer was given which challenged the basis for the calculation of the demand. Also, the applicant had initiated an appeal of the very determination used by the respondent as the basis for the issue of her statutory demand. Indeed, the respondent had initiated her own challenge to the Authority's determination by then.

[13] I am satisfied that the applicant responded promptly and responsibly to the issue of the statutory demand, to the extent of ensuring the amount able to be claimed by the respondent had been posted as security pending the appeal.

[14] For the respondent it is claimed she was within her rights to pursue recovery because the applicant had not obtained a stay of proceeding. Frankly, there is not a lot of purpose in pursuing submissions of that kind when the clear evidence is that both parties had engaged a process by which both parties claimed the Authority's determination was wrong, i.e. that very decision which the applicant relies upon as justification for the issue of a statutory demand.

[15] Not only did the applicant act promptly and appropriately to put the respondent on notice of that dispute, it has placed sufficient funds in trust to be held as security pending outcome of the appeal.

Other matters

[16] The Court is concerned regarding the respondent's solicitor's claim of an agreement regarding the sum of money which it says ought to be paid as four months loss of wages in terms of the Authority's determination. It is quite clear that parts of a without prejudice letter exhibited to the evidence for the respondent, should not have been disclosed.

[17] One reason given for pursuing payment upon the statutory demand was that the respondent needed the funds to meet legal costs including those required for the appeal. That reason was not given in any affidavit sworn by the respondent but was referred to in the respondent's notice of opposition.

Judgment

[18] Costs are awarded to the applicant on a category 2B basis, together with disbursements as fixed by the Registrar. I will fix the amount in question, if counsel cannot agree upon it.

[19] The costs I have awarded shall not be payable until the outcome of the Employment Court's "appeal" decision.

[20] Respondent's counsel is required to advise this Court that a copy of this decision has been sent to the respondent.

Associate Judge Christiansen