



# New Zealand Employment Relations Authority Decisions

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## Brill v Gill WA184/10 (Wellington) [2010] NZERA 900 (15 November 2010)

Last Updated: 29 November 2010

### IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

WA 184/10 5297851

BETWEEN CHRYSTAL BRILL

Applicant

AND SUKHA GILL

Respondent

Member of Authority: G J Wood

Representatives: Jeffrey Brill for the Applicant

Mark Sinclair for the Respondent

Investigation Meeting: Submissions Received: Determination:

On the papers

By 21 October 2010 15 November 2010

### DETERMINATION OF THE AUTHORITY

[1] The applicant, Ms Brill, was employed by the respondent, Mr Gill, as a waitress in his restaurant. Ms Brill claims that she was sexually harassed by Mr Gill and that this forced her to leave her job. Mr Gill denies Ms Brill's accusations.

[2] Ms Brill originally pursued the matter through mediation with the Human Rights Commission, before filing a statement of problem with the Authority. At a case management conference on 19 April 2010 an investigation meeting date of 7 September was set. Ms Brill was required to provide written statements by 27 July. On 3 August Mr Brill (Ms Brill's father and representative) informed the Authority that she would not be pursuing this case any further and it was formally withdrawn.

### Costs Application by Mr Gill

[3] On 13 September 2010 Mr Sinclair then sought indemnity costs of \$1,782.50 on behalf of Mr Gill, on the basis that it had been established that Ms Brill's case was without merit. In particular, Mr Sinclair relied on six months of stress and worry on Mr Gill as a consequence of *the unfounded allegations made by Mr Brill and his daughter and at no stage have they produced any corroborating evidence*. He questioned why Ms Brill had not been required to provide any *probative evidence or make any appearance at a mediation*. I note that the parties attended mediation under the auspices of the Human Rights Commission. Mr Sinclair also notes that Ms Brill's mother had attended the restaurant after the claims of sexual harassment and that the case was an attempt at retaliation because Mr Gill had not given Ms Brill's fiancée a job. None of these matters have been proven in evidence, however.

[4] In response, Mr Brill submitted that there is evidence to support Ms Brill's claims and that costs should be reserved at least until after the application to reopen the case (which will be determined below) had been considered.

[5] The level of costs, indeed if any, that are to be awarded in respect of a claim that is withdrawn depend on the time at which the withdrawal was made. As the Court of Appeal found in *Eden v. Rutherford & Bond Toyota Ltd* CA320/2010, the Authority has a broad discretionary power to award costs. In the judgment under challenge, *Eden v. Rutherford & Bond Toyota Ltd* [2010] NZEMP 43, in a portion of the judgment that was not affected on appeal, it was held:

*The closer in time that proceedings are withdrawn before a hearing, the greater will probably have been the time put into the preparation by the other party and, therefore, costs which the other party will have incurred reasonably and which may be the subject of an order.*

[6] In this case, Ms Brill withdraw her case over a month before the investigation meeting, and thus before Mr Gill had been required to provide evidence to the Authority. Mr Gill can therefore in effect only claim for work done in providing a statement in reply. In the absence of bad faith, there is no reason for an employee pursuing a grievance to be required to contribute to the employer's costs of filing a statement in reply and to query why the statements on behalf of the applicant have not been received on time.

[7] Compelling evidence would be required to satisfy me that the claim was brought in bad faith and/or for an ulterior motive, and no such evidence has been provided, other than by assertion. Mr Brill has submitted that the withdrawal was made because of the unavailability of a witness, Ms Brill's mother. I have no evidence to conclude otherwise. I therefore determine that costs are to lie where they fall.

### **Application to Reopen by Ms Brill**

[8] Following the original claim for costs, Ms Brill filed an application for the investigation to be reopened, on the bases that Ms Brill's mother was now available and that a further witness had been identified who has allegedly experienced similar treatment from Mr Gill. In this application Mr Brill noted that he did not *want to provide their name until I can be guaranteed that their name and story will be suppressed from Sukha Gill, at least until the hearing.*

[9] In Mr Gill's statement in reply on the application for reopening, Mr Sinclair noted that Ms Brill's mother was resident in Palmerston North (the place of the investigation meeting), and had been given significant notice of the investigation meeting date. He also noted that he does not know who the mystery witness is or what precluded her from being available at an earlier date. He submitted that Ms Brill had not made out *a special or compelling case to establish what new evidence is likely to be presented that could not have been made available at the earlier hearing.*

[10] Mr Sinclair also noted that this change of mind could *only be further prejudicial from our client's perspective both in respect of his personal life and ongoing costs.* Once again he notes the lack of direct evidence provided by Ms Brill, and that Mr Gill takes offence at all the allegations, including the new ones made against him. It was also noted that Mr Brill has not satisfactorily established how and why the original application was allegedly withdrawn due to *circumstances beyond his control.*

[11] It was submitted, by way of conclusion, that a greater injustice than to refuse to reopen the case would be for Mr Gill *to have to incur the ongoing stress and additional costs of further proceedings.*

[12] In response, Mr Brill, on behalf of his daughter, noted that he is unable to name the other schoolgirl at this point because *she is scared of retribution.* In conclusion, he stated that it would be a miscarriage of justice not to have the matter investigated as his hands are tied because of the concerns over retribution.

[13] No evidence was supplied in support of these claims and the identity of the new witness remains withheld.

[14] Clause 4 of Schedule 2 of the Act provides for reopening. It states that the Authority may order an investigation to be reopened upon such terms as it thinks reasonable. As can be noted from the clause, reopening a matter is entirely at the Authority's discretion. I accept, however, that the general principles as to rehearings applying under common law should apply to applications such as this, after taking into account the investigative role of the Authority.

[15] One of the standard reasons for granting a new hearing, or a reopening in this forum, is that material evidence has been discovered since the application was withdrawn that could not reasonably have been foreseen or known before the withdrawal. In *Ladd v. Marshall* [\[1954\] EWCA Civ 1](#); [\[1954\] 3 All ER 745](#) at 748, per Lord Denning, it was stated:

*... when such an application is sought on a fresh evidence issue, there are three conditions to be fulfilled. One: it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Two: the evidence must be such that if given it would probably have an important influence on the result of the case although it need not be decisive. Three: the evidence must be such as is presumably to be believed, or in other words it must be equally apparently credible although it need not be incontrovertible.*

[16] I note that in a statement dated 4 February 2010 (attached to the original Statement of Problem) Mr Brill referred to waiting on affidavits *from a few previous staff members which...will be produced at the time of the hearing.* These affidavits have never been produced, and the statement shows that Mr Brill was aware of the potential for claims such as those that may be made by the undisclosed witness. Therefore it follows that with reasonable diligence such evidence could have been obtained in advance of the investigation meeting and Ms Brill's withdrawal of her case. Ms Brill is relying on what in effect is a secret witness, at least at this point. There is no statement from this secret witness. It therefore follows that it is impossible

to state that any evidence from her will probably have an important influence on the result of Ms Brill's case, as the Authority is not aware of it in any detail whatsoever. It can also not be said to be apparently credible, when it has not been given and the identity of the person who may give the evidence is not disclosed. Those are all substantive grounds for the Authority to decline to reopen the matter.

[17] Certainly, the possible availability of Ms Brill's mother is not a matter that is sufficient to justify a reopening. No reason has ever been given for her unavailability at the first investigation meeting set down, nor the degree to which her evidence would have been important, other than to provide evidence of the distress suffered by

Ms Brill.

[18] In conclusion, I am not satisfied that there are grounds for the reopening of Ms Brill's claims against Mr Gill. I therefore dismiss this application. Finally, I note that whatever the merits of this by now old employment relationship problem I believe it is now in the interests of both parties, having been involved at both the Human Rights Tribunal and the Employment Relations Authority, to put this longstanding dispute behind them.

**G J Wood**

**Member of the Employment Relations Authority**

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