

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 124
5400182

BETWEEN Magdolna Chapman
 Applicant

AND Safeway Self Storage Limited
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Jane Traynor, Counsel for the Applicant
 Tim Cleary, Counsel for the Respondent

Submissions received: 9 July and 1 August 2013 from the Applicant
 26 July 2013 from the Respondent

Determination: 3 October 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] Safeway Self Storage Limited (Safeway) seeks costs on an indemnity basis following the withdrawal, without prior notice to it, of Ms Chapman's proceedings in the Authority. It claims that her application for reinstatement was entirely without merit and unnecessary. Safeway seeks costs in relation to legal expenses incurred in addressing Ms Chapman's claims for both interim reinstatement, including the application for urgency, and for unjustifiable dismissal.

[2] Ms Chapman opposes the application. She disagrees that her application for reinstatement was unnecessary and without merit. Ms Traynor, counsel for Ms Chapman, submits that it was up to the Authority, not Safeway, to determine the merit of Ms Chapman's claim. The matter had settled before a hearing took place so it was not necessary for the Authority to make a finding on that point. She noted that counsel for Safeway, Mr Cleary, had requested confirmation from Ms Chapman on 26 November 2012 that "*the application for interim relief is withdrawn, costs to lie where they fall*". Ms Traynor submits that, if Safeway had wished to revisit the issue

of costs, it should have raised this as part of the settlement agreement that was later reached by the parties, and not left it until after the matter had been resolved.

Background

[3] Ms Chapman's application for interim reinstatement was filed in the Authority on 31 October 2012, with a request that it be accorded urgency. That request was granted in a telephone conference between the parties on 5 November 2012.

[4] The parties were directed to mediation, and a date for hearing the interim reinstatement was scheduled for 27 November 2012. A timetable was put in place for the receipt of a statement in reply and affidavits. The investigation meeting for the substantive personal grievance for unjustifiable dismissal was scheduled for 24 January 2013.

[5] Ms Chapman's affidavit in support of her application for reinstatement referred to the events leading to the termination of her employment for redundancy. She had been married to David Chapman, Director of Safeway, until their separation in 2008. Ms Chapman had continued to work for the company on a week about basis with Mr Chapman in order that they could both retain work and the business could continue operating.

[6] Ms Chapman viewed her redundancy as a tactic by Mr Chapman in response to her commencement of proceedings in a different jurisdiction to resolve relationship property matters. She had applied for spousal maintenance in the Family Court. However, unless that application was granted before 1 December 2012, when she would receive her last salary payment from Safeway, she would have no form of income after that date.

[7] Safeway has taken the view from the outset that Ms Chapman's dismissal was justified because of the financial position of the company. Proceedings in the Authority were unnecessary and should be adjourned pending the outcome of the Family Court proceedings.

[8] On 12 November 2012 Mr Cleary copied the Authority into a letter to Ms Traynor advising that Safeway was willing to continue paying Ms Chapman at the rate of \$6,500 gross per month until the investigation meeting into the substantive matter on 24 January 2013. Mr Cleary noted his view that there was "*no practical*

need for the application to proceed on 27 November 2012", asking Ms Traynor to confirm urgently with the Authority that this was the case. He noted that costs in relation to the interim reinstatement application remained an issue and suggested that await the determination of the substantive matter.

[9] Safeway's proposal was not accepted by Ms Chapman. Ms Traynor notified a counterproposal that would see Ms Chapman agreeing to the cancellation of the interim reinstatement investigation meeting if she were reinstated until the substantive hearing scheduled for 24 January 2013. She would take garden leave until that date, and required Safeway to continue paying her salary until the Authority made a decision on the substantive matter.

[10] The parties did not reach agreement and the arrangements for an investigation meeting into the interim reinstatement remained in place. It was adjourned, without opposition from Safeway, on the morning of its scheduled date, 27 November 2011. This followed the receipt of an email sent the previous evening, after office hours, by Ms Traynor requesting an adjournment on medical grounds.

[11] On 14 December 2012, Ms Chapman's representatives informed the Authority that the parties had agreed on "*interim arrangements to allow the parties the time to resolve the disputes they have at present and also this personal grievance proceeding*". Those arrangements entailed vacating the substantive reinstatement application fixture scheduled for 24 January 2013, reserving leave for either party to bring the interim reinstatement application back before the Authority on 3 days' notice being provided to the other party.

[12] Mr Cleary subsequently confirmed Safeway's agreement to those arrangements.

[13] A telephone conference attended by the Authority and both parties took place on 18 February 2013, at which it was agreed that Ms Chapman would file an amended statement of problem within 14 days and Safeway would file an amended statement in reply within 14 days of receipt of that. A timetable was put in place for an investigation meeting into the substantive matter that would take place on 14 May 2013.

[14] The amended statement of problem and amended statement in reply were duly filed. Briefs of evidence and accompanying documentation from Ms Chapman and

one witness supporting her, and briefs of evidence of witnesses for Safeway, with accompanying documentation, were also filed in accordance with the timetable.

[15] On 9 May 2013, the day any briefs in reply from Ms Chapman were due, the Authority received a memorandum from Ms Traynor requesting an adjournment of the investigation meeting scheduled for 14 May 2013. The stated grounds were that a Family Court hearing had taken place in April 2013 with regard to Ms Chapman's application for interim spousal maintenance, and that Ms Chapman wished to wait for the Judge's reserved decision before continuing with her claim in the Authority.

[16] Safeway did not oppose the application for adjournment which was granted by the Authority.

[17] On 21 June 2013, Ms Traynor emailed the Authority, copying in Mr Cleary, to confirm that the matter had been resolved in the Family Court and that the proceedings in the Authority could now be withdrawn. Mr Cleary informed the Authority that he had not been notified that Ms Chapman was to withdraw her proceeding and that Safeway reserved its position as to costs.

[18] Mr Cleary advises that Safeway's total legal costs for the period after proceedings were filed in the Authority until their withdrawal were \$13,400 excluding GST. Of that, Safeway seeks \$11,400 plus \$66.50 for disbursements, having deducted costs relating to mediation which it does not claim. Itemised invoices were provided to the Authority.

Discussion

[19] The principles relevant to costs awards for Authority investigations are well-known. They have been set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*¹, referred to by Mr Cleary in his submissions.

[20] Included in the principles are that costs are discretionary as to their award, and the amount awarded. They generally follow the event and will be modest. They are often applied by the Authority in accordance with a notional daily tariff, which is currently \$3,500.

¹ [2005] 1 ERNZ 808

[21] Indemnity costs are less frequently applied. Mr Cleary has referred me to *Goodalls Manufacturing Limited v Wilkes*² to support the proposition that, where a party simply abandons claims, indemnity costs may be appropriate. There is little similarity, however, between the circumstances of that case and the proceedings brought by Ms Chapman.

[22] Mr Wilkes had, almost 6 years after leaving Goodalls' employment, brought an action against it for breach of contract. He sought more than \$350,000 in damages as well as a penalty of \$50,000. He discontinued the proceedings shortly after Goodalls had filed its statement of defence. The court, in awarding solicitor/client costs against Mr Wilkes, described his claim as an "*unmeritorious try-on*" which was "*without merit and must have been known by the plaintiff to have been so*".

[23] Ms Chapman's claims were not tested in the Authority as neither the interim reinstatement investigation meeting, nor the investigation into the substantive claim of unjustifiable dismissal, took place. On the face of it, however, the claims were worthy of investigation and could not be described as an "*unmeritorious try-on*". Safeway acknowledged Ms Chapman had been dismissed for redundancy, an action it claimed to have been justified.

[24] I disagree with Mr Cleary's description of Ms Chapman's application for reinstatement as being "*entirely without merit and unnecessary*". The fact that Ms Chapman had filed proceedings for spousal maintenance in the Family Court did not prevent her from pursuing concurrent or subsequent claims for the loss of her employment in the Authority.

[25] The information before the Authority indicates that the attempts of Ms Chapman and Mr Chapman to resolve issues relating to spousal maintenance/relationship property affected the progressing of Ms Chapman's proceedings against Safeway in the Authority. This applied to both the interim reinstatement investigation meeting and to that of the substantive matter.

[26] In *Bradbury v Westpac Banking Corporation*³ the Court of Appeal stated that "*indemnity costs may be ordered where that party has behaved either badly or very unreasonably*." It also referred to indemnity costs as being "*exceptional*" and

² [1998] 2 ERNZ 513

³ [2009] NZCA 234, [2009] NZLR 400, (2009) 19 PRNZ 385 at [27]

requiring "*exceptionally bad behaviour*", going on to say that the misconduct must be "*flagrant*" to justify an order for such costs ⁴.

[27] I do not have information before me that would lead me to conclude Ms Chapman's behaviour fitted into that exceptionally bad or flagrant category. Nor do I have reason to believe that this was a case of "*commencing or continuing proceedings for some ulterior motive*"⁵ which might justify an award of indemnity costs.

[28] Safeway has incurred legal expenses in relation to preparation for two investigation meetings that did not eventuate, in the defence of proceedings that were withdrawn. Whether or not the issue of costs should have been raised as part of any settlement agreement that appears to have been made in a different jurisdiction, as Ms Traynor suggests, is not a matter on which it is appropriate for me to comment.

[29] Costs come within the Authority's equity and good conscience jurisdiction. Taking all the circumstances outlined above into account, I find it reasonable that Ms Chapman should contribute towards the costs incurred by Safeway in its preparations for both investigation meetings.

[30] Ms Chapman is therefore ordered to contribute to Safeway's costs in the sum of \$3,000.

Trish MacKinnon
Member of the Employment Relations Authority

⁴ Ibid at [28]

⁵ Ibid at [29]