

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Olivia Corbett (Applicant)
AND Bendon Limited (Respondent)
REPRESENTATIVES Chris Patterson, Counsel for Applicant
Emma Butcher, Counsel for Respondent
MEMBER OF AUTHORITY A Dumbleton
COSTS SUBMISSIONS 27 September and 4 October 2006
RECEIVED
DATE OF DETERMINATION 10 January 2007

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] In a determination dated 30 May 2006 and issued under AA188/06, the Authority found that Bendon Limited was not legally responsible for the employment relationship problem which had been investigated by the Authority at the request of Ms Olivia Corbett.

[2] At para.[26] of the determination the Authority held, applying the test at s.103A of the Employment Relations Act 2000, that Bendon had not dismissed Ms Corbett without justification in June 2005.

[3] Further, at para.[27], the Authority determined that the disciplinary inquiry conducted pre-dismissal by Bendon had been a substantially fair and reasonable one in the circumstances. The suspension of Ms Corbett immediately prior to that inquiry was found not to have been unjustified.

[4] It followed that there was no basis for making any orders against Bendon in favour of Ms Corbett, as had been sought by her.

[5] Costs were reserved to allow the parties and their representatives time to confer and attempt a resolution of that issue themselves. Agreement has not proved possible and the question of costs has now been addressed in written submissions provided by the parties' counsel, Ms Steel and Mr Patterson.

[6] The legal principles to be applied by the Authority when fixing costs have been fully addressed in the submissions; by the respondent at paras.4 to 6, and by the applicant at paras.5 to 10.

[7] Bendon is seeking an order for costs of \$11,491 against Ms Corbett. That sum was the full amount of costs incurred after she had rejected a settlement offer made by the company of \$5,317.

[8] On behalf of Ms Corbett, counsel submits that in the interests of justice costs should lie where they fall. Alternatively, if the Authority is inclined to make an order, Mr Patterson submits costs

should be awarded only on a reasonable contribution basis and should be no more than \$2,000 against Ms Corbett, to reflect her *adverse financial position*. In this latter regard, the Authority has been advised that Ms Corbett has remained on a WINZ benefit since her dismissal in June 2005. Mr Patterson has also referred to the challenge that Ms Corbett has lodged against the Authority's substantive determination. This has yet to be heard and decided by the Employment Court. He seeks a stay of any costs award that is made against Ms Corbett until such time as her challenge has been determined.

[9] In taking into account the costs principles to be applied as discussed in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808, a judgment of the Employment Court, I have had particular regard to;

The discretionary nature of awards of costs,

Conduct increasing costs unnecessarily can be taken into account in inflating or reducing an award,

Costs generally follow the event,

Without prejudice offers can be taken into account, and

Awards will be modest.

Having regard to these and all other relevant matters I consider that this is not an appropriate case for costs to be allowed to lie where they fall, for the following reasons.

[10] After the statement of problem had been lodged, Ms Corbett and Bendon were referred by the Authority to mediation. Ms Corbett had the benefit of that process before making her election to continue on to an investigation by the Authority. Before the investigation commenced she received, but rejected, a very reasonable offer of settlement made on behalf of Bendon. The many complaints made by Ms Corbett about her employer's actions, including dismissal, were found to be without merit by the Authority in its determination. Bendon incurred substantial legal costs in participating in the investigation. I find in the circumstances that there is no feature of the case strongly suggesting as an appropriate outcome that costs should lie where they fall, as submitted by Mr Patterson.

[11] On the other hand, there is also no feature to support any order for full costs on the basis sought by Ms Steel on behalf of Bendon. The rejection by Ms Corbett of the company's reasonable offer to settle the matter does not of itself point to such an order as just in the circumstances.

[12] The rejection of the settlement offer is however to be taken into account when looking at the quantum of costs that should be awarded.

[13] In conducting its investigation, the Authority was required to carry out a fairly routine inquiry to establish matters of fact, and it was also required to interpret a particular term of the parties' employment agreement. There was nothing unduly complicated about the exercise and I would consider, on the basis of time alone, that an order for costs of up to \$2,000 would be appropriate for a hearing of a little over a day in this case. The order needs, however, to take into account Ms Corbett's decision to reject the settlement offer made to her by Bendon at a stage when the investigation had not yet started, and some consideration must be given to her ability to pay any order for costs. On that latter question, I do not think there is any good reason why the order should be reduced. Ms Corbett's unemployment for 18 months since her dismissal is surprising and seemingly inconsistent with the employability evident from what I saw, heard and read of her. If there is some explanation for her situation, then the Authority has not been told what it is.

[14] I also take into account that Ms Corbett chose to engage a solicitor to represent her during the investigation. For this she was charged several hundred dollars an hour, in accordance with the market for that kind of professional work. It was her legal right to have such assistance but professional representation was not a matter of practical necessity, because it is the duty of the Authority itself to investigate cases brought to it and to satisfy itself as to the facts and the law to be applied. The Authority cannot have much sympathy for Ms Corbett's claim to now be impecunious when she elected to spend money on legal representation rather than cut her costs by having the Authority proactively inquire into and investigate the employment relationship problem raised by her.

[15] Also, parties on tight budgets need to consider with greater care any reasonable offers of settlement. I find that Bendon's was such an offer and that it was unreasonably rejected by a party who may have put matters of principle too far ahead of matters of practical and economic reality.

[16] In those circumstances, I consider that the award of costs to be made against Ms Corbett should be inflated (as the Court put it in *Da Cruz*) to \$3,550 as a reasonable contribution to actual legal fees and expenses incurred.

Application for stay of costs order

[17] Mr Patterson has applied for a stay of enforcement of any award made. I do not consider the issue of a stay to be an appropriate course in the circumstances. This is because the investigation process has been completed and a determination has been issued. There should now be finality in that process. Although there has been a "challenge" filed in the Employment Court, it will be conducted by way of *de novo* hearing. It is not a conventional appeal or review against an Authority decision but is an occasion allowing parties a second bite, by starting again at the beginning, rather than by extending or prolonging the Authority investigation process. The respondent at this point is therefore entitled to say that it has been successful and is entitled to have the last remaining matter of costs dealt with to bring closure to the investigation. It is also a

factor in my consideration that any stay might operate for an undesirably long period, in the event of delay by the Court in issuing a decision.

[18] Finally, I am influenced by the fact that Bendon is legally represented and that its advisers are likely to weigh up with the company the need to exercise discretion when considering enforcement of the order for costs that I have made. This is because of the further cost of enforcement, the limited means of Ms Corbett to pay and the possibility of a different decision being obtained from the Employment Court when the *de novo* challenge is eventually disposed of. There is also nothing to prevent another application for a stay being made in the future if circumstances change.

Order for costs

[19] Accordingly, it is the order of the Authority that Ms Corbett shall pay to Bendon the sum of \$3,550 as a reasonable contribution towards the latter's legal costs incurred from its participation in the investigation. The order is made pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

A Dumbleton
Member of Employment Relations Authority