

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jacqueline de Souza (Applicant)

AND Waikato Students' Union (Respondent)

REPRESENTATIVES David Allan for the applicant
Joan Forret for the respondent

MEMBER OF AUTHORITY James Wilson

INVESTIGATION MEETING 9 March 2006
10 March 2006

DATE OF DETERMINATION 5 September 2006

COSTS DETERMINATION OF THE AUTHORITY

Application for costs

[1] In my substantive Determination regarding Ms de Souza's employment relationship problem (Determination AA 160/06, 8 May 2006), I recorded that Ms de Souza accepted that the termination of her employment was for reasons of genuine redundancy. I also found that

- Ms de Souza did not have a grievance against the Waikato Students Union as a result of the WSU's failure to ratify a settlement reached at mediation; but
- She did have a personal grievance against WSU in that they failed in their duty to provide her with a safe workplace.

In that Determination I reserved the question of costs and requested that the parties attempt to settle that issue. They have been unable to do so and both Mr Allan, for Ms de Souza and Ms Forrett for WSU have filed submissions in this regard.

The Investigation

[2] For reasons which need not be canvassed in this determination, a meeting set up by another Authority Member to investigate Ms de Souza's claims was abandoned without being completed. By agreement the file was then transferred to me. At the same time Ms de Souza's previous representative elected to pass the matter to Mr Allan. Following unsuccessful new attempts to reconvene mediation, a new investigation meeting, lasting a little over 1½ days, took place in March 2006. Mr Allan, on behalf of Ms de Souza is not seeking costs on behalf of his client before the first, abandoned, investigation meeting.

The submissions

[3] Ms Forret, on behalf of the WSU, argues that the WSU was put to considerable, unnecessary, expense by the abandonment of the first investigation meeting. She also suggests that Mr Allen's pursuit of the claim of *sham redundancy* was doomed to failure and resulted in the investigation taking longer than was necessary. She argues that as Ms de Souza was successful in only one of her claims and in the light of the unnecessary cost that WSU incurred, costs should lie where they fall.

[4] Mr Allen says that the actual costs to his client of the second investigation meeting and preparation time, calculated at the legal aid rate of \$130.00 per hour, amounted to \$7241.00. The legal aid grant for this meeting was \$4570.80. Mr Allen seeks a contribution towards costs of 2/3rds of the legal aid grant being \$3000.00. Mr Allen argues that the amount of time needed to explore his clients suspicion that her redundancy was a sham was important given the information she had received from Members of the WSU Executive. He also says that despite not being successful with all of her claims she was successful in her assertion that her employer failed in its duty to provide her with a safe workplace.

Legal principles

[5] The award of costs in matters before the Authority is discretionary. The principles generally applied to the use of this discretion where set out and endorsed by the Employment Court in *PBO v Da Cruz* unreported, AC 2A/05, 9 December 2005. The Court listed these principles as:

- *There is a discretion as to whether costs would be awarded and what amount.*
- *The discretion is to be exercised in accordance with principle and not arbitrarily.*
- *The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.*
- *Equity and good conscience is to be considered on a case by case basis.*
- *Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.*
- *It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable.*
- *That costs generally follow the event.*
- *That without prejudice offers can be taken into account.*
- *That awards will be modest.*
- *That frequently costs are judged against a notional daily rate.*
- *The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.*

Discussion and Determination

[6] Ms de Souza was successful in a major aspect of her claim and is entitled to a contribution to her costs. I have taken into account the additional expense incurred by both parties as a result of the abandoned first investigation. I consider that while the investigation meeting may have been a little shorter (and perhaps concluded in less than a day) had Mr Allen not pursued the issue of “sham redundancy” in quite so much detail, this did not add significantly to the overall costs of the parties. Taking into account all of the circumstances surrounding this case it appears reasonable that the level of cost awarded should fall within the usual range for an investigation meeting occupying 1 day.

[7] The Waikato Students Union is to pay Ms de Souza the sum of \$1500 as a contribution to her costs.

James Wilson
Member of Employment Relations Authority