

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 10/08
5036688

BETWEEN JOHN STUART DRUMMOND
 Applicant

AND NATIONAL UNION OF
 PUBLIC EMPLOYEES INC
 Respondent

Member of Authority: Philip Cheyne

Representatives: Stephen Sansom, Counsel for Applicant
 Andrew McKenzie, Counsel for Respondent

Submissions received: 21 December 2007 from Applicant
 1 February 2008 from Respondent

Determination: 8 February 2008

DETERMINATION OF THE AUTHORITY

[1] In a determination dated 10 August 2007 I dismissed most of Mr Drummond's claims against his former employer but found that he was entitled to arrears of salary arising from the employer's unilateral reduction in his hours of work and salary. That breach also gave rise to a personal grievance of unjustified disadvantage and Mr Drummond was awarded a modest amount of compensation for the resulting distress. Costs were reserved.

[2] In December 2007 NUPE lodged and served a memorandum setting out its argument to support a claim for an award of costs against Mr Drummond. Mr Drummond in turn lodged and served a memorandum rejecting that claim and seeking a costs order in his own favour. This determination resolves the disputed issue about what (if any) award of costs should be made against whom.

[3] Mr Drummond lodged a challenge against the earlier determination in September 2007 which has yet to be heard. I accept NUPE's submission that the

Authority should proceed to determine costs notwithstanding that challenge. At this point, the costs decision must proceed on the basis of the findings in the original determination.

[4] For the proceedings in the Authority, Mr Drummond was legally aided. Addressing that point, NUPE seeks an order that exceptional circumstances exist permitting the Authority to make an award against Mr Drummond that exceeds the amount of his personal contribution to legal costs. Alternatively, NUPE seeks an order specifying what costs would have been awarded but for the operation of s.40 of the Legal Services Act 2000. Before turning to analyse the impact of that Act, I will first consider whether there should be any award of costs, applying the principle that costs follow the event.

[5] Mr Drummond was dismissed for serious misconduct. His claim was of unjustifiable dismissal and he sought substantial monetary remedies. His argument also encompassed complaints about several potential disciplinary issues that arose before his dismissal but which were not proceeded with. None of these complaints in the Authority were resolved in Mr Drummond's favour. If the proceedings had been mostly or wholly about the dismissal, NUPE would be entitled to an order of costs against Mr Drummond.

[6] The second part of Mr Drummond's problem was his claim to enforce an alleged agreement to pay him redundancy compensation or alternatively to enforce the benefit of the redundancy compensation provision in his written employment agreement. Neither of these claims as formulated was successful. What happened was that NUPE reduced Mr Drummond's hours of work and salary in breach of the existing employment agreement and without Mr Drummond's consent. As a result, Mr Drummond was found to be entitled to some arrears of salary which the parties were left to quantify (about \$6,000 apparently) and a modest sum of compensation (\$2,000) for the resulting grievance after taking account of his contribution to the circumstances of that grievance. If this had been the sole issue for investigation, at most a day would have been required and Mr Drummond would have been entitled to a modest award of costs assessed on a daily tariff basis.

[7] The third part of the problem was Mr Drummond's claim for arrears of holiday pay. This required very little time and Mr Drummond was wholly unsuccessful. It adds little to the picture regarding costs at this point.

[8] Overall then, it can be said that Mr Drummond had some success with the lesser part of his claim but not on the basis of how the complaint was advanced or argued; while he failed completely on the major part of his claim. Looked at that way, it cannot be said that Mr Drummond should be treated as having been successful in the proceedings for the purposes of assessing costs so I decline to make any award in his favour.

[9] NUPE was wholly successful in proving justification for dismissing Mr Drummond. However, NUPE breached the employment agreement between it and Mr Drummond by unilaterally reducing his salary. That breach led on to the settlement discussions that resulted in the purported agreement that Mr Drummond sought to enforce. Mr Drummond's view that there had been a settlement or a redundancy was not untenable even though it was not eventually upheld. Indeed the Authority's finding establishes that Mr Drummond was subject to a significant breach of contract.

[10] Mr Drummond was found to be responsible for misleading NUPE about his salary in previous employment before this employment commenced. That conduct was found to be a contributing factor in the circumstances giving rise to the unjustified disadvantage grievance. There were also other issues about Mr Drummond's reliability as a witness. NUPE argues that these factors add weight to its claim for costs. I do not accept the argument. Often enough the Authority has to assess conflicting evidence and express conclusions about witnesses' reliability. It is a long step from that exercise to saying that a party being found to be an unreliable witness adds weight to the other party's claim for costs. Regarding the contributing conduct, that resulted in a reduction in remedies. There would be an inappropriate double counting if it was now brought to account regarding costs.

[11] Viewing the proceedings overall, in light of NUPE's serious breach of Mr Drummond's employment agreement, it would be wrong to see NUPE as a successful party. Accordingly I find that NUPE is not entitled to an award of costs.

[12] From this I conclude that neither party should have an order of costs against the other. It follows that it is unnecessary to deal with NUPE's submissions about exceptional circumstances.

Summary

[13] The costs applications of both parties are declined.

Philip Cheyne
Member of the Employment Relations Authority