

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 127
5292954

BETWEEN ARIEL FORSBREY
 Applicant

AND WAITANGI NATIONAL
 TRUST TRUST
 Respondent

Member of Authority: Alastair Dumbleton

Submissions Received 20 January and 7 February 2011

Determination: 30 March 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] On 14 December 2010 under AA509/10 the Authority determined that Ms Ariel Forsbrey had not been dismissed from her employment with Waitangi National Trust. Ms Forsbrey had raised a personal grievance alleging she was forced to resign by the actions of her manager, Mr Antony Loggie, and the Trust when it failed to deal properly with concerns she raised about Mr Loggie's behaviour towards her. She claimed that her resignation was a constructive dismissal.

[2] In its determination the Authority held:

[Ms Forsbrey's] resignation was a course she freely decided to take and was not one forced upon her by any breach of duty or unreasonable action by either Mr Loggie or the Trust.

[3] Costs were reserved and a timetable was given for application to be made and replied to. From the submissions received it is clear that the difference between the parties is not as to whether an award should be made but the amount of it.

[4] The Trust has sought an award against Ms Forsbrey of \$7,976.25 which is 75% of actual legal costs incurred of \$10,635.00.

[5] Ms Forsbrey in accepting that an order for costs should be made against her seeks an amount at the level of the so-called “tariff” to be discerned across the range of Authority costs awards. She submits that \$2,000 is appropriate to match that tariff. Among reasons she puts forward in opposition to the level of costs sought by the Trust is her inability to pay more than \$2,000.

[6] Both the Trust and Ms Forsbrey in their submissions have referred to the governing legal principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

[7] No doubt in the generality of Authority investigations nearly \$8,000, or 75% of actual costs, as sought by the Trust would represent a very high award for a one day investigation meeting. However this was a claim of constructive dismissal. They bring their own demands of time and care to be put in by an employer preparing for an Authority investigation. As was seen in this case, the employer must participate in an examination, often in quite minute detail, of day-to-day interaction between parties in an employment relationship, and often over many months or longer. The investigation may not take place until many months after events in question occurred, adding a further difficulty with this type of grievance claim.

[8] I accept that in a case of this kind there was significantly more preparation required by the employer in conjunction with its legal advisors than might be indicated by the one day duration of the investigation meeting.

[9] Ms Forsbrey claimed that she had been subjected to humiliation, intimidation and abuse by Mr Loggie for two or more years. To meet that claim the Trust went as far as it reasonably could to demonstrate that Mr Loggie, apart from the final minor lapse, which was not without provocation, almost invariably addressed Ms Forsbrey in a polite and businesslike manner.

[10] It is one of the stated principles in *Da Cruz* (above) that while costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party’s behaviour, “conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.” The Court held that it is open to the Authority to consider “whether all or any of the parties’ costs were unnecessary or unreasonable.”

[11] The pursuit of this case in the Authority by Ms Forsbrey without an adequate evidential foundation for her serious allegations of bullying and intimidation made against Mr Loggie, and in doing so after she had been warned by the respondent and the Authority of the need to supply that evidence, was a folly of Ms Forsbrey. She made unsubstantiated and malevolent attacks on Mr Loggie and his character, leading the Authority to question her motives in bringing the claim.

[12] By law Ms Forsbrey was entitled to represent herself but in doing so she succumbed to the risk of losing objectivity. She appeared overwhelmed by a need to make the Trust and Mr Loggie pay for her inability to perform to reasonable standards required of her, which was a misuse of the opportunity she was given to have an investigation.

[13] Before the investigation meeting Ms Forsbrey had the enormous benefit of mediation as a means of providing her with a reality check. She may wish to reflect on whether she heard at mediation a strong and clear warning about the risk of achieving the outcome she has now got.

[14] I take into account that although she was representing herself, as she had every right to do, Ms Forsbrey is a mature and obviously intelligent person who should have known better than to have continued waging this grievance on her former employer.

[15] I consider that an award of costs well above the tariff is justified in the circumstances where sweeping and very personal condemnation without evidential support was made of Mr Loggie, who was obviously and naturally stressed by it when taking part in the investigation. The Trust took the matter extremely seriously, as demonstrated by the number of witnesses it had in attendance and who gave persuasive evidence to the Authority.

[16] In responding to the claim the Trust faced a significant reputational loss as well as a large monetary claim of \$56,000, justifying the input of a senior very experienced employment lawyer from out of town, Mr Mackinnon. The Trust has limited resources for carrying out its important purposes and these should not have had to be expended unnecessarily on a case such as this one.

[17] The Authority is not persuaded that Ms Forsbrey is unable to meet an award of costs of more than \$2,000. I note that her husband runs a business in which she has

had some employment and that she is retired or semi-retired to the Bay of Islands where she lives in a residence in which, I expect, she and her husband have equity.

[18] I therefore consider that the award should be markedly above the \$2,000 Ms Forsbrey agrees would be reasonable for her to pay.

[19] I consider that \$5,250, which will allow for significant disbursements for Mr McKinnon's travel costs and other things, is a reasonable and appropriate contribution to actual costs incurred in this case.

Determination

[20] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000, Ms Ariel Forsbrey is ordered to pay \$5,250 to Waitangi National Trust as a contribution to its costs of representation and the expenses incurred by it in responding successfully to the claim in this case.

A Dumbleton
Member of the Employment Relations Authority