

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 67  
5360571

BETWEEN

MARGOT GAZELEY  
Applicant

A N D

OCEANIA GROUP (NZ)  
LIMITED  
Respondent

Member of Authority: Alastair Dumbleton

Memoranda Received: 21 December 2012, 1 and 28 February, and 5 March 2013

Date of Determination: 15 April 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The applicant is ordered to pay \$30,000 as a contribution to the legal costs of the respondent and \$2,294 as a contribution to its disbursements.**

**Application for costs**

[1] In its determination dated 30 November 2012 – [2012] NZERA Christchurch 261 – the Authority held that Mrs Margot Gazeley had not been unjustifiably suspended or unjustifiably dismissed from employment she had with Oceania Group (NZ) Ltd. No remedies were awarded by the Authority in relation to Mrs Gazeley’s claims of personal grievance or her claims for special damages and penalties brought for alleged breaches of good faith by Oceania in its employment relationship with Mrs Gazeley.

[2] The Authority’s November 2012 determination followed an investigation meeting that took place over five days in May and June last year. Extensive submissions were received from the parties in July and August.

[3] There had been an earlier investigation by the Authority, shortly after Mrs Gazeley was dismissed in September 2011. This was to determine the interim reinstatement application she had made which, in November 2011, the Authority declined. A challenge against that decision to the Employment Court, heard in January 2012, was unsuccessful. There was also an application made by Mrs Gazeley, also unsuccessfully, to remove her grievance claims from the Authority to the Employment Court for hearing.

[4] As could be expected, before the investigation meetings the parties had tried to resolve the employment relationship problem by mediation.

[5] Costs were reserved by the Authority in its November 2012 determination and directions given requiring any application by Oceania to be made in writing within 21 days of the determination and any reply by Mrs Gazeley within a further 21 days. The parties were encouraged to try to resolve the question of costs themselves.

[6] Oceania, through counsel Ms Dunn, filed an application for costs within the time directed, on 21 December 2012.

[7] Mrs Gazeley, through counsel Ms Sharma, sought an extension of time in which to file, from 11 January until 28 February 2013. On 7 January 2013 the Authority granted a 24 day extension until 4 February 2013.

[8] In response Ms Sharma filed a memorandum on 1 February 2013, giving her view that the Authority's rejection of the request for a longer period until 28 February was unfair. She advised that Mrs Gazeley was left with little choice other than allow the Authority to proceed without hearing from her and issue a determination which would be challenged on the grounds of breach of natural justice.

[9] Accompanying counsel's memorandum in reply to Oceania's costs application, filed out of time on 28 February, was an affidavit sworn by Mrs Gazeley addressing her financial situation. No reason was offered as to why at least that information, which Mrs Gazeley had been best placed to give herself, could not have been supplied by 4 February 2013, regardless of whether her representative had time to attend to this case before 28 February.

[10] Oceania incurred \$134,000 in legal costs responding to Mrs Gazeley's claims in the Authority and \$22,000 defending the challenge made unsuccessfully to the Court by Mrs Gazeley.

[11] Costs of \$60,000 are sought from Mrs Gazeley, as a contribution to the costs incurred in relation to the investigation by the Authority of the interim reinstatement application and the substantive grievance, penalty and damages claims. Oceania also seeks to recover \$5,900 in disbursements from Mrs Gazeley.

[12] The claim is for the meetings of the Authority which took place over a total of six days in November 2011 (interim reinstatement) and May and June 2102.

[13] Considerable costs have also been incurred by Mrs Gazeley. With reference to "the substantive hearing" she deposes that her legal fees have been about half of the costs Oceania incurred. I have taken her to be referring to the amount of \$134,000, in which case her legal fees are about \$67,000 for the 6 days of investigation meeting, but if she is referring to \$156,000 which includes the costs of Oceania defending the challenge in the Court, then the amount she has been billed is about \$78,000.

[14] Mrs Gazeley is understandably dismayed at the possibility that having spent some \$67,000 or more to resolve her personal grievances and other claims, she is at risk of being ordered to contribute up to \$66,000, including disbursements, towards the amount spent by Oceania in successfully defending those claims.

[15] The amount of \$60,000 claimed as a contribution to Oceania's legal costs has been computed by applying to the six days of investigation meetings a rate of \$10,000 per day. That figure has been reached by increasing the Authority's daily tariff, which is currently \$3,500, because of two *Calderbank* offers made and rejected by Mrs Gazeley, and also a claimed lack of expedition in the presentation of Mrs Gazeley's case to the Authority. The tariff has been uplifted by a factor of nearly three.

[16] In the costs memorandum that was eventually filed for Mrs Gazeley it is submitted that Oceania's costs at \$134,000 are excessive, the claim is not supported by any evidence as to how that amount was spent on the case, and that Mrs Gazeley has a limited ability to pay any award of costs.

[17] It is submitted in conclusion for Mrs Gazeley that the Authority should make an assessment of the contribution she ought to make to Oceania's costs, and that in doing so the Authority should exercise its jurisdiction in equity and good conscience having regard to the particular circumstances of the case and of Mrs Gazeley.

[18] I agree that the starting point in considering costs in this case should be the Authority's daily tariff of \$3,500 currently. This case was one of average, or slightly above average at best, complexity in terms of both legal and factual issues that fell to be investigated and determined.

[19] Although ultimately unsuccessful in the Authority, the personal grievance claims of Mrs Gazeley did not lack merit.

[20] I agree that the two *Calderbank* offers made by Oceania, and their rejection by Mrs Gazeley, and to a lesser extent the uneconomical use of the Authority's meeting time, are factors that justify an increase in the daily tariff approach to be taken.

[21] I do not agree that the circumstances of this case support an uplift of the daily tariff to the extent that an award of costs of \$60,000 should be made against Mrs Gazeley. An award of that amount in a case such as this is likely to act as a deterrent to grievants seeking access to a means of having grievances and other employment relationship problems resolved, which is supposed to be available in the Authority.

[22] In their submissions, both counsel, Ms Dunn and Ms Sharma, have referred to the leading case on costs awards in the Authority, *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. In its decision, the Full Bench of the Employment Court considered in detail the role and functions of the Authority, noting amongst other things that it is not a court but an investigative body with a mandate to resolve employment problems. The Court found, at para.[27]:

... (a) *A picture emerges of a specialist institution set up to undertake investigations using whatever procedure it chooses for the purpose of resolving employment relationship problems without regard to technicalities.*

[23] The Court noted a distinction between it and the Authority, in that the Authority rather than the parties conducts the investigation of the employment relationship problem brought to it. Given its unique role in controlling its own

investigations, the Authority, the Court held, should judge the reasonableness of the parties' costs in the light of whichever procedure has been adopted. The Court noted that its procedure may range from the formal to the informal and from at least part adversarial to inquisitorial, and that therefore the nature of a particular investigation meeting must be a consideration relevant to the exercise of the Authority's discretion to award costs.

[24] In setting out some basic tenets in considering costs, the Court noted that Authority awards will be "modest" and also that "without prejudice offers," or *Calderbank* offers, can be taken into account. The Court also referred to a notional daily rate approach that the Authority may take. At the time the Court gave its judgment in December 2005, it assessed that rate to be \$2,000 which it used as a starting point and then increased for reasons given which included the making of a reasonable offer to settle which had been rejected.

[25] In a recent decision of the Employment Court, Judge Inglis referred to the "*intended cost effective, low level, and speedy nature of proceedings*" in the Authority. She did so in the course of reaching a decision to stay a costs determination of the Authority which she considered had, arguably, awarded an excessive amount in reimbursement of expenses for expert witnesses. See *Detection Services Ltd v. Christopher Pickering* [2013] NZEmpC 36.

[26] For the last year whenever the Authority has used the daily rate approach, the amount applied has been \$3,500, but the rate whatever it may be from time to time is able to be increased or decreased depending on the circumstances.

[27] The concern the Authority has in this case is that someone like Mrs Gazeley who sought to be reinstated to her employment under which she had received remuneration of about \$80,000 a year, could elect to retain counsel and become liable to pay fees, but if unsuccessful in her claim be ordered to pay \$60,000 to the other party as well. That situation cannot be what is contemplated in having employment relationship grievances and other claims resolved by a cost-effective, low level and speedy tribunal.

[28] While the levels of total costs to both parties in this case have been high – about \$67,000 or more for Mrs Gazeley and \$136,000 plus disbursements for Oceania – this is not a matter that should properly be the concern of the Authority, as

employees and employers have a right under the Act to choose any other person to represent them. That person may be a barrister and solicitor or other professional advocate, or a family member or friend. The level of fees charged and the way they are assessed is also not a matter the Authority may concern itself with, as that is by arrangement made between the party and their representative. The Lawyers and Conveyancers Act 2006 provides some protections in this regard for the clients of barristers and solicitors, and the law of principal – agent may govern non-lawyer representatives.

[29] This Authority and other tribunals like it have been created as specialist court-like bodies giving access to legal decision-making that would otherwise only be available to ordinary members of the public through the courts where there is a greater need for legal representation. The class of public that the Authority can make decisions about is mainly employees and employers in an employment relationship.

[30] The inquisitorial approach the Authority may take with any investigation is recognised to be a mechanism in tribunals for ensuring that applicants and other parties do not need the assistance of a lawyer, or other advocate, or agent, in order to present their position in the normal course of events, or at least do not need the same level of assistance that before the courts may be needed from legal representatives. If people are unable to give evidence without assistance, the Authority is able to question them in order to elicit the evidence, and indeed it is under a duty to do so as an investigative body. The need for comprehensive or detailed legal submissions referring extensively to case law is much lessened, if present at all, by the fact that the Authority is a specialist tribunal which can reasonably be expected to be familiar with current statute and case law in relation to personal grievances and remedies for breach of statute or contract.

[31] I agree with Ms Dunn that the without prejudice offers made and rejected are a significant factor to be taken into account when assessing costs. Oceania twice offered Mrs Gazeley \$40,000 to settle her claim. The first offer was made before her application for interim reinstatement had been heard and if accepted then would have saved both parties a great deal of expense, bearing in mind the total amounts that were accrued by the end of the proceedings.

[32] I conclude that the two offers of settlement made by Oceania were reasonable and were made in a timely way to allow Mrs Gazeley an opportunity to take advice on

the offers and consider that advice before making her decision. The daily rate should be increased for this reason.

[33] It should also be increased but to a lesser extent to reflect the time taken up by the investigation meeting. Oceania has made its claim on the basis that six days were required. There were, however, four meeting days to hear evidence in Nelson and a further half day in Auckland and Nelson, by video conferencing, for the evidence of Oceania's CEO and other witnesses. Part of a fifth day in Nelson was taken up by the interim reinstatement application. I consider the case could have been conducted more efficiently on behalf of Mrs Gazeley and that the 4½ days should not have been necessary for the May and June meetings.

[34] As to the ability of Mrs Gazeley to pay an award of costs, I note her affidavit evidence that while she has legal fees of \$67,000 or more to meet, some accommodation has been reached with Ms Sharma for her accounts to be put "on hold," at least until the challenge against the Authority's determination made to the Employment Court has been disposed of.

[35] I do not consider that the evidence given by Mrs Gazeley in her affidavit should lead to a nil award of costs or disbursements. The submissions made on her behalf are directed at an award of costs being made at the level of a reasonable contribution, in equity and good conscience.

[36] Although not impecunious Mrs Gazeley does I accept have some limitations on her ability to pay, but that should be regarded as a matter going to the discretion of the Authority to award compliance later on, if and when there arises an issue of enforcement in relation to the costs decision that the Authority should now make.

[37] I consider that particularly because of the reasonable without prejudice offers to settle made by Oceania, the daily rate should be increased from \$3,500 to \$5,000, which is to be applied to six days of meetings. That will give \$30,000 as an award of costs, which looked at globally is getting near a point where the expense to an unsuccessful grievant may place a real limitation on the right of access to dispute resolution by the Employment Relations Authority, which employees such as Mrs Gazeley are intended to have by law. I consider that in the circumstances an award at that level should be made, but no higher.

[38] In addition, I consider the disbursements as claimed for travel and accommodation are reasonable in the circumstances, as they have been confined to a single counsel Ms Dunn and are not claimed for second counsel Ms Smith.

[39] In relation to disbursements for the video conferencing on 16 June 2012, I consider these should be disallowed, as the use of that facility only became necessary when there were difficulties securing the attendance at the investigation meeting of Mr Hipkins, the main witness for Oceania. I take the view that it was reasonable for Mrs Gazeley to expect that he would attend the hearing in Nelson and give his evidence, critical to the issue of justification, during the five day period that was allocated for this. There would have been no disbursements required for video conferencing if Oceania had presented Mr Hipkins at the May meeting in Nelson. The amounts of \$1,696.25 and \$1,249.76 are therefore disallowed from the \$5,900 disbursements, leaving a balance of \$2,954 which is to be paid to Oceania by Mrs Gazeley in addition to \$30,000 legal costs.

[40] This order for payment of costs and disbursements is made by the Authority pursuant to clause 15 of Schedule 2 of the Employment Relations Act.

A Dumbleton  
**Member of the Employment Relations Authority**