

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 206
5597289

BETWEEN IGOR GRIGOROVICH
 Applicant

A N D BABBAGE CONSULTANTS
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
 S Blackwell, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions: 3 May 2016 from the Applicant
 3 May 2016 from the Respondent

Date of Determination: 23 June 2016

DETERMINATION OF THE AUTHORITY

- A. The application for personal grievance is dismissed.**
- B. There is no order for costs. Pursuant to s.45(4) of the Legal Services Act, an order for costs would have been made against Igor Grigorovich of \$2,333.33 if this section had not affected his liability.**

Employment relationship problem

[1] Igor Grigorovich filed a personal grievance application that was subsequently withdrawn days before the start of the investigation meeting on 2 May 2016. He was legally aided. The respondent seeks costs for the late withdrawal.

Issues

[2] Several issues arise from this matter. These are:

- a) Was this personal grievance application withdrawn in the Authority?
- b) What is the effect of Mr Grigorovich's grant of legal aid upon this costs application?

Was this personal grievance application withdrawn in the Authority?

[3] It is common ground Mr Grigorovich advised by email on 28 April 2016 that he wished to withdraw his application. The hearing was due to start on Monday, 2 May 2016.

[4] The Employment Court has rejected a purported withdrawal by email and by analogy with the High Court Rules required a party sign and file a notice of discontinuance.¹ The same formality is not required in the Authority.

[5] A matter before the Authority may at any time be withdrawn by an applicant². There is no set process for withdrawing an application in the Authority. The Authority is empowered to "follow whatever procedure the Authority considers appropriate."³ It also has the power to validate informal proceedings.⁴ I take the view this is what Mr Grigorovich intended to invoke when he emailed advising he wished to withdraw his personal grievance application.

[6] Therefore Mr Grigorovich's application for withdrawal was properly made. The personal grievance application is dismissed.

What is the effect of Mr Grigorovich's grant of legal aid upon this costs application?

[7] Withdrawal does not prevent a costs award to the other party⁵. Costs follow the event, meaning a successful party is entitled to seek an order requiring the other party to contribute towards his or her costs.

Starting point for costs

[8] The starting point for costs will be the Authority's daily notional tariff it imposes which is currently \$3,500 per hearing day. Given the withdrawal notice was

¹ Regulation 6(2)(a)(ii) Employment Court Regulations 2000; *Kapadia v. Axiom Rolle PRP Valuations Services Ltd* [2007] ERNZ 579 (EmpC).

² Clause 14, Schedule 2, Employment Relations Act 2000.

³ Section 160(1)(f) Employment Relations Act 2000.

⁴ Section 219 Employment Relations Act 2000.

⁵ *Kelleher v. Wiri Pacific Ltd* [2012] ERNZ 406.

received prior to the start of the one day investigation meeting, two thirds of the respondent's work towards completion of this matter would have occurred. Therefore the starting point for an award of costs would be two-thirds of the Authority's daily notional tariff, or \$2,333.33.

Effect of the grant of legal aid

[9] Mr Grigorovich has supplied a copy of his legal aid grant letter dated 28 April 2016. The letter confirmed his grant of legal aid expired on 4 May 2016. The grant of aid was withdrawn because his prospects of success were too low. This must have been advised to the Agency on or about 22 April 2016. No grant of aid for the applicant to attend an investigation meeting was made. The reason given was because "prospects were determined at the Direction Conference that there were no prospects to continue." Despite the withdrawal of aid Mr Grigorovich submits that under ss.45 and 46 of the Legal Services Act 2011 no order for costs may be made against an aided person in a civil proceeding.

[10] That is not correct. An order for costs may be made against an aided person in a civil proceeding if the Authority is satisfied that there are exceptional circumstances⁶.

Are there exceptional circumstances?

[11] The phrase "exceptional circumstances" is not defined within the Legal Services Act 2011. To be "exceptional" a circumstance must be "Unusual; not typical".⁷ The Supreme Court has held the phrase in an employment law context means unusual, that is, the "exception to the rule".⁸

[12] In determining whether there are exceptional circumstances, the following conduct of an legally aided person may be taken into account⁹:

- a. Any conduct that causes the other party to incur unnecessary cost;
- b. Any failure to comply with procedural rules and orders of the Court;

⁶ Section 45(2) Legal Services Act

⁷ Oxford Dictionary Online <http://www.oxforddictionaries.com/definition/english/exceptional>.

⁸ *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7, [2008] ERNZ 109 at [31].

⁹ Section 45(2) Legal Services Act

- c. Any misleading or deceitful conduct;
- d. Any unreasonable pursuit of one or more issues on which the aided person fails;
- e. Any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution;
- f. Any other conduct that abuses the processes of the Court.

Is there any relevant conduct by Mr Grigorovich giving rise to exceptional circumstances?

[13] There is conduct which has incurred unnecessary cost. Mr Grigorovich required leave to raise his personal grievance outside of the 90 day time limitation. At a teleconference in February 2016¹⁰ I gave an indication of the success of one ground and specific directions about the evidence required to be filed in order to have any measure of success in his application.

[14] The evidence was filed late and outside the Authority's timetabling orders on 7 March 2016. The evidence did not address the matters raised at the earlier teleconference. If a proper analysis of Mr Grigorovich's application had been made at that point, it would have concluded the prospects of success in being granted leave were low.

[15] However it is not until 21 April 2016 Mr Hays advised the Authority by email that he was no longer able to represent Mr Grigorovich, was advising Legal Aid Services that he "cannot certify funding" and legal aid will not fund his appearance at hearing. The clear inference was the application lacked merit.

[16] At the time of Mr Hayes advice the respondent had been put to the expense of filing its evidence. From the legal aid correspondence filed it appeared the lack of prospects ought to have been known from the point of the teleconference in February 2016.

[17] There is also evidence of attempts to negotiate settlement of this matter. An email dated 7 March 2016 from Barry Hayes to Mr Blackwell seeks settlement on the basis the respondent provided a positive reference and an agreement Mr Grigorovich

¹⁰ Minute dated 11 February 2016.

left *“because he was not certified to do the required work and lacked sufficient New Zealand experience at the time”*. There is a handwritten note at the bottom of the email. It records a counteroffer that Mr Grigorovich withdraw with costs to lie where they fall. At that stage neither party had incurred costs of preparing for hearing. Mr Grigorovich does not appear to have accepted this at the time.

[18] Following receipt of Mr Hayes advice about the lack of prospects of success and withdrawal as representative, the respondent sent an email to Mr Grigorovich directly on 22 April 2016. It sought withdrawal of the application before the Authority by 4pm that day and in return, the respondent would not seek costs. It does not appear that Mr Grigorovich accepted that offer.

[19] The seriousness of the above conduct must be offset against a number of other facts. Mr Grigorovich was at the time the second offer was made a self-represented litigant. The Agency had confirmed the withdrawal of legal aid the same day he advised the Authority of his withdrawal. He may not have appreciated the urgency required at the time and its impact upon costs. I also take into account the short timeframe for acceptance of the settlement offer and the fact withdrawal occurred within 6 days thereafter but prior to the hearing. The costs incurred between 22 and 28 April 2016 would have been negligible. The respondent’s position would not have worsened by the late withdrawal. In my view that removes this matter from conduct that would be considered an “exceptional circumstance”.

[20] The application for personal grievance is dismissed.

[21] There is no order for costs. Pursuant to s.45(4) of the Legal Services Act, an order for costs would have been made against Igor Grigorovich of \$2,333.33 if this section had not affected his liability.

TG Tetitaha
Member of the Employment Relations Authority