

Determination Number:AA 240/06
File Number: 5041549

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY AUCKLAND OFFICE**

BETWEEN Sharyn Harcombe (applicant)
AND Bakers Delight (NZ) Limited (respondent)
MEMBER OF AUTHORITY Alastair Dumbleton
COSTS SUBMISSIONS 30 June and 12 July 2006
RECEIVED
DATE OF DETERMINATION 17 July 2006

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] The substantive determination in this case was issued by the Authority on 11 July 2006 under AA238/06. As that was only a few days ago I need not repeat the circumstances that led the Authority to find in the determination that Bakers Delight had breached the Parental Leave and Employment Protection Act 1987 (PLEPA). To remedy that breach the Authority ordered Bakers Delight to pay its employee Ms Sharyn Harcombe, \$3,000 in compensation for the harm suffered by her.

[2] During the investigation meeting an application for costs was made on behalf of Ms Harcombe by Mr Organ, her representative. He has since supplied the Authority with an itemised account of costs billed to his client, as requested. In response, Mr Patterson, counsel for Bakers Delight, has made extensive submissions on the question.

[3] This is a case where the respondent employer has asserted that the employment relationship problem grew out of a misunderstanding on its part. That was nothing Ms Harcombe contributed to in any way. The employer should not be too severely criticised for making a mistake about her rights and its own obligations under the PLEPA, but Bakers Delight is to be criticised by the Authority for failing to act swiftly and decisively to rectify the problem. Its failure caused Ms Harcombe to engage a professional employment law consultant who then took the necessary steps to have the matter finally resolved.

[4] Mr Organ's fees charged to Ms Harcombe for his work were \$6,975 (including GST), and there was a disbursement of \$70 for the lodgment fee in the Authority. Mr Patterson, on behalf of Bakers Delight, submits that those fees are excessive for the work required to be done. He submits that costs should lie where they fall, or that alternatively an award of \$2000 at most is justified.

[5] Like most employees, Ms Harcombe is not an expert on employment law and it was perfectly reasonable for her to engage Mr Organ who commands fees of \$280 per hour (plus GST), an average rate in the employment law advocacy market.

Mr Organ's total fees equate by my reckoning to about 22 hours of work on the case. Mr Patterson submits that only a third of that time, seven hours, was necessary to do the job. No doubt others might have done the necessary work in less time, but Mr Organ is not to be criticised for giving the matter and his client his full care and attention, so that the job was

done properly. Bakers Delight is not in a position to complain about Mr Organ's fees, having compelled Ms Harcombe to have to get his professional help.

[6] I take the view in the stark circumstances of this case that the result would be entirely unjust if Ms Harcombe ended up out-of-pocket overall. She has been awarded a relatively modest \$3,000, but that was to compensate her for the harm caused by the breach of the PLEPA. There was also a breach of the employment agreement, noted by me in the determination of 11 July, and a further breach of the Employment Relations Act 2000 in relation to good faith behaviour was noted too. Those additional breaches have not been the subject of any award or even a claim for a penalty, luckily for Bakers Delight.

[7] I have kept it in mind that the purpose of an award of costs is not to punish a party for its behaviour but is to compensate a party who has been unnecessarily put to the expense of engaging a professional advocate. I also bear in mind that awards of costs on a full indemnity, or near that level, basis are rare in the Authority and indeed in the Courts generally. Although regularly requested to, in 15 years' I have never made such an award, to my recollection.

[8] The exceptional circumstances of this case, however, fully justify a much higher award than the usual reasonable contribution level. Mr Patterson's submission that costs should lie where they fall, fails to grasp how needless it was for this matter to have to be brought to the Authority for resolution.

[9] Bakers Delight will have to search itself as to why it did not clear its misunderstanding up with Ms Harcombe directly and much more quickly. It had undertaken to do just that as a term of the employment agreement, found in the Personnel Policy at No 25. Bakers Delight failed to honour that promise and should not therefore complain about having to indemnify Ms Harcombe for the consequences to her of that failure.

[10] Ms Harcombe should not have to use any of the \$3,000 compensation award to make up any shortfall in a costs award from her actual costs. The award had no fat on it to absorb any of the legal costs.

[11] Although in the narration to Mr Organ's invoice of his fees there is reference to attendance at a "mediation hearing" on 19 June 2006, Bakers Delight itself acknowledged in the Statement in Reply that it had not been to mediation as at 23 June. The time spent by Mr Organ on 19 June attempting mediation is therefore claimable. So is the time in mediation on 30 June, which I regard as an extension of the investigation.

[12] When Bakers Delight discovered its misunderstanding in early June, that was the time to put things right with Ms Harcombe. It is from that time that the conduct of the employer was such that I consider a higher level of costs should be awarded in this case. No doubt, in very different circumstances, an award of reasonable costs might see some reduction from the \$7,000 charged by Mr Organ, but in this case it would be merely tinkering to reduce the costs award by \$1,000 or so if they were excessive to that extent.

[13] Mr Patterson referred me to the Court of Appeal decision on costs given in *Binnie v Pacific Health Ltd* unreported, CA 65/02, 1 April 2003. At para [21] the Court held that a strong case for full indemnity costs exists when the losing party's case was wholly lacking in merit and its stance had been pursued in a reprehensible way. The Court added that the nature of the conduct which entitles the winning party to relief can also be relevant to the level at which costs should be awarded.

[14] Bakers Delight I find never had a case to pursue and conceded as much on 19 June. I do not consider *Binnie* precludes an award of full costs in the circumstances of this case. *Binnie* also mentions another basis for fully compensating a party for legal costs. The Court considered, at para [17], that this can be done by an award of special damages rather than party and party costs. S.162 of the Employment Relations Act gives the Authority jurisdiction to award damages in different forms. Reimbursement by the employer of expenditure by an employee as special damages seems particularly appropriate where the employment relationship is an ongoing one and a party has incurred the cost of fully restoring

it by having a breach by the other party rectified. The restoration of the relationship was in the overall interests of Bakers Delight as well as Ms Harcombe.

Determination

[15] I therefore order Bakers Delight to pay Ms Harcombe the full amount of her legal costs. Including GST, that amount is \$6,975. Bakers Delight is also to pay her \$70 to reimburse her for the lodgment fee in the Authority. The total of those is to be paid within 14 days of the date of this determination.

A Dumbleton

Member of Employment Relations Authority