

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Puti Hauraki (Applicant)

AND Te Awa o Te Ora Trust (Respondent)

REPRESENTATIVES Jeff Goldstein, Counsel for Applicant
Ian Thompson, Advocate for Respondent

MEMBER OF AUTHORITY Helen Doyle

SUBMISSIONS RECEIVED 18 October 2005
26 October 2005
1 November 2005

DATE OF DETERMINATION 15 November 2005

COSTS DETERMINATION OF THE AUTHORITY

- [1] In my determination dated 25 January 2005 I made an interim order reinstating the applicant. I reserved the issue of costs until after the substantive matter had been determined.
- [2] In my determination dated 14 September 2005 with respect to the substantive matter I found that the applicant had a personal grievance and awarded remedies. Permanent reinstatement was not sought. I reserved the issue of costs and encouraged the parties to reach agreement.
- [3] There was an attempt by the parties to reach agreement on costs but it was unsuccessful. I received submissions from Mr Goldstein on behalf of the applicant and Mr Thompson on behalf of the respondent.
- [4] Mr Goldstein submits that the applicant's actual costs are \$3000.00 plus GST for the application for interim reinstatement. The applicant's actual costs for the substantive matter which took almost three full days are \$7000.00 plus GST. The applicant also claims disbursements in the sum of \$70.00 for the filing fee and \$600.00 for hearing fees. The total claim is \$10,000.00 plus GST for costs, and disbursements of \$670.00.

[5] Mr Goldstein seeks an order that the respondent pay the full amount of costs incurred in both the interim reinstatement application and the substantive matter. Mr Goldstein submits in terms of the application for interim reinstatement that there was a strong case for reinstatement and detailed affidavits and submissions were required. He submits in terms of the substantive matter that the respondent unnecessarily lengthened the substantive investigation by raising matters not relevant to the issues. He also submits that there were prejudicial matters in the statements of evidence from the respondent witnesses which were not relevant but required to be responded to and close questioning.

[6] He submits that in the event the Authority is not prepared to order the full amount payable then the respondent should be ordered to pay a substantial amount.;

[7] Mr Thompson in his submissions on behalf of the respondent said that the respondent made extensive efforts to resolve the matter. He refers to the financial position of the respondent and attaches a letter to his submissions that he said was a Calderbank letter dated 18 November 2004. The letter was headed *without prejudice* and preceded the date of dismissal. There was an offer to the applicant for an exit package and an indication that consideration would be given to costs.

[8] Mr Goldstein replied to the submission from Mr Thompson, appropriately restricting further submissions to the new matter about the Calderbank letter. Mr Goldstein, I find, correctly submitted that there was a requirement that a Calderbank offer be transparent to provide the protection that such an offer provides [*Ogilvy & Mather v Darroch* [1993] 2 ERNZ 943 at 953]. Mr Thompson's letter makes no mention of *save as to costs* after without prejudice. In these circumstances I view the letter as simply without prejudice communication between the parties which should not properly be before the Authority. I do not have regard to it.

[9] It does not seem in dispute though that there were attempts by the respondent quite sensibly to resolve the matter.

Determination

[10] I have had regard to the actual legal costs and disbursements of the applicant. I am required to consider if all the expenditure was reasonably incurred and if not, then what proportion was reasonable. I then need to consider whether a full award is justified. If it is not justified then I need to determine what would represent a fair contribution to actual costs reasonably incurred by the applicant.

[11] I am of the view in this case that it is appropriate a cost award be made in favour of the applicant. I have considered both the application for interim reinstatement and the substantive application separately.

[12] Most of the cost to the applicant with her application for interim reinstatement was in the preparation of affidavits and submissions. The actual costs of \$3000.00 plus GST together with a filing fee of \$70.00 appear to have been reasonably incurred with a charge out rate of \$200.00 per hour. I am not satisfied the circumstances of this case can justify a full award of costs for the interim application. I am of the view that a fair and reasonable contribution toward the costs incurred by the applicant for the interim application would be \$2500.00 together with the filing fee of \$70.00.

[13] I order Te Awa O Te Ora Trust to pay to Puti Hauraki the sum of \$2500.00 together with a filing fee of \$70.00 being costs and disbursements with respect to the application for interim reinstatement.

[14] The substantive matter took almost three full days to investigate. During a telephone conference just prior to the meeting on 1 June I considered the relevancy of three witness statements that had been provided for the respondent. I concluded that all three statements contained material not directly relevant to the substantive matter and prejudicial to the applicant. I advised that the statements would not be taken into account. Although there were still some statements containing evidence peripheral to the main issues before the Authority it was much more limited because of this.

[15] I did not consider the conduct of witnesses for the applicant and respondent unduly contributed to the length of the hearing. It was not an easy situation for either party but both representatives sensibly limited their questioning to the main issues for determination.

[16] The case was clearly very important to both the applicant and respondent. There were some elements of complexity about the reinstatement issue as well which required the respondent to give some detailed evidence from several witnesses as to what occurred during the short period of time when the applicant was reinstated. The applicant was not successful in her claim of constructive dismissal or breach of the Authority order in terms of the reinstatement ordered on an interim basis. The actual costs of \$7000 plus GST appear to have been reasonably incurred.

[17] Taking all matters into account I am of the view that there should not be a full award of costs for the substantive matter but that a fair contribution toward the applicant's costs would be 70% of actual costs of \$7875.00 which is the sum of \$5512.50. The applicant is also entitled to the hearing fee of \$600.00.

[18] I order Te Awa O Te Ora Trust to pay to Puti Hauraki the sum of \$5512.50 together with hearing fees of \$600.00 being costs and disbursements with respect to the substantive matter.

[19] The total amount awarded to Ms Hauraki for costs and disbursements is \$8682.50. I am aware that the respondent is a non profit organisation and relies on others for funding. If there are difficulties in paying this amount in one instalment then I would expect Mr Thompson and Mr Goldstein to be able to come to an arrangement about payment.

Helen Doyle
Member of Employment Relations Authority