

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ashok Kumar (Applicant)
AND McDonald's Restaurants (New Zealand) Limited (Respondent)
MEMBER OF AUTHORITY Alastair Dumbleton
COSTS SUBMISSIONS 13 and 21 July 2006
RECEIVED
DATE OF DETERMINATION 31 July 2006

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] In its determination dated 23 May 2006 given under AA180/06, the Authority rejected Mr Kumar's complaint that his dismissal by McDonald's had been unjustified.

[2] At para [30] of the determination the Authority held that applying the objective test of justification under s.103A of the Employment Relations Act 2000, a fair and reasonable employer would have dismissed Mr Kumar in the circumstances. The Authority found that no other type of personal grievance could be sustained either.

[3] The Authority went on to find that if it had reached a different conclusion about the justification of Mr Kumar's dismissal, it must almost inevitably have also found that Mr Kumar had contributed to the situation that gave rise to his personal grievance. It held:

The first complainant and Ms Kahn gave evidence that was credible and compelling of experiencing and witnessing sexual harassment perpetrated against the former by Mr Kumar. The conduct and its strong link in the chain of causation leading to the dismissal, are likely to have disintitiled Mr Kumar to any remedies for his grievance.

[4] As to costs, the parties were directed to confer through their representatives with a view to resolving that question by agreement. That was not reached and the parties have asked the Authority to fix costs.

[5] The evidence in this case was necessarily extensive but not complex. The investigation meeting took three full days and part of a fourth day. For McDonald's counsel Ms Hartdegen seeks an award calculated as 66% of solicitor-client costs incurred by her client. Counsel advises they were \$45,765, inclusive of GST. The contribution to total costs sought is \$23,760 and disbursements of \$250. In her submissions Ms Hartdegen has noted that Mr Kumar's union, Unite, acknowledged during the hearing that it would indemnify him for any award of costs made against him.

[6] Ms Hartdegen also referred the Authority to *PBO Ltd v Da Cruz* unreported, 9 December 2006, AC 2A/05, a judgment of the Employment Court endorsing the costs principles that the Authority had been applying before that decision was given.

[7] For Mr Kumar counsel Mr Ryan (who did not represent him at the investigation meeting), has submitted that the matter before the Authority was not complex and that the appropriate range of costs in the Authority is around \$1,500 per day of investigation meeting. He submits that an award of \$6,000 maximum, is reasonable in the circumstances.

[8] I begin by looking at the length of the investigation meeting. Generally that is not a matter for one party to criticise the other about, as the length of an investigation meeting is subject to the overall control of the Authority, will which decide the scope and depth of any investigation it is undertaking.

[9] Parties need to consider carefully the level of representation they need for an Authority investigation, assuming they wish to have a representative at all. As has been pointed out before, an investigation meeting in the Authority is not a trial where parties usually carry an onus to establish factual or legal matters and where the judge or adjudicator has a limited ability to conduct an inquiry in a different direction from the parties, where that might seem to be productive. Authority members carry the overall responsibility of satisfying themselves as to the facts and making a determination according to the applicable legal principals. Parties are not expected to do the work of the Authority and parties cases should not fail because they have not uncovered or presented relevant evidence or because they are unaware of the procedure to be applied by the Authority.

[10] While professional representatives do in general ease the task of the Authority, there is no strict requirement for them to perform any particular role. With or without a representative, the same witnesses will have to be called (by the Authority itself if necessary), the same questions will have to be asked of them and the same matters of law will have to be identified and considered by the Authority. I therefore regard it as a matter between McDonald's and its counsel, Ms Hartdegen as to the level of fees charged for the work. It is not a matter that Mr Kumar should automatically become fully responsible for simply because, in the event, his application was unsuccessful.

[11] In my view the investigation meeting could have been concluded in 2 to 2.5 days. The reason it did not was because the Authority permitted Mr Kumar and his representative to bring evidence to show, if they could, that McDonald's has been lied to by the complainants when it was investigating the allegations made by them against Mr Kumar of sexual

harassment. His two-stage approach to his written evidence, also took up more time than necessary.

[12] As I explained at the outset of the investigation, a dismissal that is justified at the time that action is taken by an employer cannot subsequently become unjustified by a later confession of lying made by a key witness in the employers investigation. This line of inquiry was permitted by the Authority because of the possibility that if McDonald's had been lied to Mr Kumar would have suffered an injustice, although not one that could have been put right by holding his dismissal to be unjustified. If either or both of the complainants had lied to McDonald's then Mr Kumar may well have had the ability to bring civil proceedings against them in tort, but the Authority would not have been able to find his dismissal to be unjustified and order his reinstatement.

[13] If it had been revealed in the presence of McDonald's at the investigation meeting that lies had been told, the Authority would have expected the employer to at least consider whether, morally if not legally, it was obliged to reinstate Mr Kumar and take appropriate disciplinary action against either of the complainants.

[14] Although Mr Kumar and his representatives were given leave to pursue this inquiry, in the result they failed to show that any injustice had been done to Mr Kumar. I heard the direct evidence of the first complainant who I found to be truthful. McDonald's could reasonably have taken the same view of her honesty when considering her complaints. The union took it upon itself to approach the complainants after Mr Kumar had been dismissed and it obtained from them statements with which they each purported to withdraw their complaints of sexual harassment made earlier against Mr Kumar. The union apparently believed the complainants to be stating that Mr Kumar had been innocent of sexually harassing them. The union could and should have ascertained exactly what the complainants were stating, before deciding whether to pursue this particular line of inquiry before the Authority.

[15] I therefore consider that for at least one day of the investigation meeting Mr Kumar must bear the responsibility of unnecessarily prolonging the investigation. A higher level of costs will be fixed, partly for that extra day but also for the additional time needlessly taken up after Mr Kumar supplied a second and much more extensive statement of evidence part way through the investigation. Key McDonald's witnesses had to be recalled as a result.

[16] I fix costs by treating the investigation meeting as lasting three full days. For two of those, costs will be fixed at \$1,800 per day and at \$3,600 for the third day. That gives a total of \$7,200 legal costs.

[17] Disbursements of \$250 are also awarded, giving a total of \$7,450 costs which are to be paid by Mr Kumar to McDonald's.

A Dumbleton
Member of Employment Relations Authority