

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 82A/09
5120817

BETWEEN LARRYANNE MOIR
 Applicant

AND COLES MYER NZ
 HOLDINGS LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Rachel Brazil, Counsel for Applicant
 Penny Swarbrick, Counsel for Respondent

Submissions received: 21 September 2009 from Applicant
 21 July 2009 from Respondent

Determination: 22 October 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] The applicant, Ms Moir, was unsuccessful in her claim of unjustified dismissal but the Authority found Ms Moir was disadvantaged in her employment by an unjustified action on the part of the respondent. The Authority awarded Ms Moir a compensatory payment of \$4,000 in respect of the disadvantage only.

[2] For the applicant, Ms Brazil submitted an affidavit outlining Ms Moir's financial position, and in her submissions proper counsel sought an award of \$3,000 in favour of her client as a contribution to her costs. Ms Brazil relies on an Authority determination, *Clear v. Waikato District Health Board* (23 February 2008, J Scott, AA67/08) in which the applicant was partially successful as is the case here. Counsel submits:

The applicant's costs were directly attributable to her inability to perform a role due to her injuries. These injuries were brought about as a consequence of the respondent's failure to ensure a safe working environment. The respondent should not benefit from its failure to address health and safety issues.

[3] After outlining a summary of costs incurred by Ms Moir in relation to the Authority's investigation meeting (copies of the invoices were attached to the affidavit), counsel advises that total costs, excluding submissions, were \$7,149.31 (GST inclusive). Ms Brazil submits that, in line with *Clear* (supra), a starting point for the Authority would be a reasonable costs award in favour of the applicant of \$3,000.

[4] For the respondent, Ms Swarbrick acknowledges the wide discretion the Authority has by virtue of Schedule 2 clause 15 to make such orders in relation to costs and expenses as the Authority thinks reasonable. Counsel refers the Authority to *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 and the principles set out there by the Full Court of the Employment Court. Specifically, Ms Swarbrick refers the Authority to the principles in that decision relating to conduct which increases costs unnecessarily being able to be taken into account and inflate or reduce an award, and that discretion should be exercised in accordance with equity and good conscience on a case-by-case basis. Quite correctly, counsel submits that *PBO* (supra) confirms that the tariff approach is not to be applied too rigidly.

[5] In addressing this instant case, counsel submits the respondent was totally successful in defending the claim for unjustified dismissal and for penalties for a breach of good faith and that, accordingly, the respondent ought to be entitled to contribution to the costs it reasonably incurred.

[6] Counsel rightly points out that the Authority made the finding of disadvantage by exercising its discretion under s.122 of the Act as this matter was not pleaded before it. Ms Swarbrick submits:

It was based on the evidence called by the applicant in support of her unsuccessful grievance. No additional evidence was required; nor were submissions sought on that issue. Accordingly, no additional costs were incurred by either party in relation to that disadvantage issue.

The applicant would not, therefore, be entitled to any costs in relation to that partial success if she were to claim them.

[7] On behalf of her client, counsel submits it should be entitled to a cost award of \$7,500 based on a daily tariff of \$3,000 for 2.5 days. Ms Swarbrick explains that the time involved comprises: one full day in the Authority; one day for the completion of written submissions; and the teleconferences prior to the hearing date. Counsel submits that an award of this amount is reasonable and would be consistent with the Authority's approach in other similar cases.

[8] Counsel points out the respondent's legal costs of preparation and representation are in excess of \$15,000 exclusive of GST, disbursements and executive time. Counsel submits the costs were all incurred in the conduct of the litigation. Counsel submits the claim is reasonable in the circumstances, and particularly given the detail required to be attended to in the evidence and supporting documentation, the interlocutory matters, the preparation for and attendance at the hearing, briefing of witnesses and drafting of written legal submissions. Ms Swarbrick submits that all work undertaken by the respondent's counsel was necessary for the preparation of a hearing in the light of the scope of the pleadings and the range of matters raised by the applicant. Counsel says:

The applicant failed to provide particulars of the alleged breaches she claimed penalties for and this increased the cost of preparing for the hearing.

Analysis and discussion

[9] The scope of the pleadings on behalf of the applicant was particularly broad given the facts of the case. It is axiomatic that when faced with a statement of problem which includes the awarding of penalties a prudent respondent will necessarily prepare evidence in rebuttal. When, in the last analysis, the applicant simply asserts breaches have occurred but provides no supporting evidence in the investigation setting, the time invested by the respondent's counsel can be seen to be unnecessary.

[10] I have no reason to doubt the information provided to the Authority in Ms Moir's affidavit. Nor am I in any doubt that she believed her chances of success in her primary claim were sound. This proved not to be so on the evidence, and a thorough review of the statement in reply might well have led to a narrowing of the pleadings.

[11] The respondent is a nationally-based company with its head office in Auckland. It is quite proper in those circumstances for a respondent to brief counsel familiar with its business. In such a situation, the respondent was entitled to brief Ms Swarbrick.

[12] I have considered the information in Ms Moir's affidavit thoroughly and accept that a significant cost award in favour of the respondent would necessarily render nugatory the modest award made by the Authority in the substantive meeting. However, I am not minded to let costs lie where they fall as I accept the respondent was put to excessive, unnecessary cost in preparing its defence. This is particularly so in relation to the allegations of breaches of its obligations to act in good faith under s.4 of the Act.

[13] In equity and good conscience, the Authority has considered the applicant's financial situation and does not wish to add unduly to Ms Moir's straightened situation.

Determination

[14] I award the respondent the sum of \$500 as a contribution to what I find are its reasonably incurred costs.

[15] But for Ms Moir's situation, the Authority would have made an award based on the tariff approach as set out in *PBO*.

Paul Montgomery
Member of the Employment Relations Authority