

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 3
5334612

BETWEEN VIRGINIA SUSAN
MACFARLANE
Applicant

AND DUTCH VILLAGE TRUST
Respondent

Member of Authority: R A Monaghan

Representatives: R Crotty, counsel for applicant
M Tolich, counsel for respondent

Memoranda received: 22 December 2011 from applicant
9 December 2011 from respondent

Determination: 6 January 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 11 November 2011 I declined to order a penalty in respect of one of two alleged breaches of terms of settlement recorded by a mediator under s 149 of the Employment Relations Act. The alleged breach concerned statements made about the applicant by a trustee of the Dutch Village Trust, which I found were made in the trustee's personal capacity. The second alleged breach, which concerned a reference, was resolved during the investigation meeting.

[2] Costs were reserved, and the parties have filed memoranda on the matter.

[3] Counsel for the respondent cited the principles in *PBO Limited v da Cruz*¹ but referred to earlier unsuccessful attempts to settle the matter and submitted that full solicitor and client costs should be awarded in the sum of \$21,778. The memorandum in support referred in a general way to 'without prejudice' offers to settle, but no written offer headed 'without prejudice save as to costs', for example, was produced and counsel for the applicant said there were no such offers. There was

¹ [2005] ERNZ 808.

no further analysis of why full costs and in the amount specified, would be appropriate.

[4] As to the specified amount, the invoices provided in support included reference to time spent on a matter involving the respondent and another employee which should not have been included. I cannot identify from the invoices which amounts were charged to the present matter alone.

[5] As to liability for full solicitor and client costs in general, I have reservations about the extent to which any generalised reference to the attempts to settle included reference to what occurred during mediation. Discussions during the investigation meeting led to the resolution of the second alleged breach by the re-visiting of an earlier offer. Even if the package finally agreed differed in certain respects from the earlier offer, the offer was of a kind that should have led to a resolution of the matter without the need to proceed to the Authority in respect of that breach. I do not know, and probably cannot know, why it did not. Overall my reservations mean that without further argument in support I do not take that matter any further in the context of whether full costs should be awarded.

[6] The references to attempts to settle did not extend to the alleged breach in respect of the statements made by the trustee. Ms Macfarlane was entitled to be concerned about the statements and to seek redress. The circumstances were particularly unfortunate as they involved an unsatisfactory conversation between two individuals, both of whom were acting on their own account. Even so, had the Dutch Village Trust been liable for the trustee's statements, I would have considered the circumstances amounted to a serious breach of the relevant term of settlement.

[7] For these reasons it is appropriate to consider Ms Macfarlane's lack of success on the point in the context of an award of costs based on the usual principles, but not to go as far as an award of full costs.

[8] Accordingly I do not consider the circumstances of this matter call for an order for full costs.

[9] Counsel for the applicant submitted that costs should lie where they fall, on the basis that 'the final outcome could be classified as a draw'. He said the Authority had effectively made an order by consent in the matter of the reference, and no order in respect of the trustee's statements.

[10] I would not go as far as to say that the matter was a 'draw' in that I do not accept the parties achieved equivalent degrees of success. The Dutch Village Trust defended itself successfully in respect of the statements made by the trustee in her personal capacity, and is entitled to consideration of a contribution to its costs.

[11] If a notional daily rate were applied, the contribution would be \$1,500 - \$1,750 based on a half day investigation meeting. I reduce the amount to take account of what could be considered a 'draw' in the matter of the reference. Counsel also raised Ms Macfarlane's ability to pay, but there was too little information to support taking that matter into account so I do not do so.

[12] Ms Macfarlane is therefore ordered to contribute to the costs of the Dutch Village Trust in the sum of \$750.

R A Monaghan

Member of the Employment Relations Authority