

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 187
5164043

BETWEEN RACHEL MANAWATU
Applicant

A N D TE TAI O MAROKURA
CHARITABLE TRUST
Respondent

Member of Authority: Helen Doyle

Representatives: Robert Davidson, Counsel for Applicant
Alan Knowsley, Counsel for Respondent

Submissions Received: 25 October 2011 from Applicant
4 November 2011 from Respondent

Date of Determination: 28 November 2011

**DETERMINATION OF THE AUTHORITY
AS TO LOST WAGES AND COSTS**

[1] In my determination dated 3 October 2011, I found that the applicant was unjustifiably dismissed and awarded remedies. I found the applicant contributed towards the situation that gave rise to the personal grievance and there should accordingly be a 25% reduction to the remedies awarded. I reserved leave for either party to return to the Authority if agreement was unable to be reached with respect to lost wages. I also reserved the issue of costs and encouraged both parties to reach agreement, failing which a timetable was set for an exchange of submissions.

[2] I have now received submissions both as to lost wages and costs.

Lost wages

[3] Mr Davidson has provided documentation from the Inland Revenue Department to establish earnings by Ms Manawatu during the relevant period of

10 months for which an award was made for lost wages. Both counsel agree on the actual loss of income as below:

- Annual salary: \$42,000;
- 10 months loss of wages therefore: \$35,000;
- Earnings over that period: \$26,321;
- Lost income for 10 months: \$8,679.

[4] Mr Davidson submits that there should be an order that the sum of \$8,679 be payable in full without contribution being deducted because the applicant continued to sustain loss of wages after the 10 month period had ended. The question as to whether there should be lost wages after the 10 month period was addressed in the substantive determination and it was found there was insufficient evidence of attempts made after that time to mitigate any loss. I also find, as Mr Knowsley states in his submission, that contribution is to be deducted from the lost income figure of \$8,679 in accordance with para. [93] of the determination. That is the sum of \$2,169.75 which leaves a balance owing to the applicant for lost wages of \$6,509.25 gross.

[5] I order Te Tai o Marokura Charitable Trust to pay to Rachel Manawatu the sum of \$6,509.25 gross being reimbursement of lost wages.

Costs

The applicant's submissions

[6] Mr Davidson referred to the leading Employment Court judgment as to costs, *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. I accept that the principles set out in that judgment are applicable in the Authority in exercising its discretion as to costs.

[7] Mr Davidson submits that there could be no issue that the applicant's conduct was other than of assistance to the Authority. He submitted that the case was extremely important to the applicant and that whilst it was not legally or factually complex, it was made more complex because of the nature of the applicant's employment and the complexity of the various relationships between the applicant and the respondent agents.

[8] Mr Davidson referred to the general guide in *Reid v. New Zealand Fire Service Commission* [1995] ERNZ 38 and an award of two to three times the hearing time as reasonable for preparation.

[9] He submits that the applicant's arguments did not lack substance and the issues were neither unduly technical nor legalistic.

[10] Actual costs for the applicant were \$9,500 excluding GST with disbursements claimed in the sum of \$285 being the filing fee of \$70, an administration fee of \$65 and travel costs of \$150.

[11] In this case which required a second investigation meeting day, the Authority's administration file provides that a hearing fee was charged to the applicant of \$153.33. This amount appears to have been overlooked as a disbursement but I find should properly be taken into account as another disbursement incurred by the applicant.

[12] Mr Davidson submits that the applicant should be awarded a significant contribution towards her costs.

The respondent's submission

[13] Mr Knowsley firstly submits that Mr Davidson made no approach to try to reach agreement on costs notwithstanding that the Authority, in its determination, encouraged the parties to do so. He submits that Mr Davidson should not be entitled to any additional costs in terms of preparation of the costs submission.

[14] Mr Knowsley submits that costs should be in the normal range of \$3,000 per day for a hearing that lasted one day plus 1½ hours on the second day. He submits that at most, therefore, costs should be based on 1¼ days and should be subjected to the 25% reduction.

[15] Mr Knowsley submits that the conduct of the applicant caused the hearing to be longer than necessary because, in her statement of evidence and that of another witness, there was reference to having been contacted by or having contact with various staff at the Trust office during the week the applicant was away from the office. He also submitted that the evidence of the other witness was subsequently accepted not to be correct on that point.

[16] Mr Knowsley submits that the evidence at the investigation meeting was that the applicant did not tell staff that she was withdrawing from the office as she did not contact the manager of the respondent or other staff members. Nevertheless, he submits the respondent was put to trouble in relation to these statements and had to file statements in rebuttal. He submits that had this not been required, the hearing time would have been reduced and that there should be a reduction in costs to reflect this.

[17] Mr Knowsley further submits that an argument that there was contact was persisted with in closing submissions. Mr Knowsley submits any costs award should be at the lower end of the scale and subject to contribution.

Determination

[18] My own record of the hearing times accords with Mr Knowsley's times. The first day was quite a full day commencing about 10.40am and adjourning at 6pm. I do note that although the second day was short, being an hour and a half, written submissions were received from both parties after the investigation meeting concluded.

[19] There is no reason to depart from the usual principle that costs should follow the event. This was an important case for both parties. The purpose of costs is not to punish or express disapproval and the Authority should only give consideration to such conduct that increased the investigation/meeting time and therefore impacted directly on costs incurred by the parties.

[20] I agree with Mr Knowsley that additional time was caused by statements made by the applicant in her statement of evidence and those appearing in another witness' statement that she had contact with or from staff in the Trust office and there was knowledge of her whereabouts. Although the applicant conceded that there had not been direct discussions of this nature fairly early on in her oral evidence, the respondent had prepared witness statements to deal with the issue of contact or knowledge.

[21] Costs, I find, should be assessed in this case on the basis of the daily tariff in the Authority which is now recognised as usually \$3,000 per day and any adjustments should be made from that point.

[22] The second day only occupied 1½ hours but I make an allowance for subsequently provided written submissions but not the costs submission because I accept Mr Knowsley's view that the provision of such could have been avoided if the parties had discussed costs.

[23] On that basis, I find that it would be fair to allow costs for one and a half days. That would be the sum of \$4,500. I then make a reduction to conduct I have found increased the hearing time, as explained above, of \$500.

[24] I find that a fair and reasonable award of costs in all the circumstances is the sum of \$4,000. The applicant is entitled to reimbursement of her filing fee of \$70. The sum of \$65 for general expenses of an administrative nature does not seem unreasonable and given that Kaikoura is a destination that inevitably requires some travel costs to be incurred and Mr Davidson travelled to and from Kaikoura by car, the sum of \$150 is also reasonable. As already set out, reimbursement of the hearing fee of \$153.33 is also appropriate.

[25] The Court of Appeal has held that where an employee's conduct has contributed to his or her dismissal and has been taken into account in assessing remedies, it cannot be taken into account a second time in assessing the employee's contribution to costs: *White v. Auckland District Health Board* [2008] NZCA 451. On that basis, therefore, I make no reduction in terms of any contribution.

[26] I order Te Tai O Marokura Charitable Trust to pay the sum of \$4,000 to Rachel Manawatu being costs together with the sum of \$438 being disbursements.

Helen Doyle
Member of the Employment Relations Authority