

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 157A/09
5272535

BETWEEN PAULA MASOE
Applicant

AND TE ROOPU AWHINA KI
PORIRUA TRUST
Respondent

Member of Authority: P R Stapp

Representatives: Paul McBride for Applicant
Alan Knowsley for Respondent

Submissions received: By 17 November 2009

Determination: 10 December 2009

COSTS DETERMINATION OF THE AUTHORITY

The facts

[1] The Authority reserved the matter of costs to be dealt with by way of written submissions in an earlier determination (PR Stapp unreported 19 October 2009 WA 157/09). That matter involved an interim injunction. Costs will often wait until the substantive matter has been dealt with, but in this case I was convinced from submissions for the applicant to deal with them to bring closure and certainty to the injunction proceedings. To avoid any double dipping there may have to be an adjustment made later to account for any work done for the substantive hearing that have been included in the costs at this stage. Although this case involved an interim injunction, that injunction has left it to the employer to essentially start its investigation again, or develop another strategy, or wait for the substantive investigation. In any case the interim injunction may be headed off by the other causes of action that the applicant has relied upon to raise a personal grievance in her employment relationship problem. If the employer embarks on another strategy to

deal with its issues with the applicant given the time before the substantive investigation meeting is due to start. That sets this matter up differently from other cases where costs would wait until the substantive investigation meeting.

[2] The applicant has applied for a substantial amount of her actual costs that were \$12,000 plus GST. She has asked for an order of \$8,000 plus GST, plus disbursements of \$85.50 for photocopying and \$70 for the filing fee.

[3] The respondent submitted that the claim is too high. An award in the vicinity of \$2,000 would be more appropriate. The disbursements are not disputed. Costs should not dissuade a respondent from taking part and the Authority's decision was only an interim determination of the matter.

Employment Relationship Problem

[4] How much costs should be awarded to the applicant, Mrs Masoe?

Determination

[5] The applicant is entitled to costs. The applicant was successful. She has been put to an expense on a matter that should not have required litigation given the clear evidence of an arguable case. The respondent could have avoided costs when the balance of convenience and overall justice should have been identified as risks for it. In saying that there was an alternative open to the respondent to deal with the matter by settling or reaching undertakings in the matter.

[6] The amount of any costs should not dissuade a respondent from taking part in an Authority investigation, but of course that must involve the respondent making an assessment of the risk, given that costs may be an issue. The costs have been incurred and the respondent should have gone into this with its eyes open as to the implications. This is not about a choice to litigate when there are considerable risks but about developing successful employment relationships and the best way to do that is to achieve undertakings and settlement. This factor is only tempered by the requirement on the Authority to keep costs modest.

[7] No undertakings were possible between the parties. The respondent vigorously opposed the application for an interim injunction despite making a concession during the Authority's investigation meeting, but then only in regard to the scope of any order. That was too late and clearly not enough. The Authority's intervention could have been entirely avoided with some risk assessment and with the respondent standing back from the situation it has got itself into and applying proper judgement.

[8] The applicant has incurred substantial legal costs to preserve her position in regard to her employment because of the respondent's decisions relating to the current investigation in the Authority. Mrs Masoe reasonably went to a lawyer for representation in such circumstances. Without such assistance I doubt that Mrs Masoe would have been able to assemble the information required and apply the serious requirements for an injunction application on her own. Moreover the position taken by the respondent would have left her disadvantaged when she was trying to protect her rights.

[9] Costs follow the event because the applicant was successful and has incurred costs. The nature of the proceedings involved extra work because of the preparation required to meet the very high standard of work and detail required for an injunction such as affidavits and undertakings for damages.

[10] In regard to the work I accept that costs properly relate to drafting the application, filing and service and telephone conferences with the Authority, the preparation of affidavits, an undertaking from Mrs Masoe and preparing submissions that comprehensively covered the legal and factual matrix. That work had to be done with some urgency and that as a factor increases the award that otherwise would have been made. I also accept that consideration must be given to the extent to which Mrs Masoe may be out of pocket to enforce her rights and to preserve the position she was in before the employment relationship problem occurred.

[11] The principles in applying costs enable the Authority to be flexible and the principles accommodate the application for injunctions. I conclude that the work required and the detail involved and the urgency, in which the work had to be done, means that the amount of costs should be more than the standard fare. The range,

bearing in mind the amount of costs incurred by Mrs Masoe, is between \$3,000 (in the case of a standard investigation meeting) and the \$9,000 awarded to a successful respondent defending an injunction in the Employment Court. Because \$3,000 is a reasonable starting point I also have to bear in mind that any injunction proceedings in the High Court will involve considerable more expense and the Authority is available for cheap and quick and speedy access that should be affordable to both employers and workers. Thus it is appropriate to apply the tariff arrangements within the range applied by the Authority. Thus, I am willing to be flexible on the upper range. This is to ensure that Mrs Masoe gets a fair contribution to her costs where the Authority's investigation meeting was not a trial as it would be in the Employment Court and that the investigation meeting was kept short because the matter could be dealt with by affidavit evidence and oral and written submissions.

Orders of the Authority

[12] Te Roopu Awhina Porirua Trust is to pay Mrs Paula Masoe the sum of \$5,000 plus GST as a contribution to her costs plus \$85.50 disbursements and \$70 filing fee.

P R Stapp
Member of the Employment Relations Authority