

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 141  
5272535

BETWEEN

PAULA MASOE  
Applicant

AND

TE ROOPU AWHINA KI  
PORIRUA TRUST  
Respondent

Member of Authority: P R Stapp

Representatives: Paul McBride, Counsel for the Applicant  
Alan Knowsley, Counsel for the Respondent

Submissions By: 16 May 2011

Determination: 12 September 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This is an application from the applicant who is seeking costs in relation to a substantive determination issued by the Authority on 22 April 2010, WA74/10 and the costs associated with the determination on damages awarded on 31 January 2011, [2011] NZERA Wellington 16.

[2] The applicant is seeking a substantial amount towards her actual costs. The costs for the matter currently before the Authority are just under \$28,000 plus GST and disbursements and include the hours for preparation by Counsel and a law clerk.

[3] The disbursements comprise the \$70 filing fee (lodged 25 September 2009); \$29.90 photocopying; \$11.95 courier; (the total amount of disbursements is \$111.85). The applicant's claim for a substantial sum of costs ("*approaching the full amount incurred*") is to recognise:

- (a) A two day investigation meeting in the Authority;

- (b) Substantial preparation for the Authority's investigation meeting;
- (c) Substantial additional work in relation to damages and related issues;
- (d) Cultural and language issues impacting on the time taken; and
- (e) The need for this less than straightforward costs memorandum submitted by the applicant's counsel.

[4] The respondent has opposed the claim because:

- (a) The applicant was not successful in all claims pursued;
- (b) A *Calderbank* offer of \$8,000 was made to the applicant in relation to her claim of unjustified dismissal. It is submitted that the applicant did not exceed the *Calderbank* offer in relation to that claim;
- (c) The respondent is entitled to seek costs in relation to the *Calderbank* offer and other unsuccessful claims pursued by the applicant.

[5] It was submitted on behalf of the respondent that costs should be either payable to the respondent or should lie where they fall.

### **Issues**

[6] Who should get costs, and how much?

### **The facts**

[7] This matter has had a lengthy twisting and turning history in the Authority. The applicant was successful in the Authority's substantive determination (22 April 2010). Costs were reserved in that determination and have not been dealt with until now. Previously costs have been awarded for the interim reinstatement application (15 October 2009 and 10 December 2009).

[8] A claim for damages in regard to costs incurred by the applicant was determined by the Authority in a determination issued on 31 January 2011 and costs were reserved too. The matters now addressed by the applicant relate to costs in relation to the substantive investigation meeting held on 15 and 16 March 2010 and the preparation and submissions for the damages determination (31 January 2011).

[9] In August 2009, the respondent sent to the applicant a letter marked “*without prejudice except as to costs*” (“the *Calderbank* letter”).

[10] That letter related to:

- (a) Addressing the so-called redundancy events which the Authority later decided amounted to an unjustified dismissal of the applicant;
- (b) Offered the applicant a payment of \$8,000 under s.123(1)(c)(i) in full and final settlement of the unjustified dismissal personal grievance.

[11] The letter did not address the applicant’s costs to that point and it did not make a mention of any apology or other vindication for the applicant.

[12] The Authority awarded (in the substantive determination) the applicant:

- (a) \$8,000 under s.123(1)(c)(i) of the Employment Relations Act 2000;  
plus
- (b) \$3,656 special damages;
- (c) Found that the applicant had a personal grievance for unjustified dismissal; and
- (d) Reserved costs.

[13] It follows that the respondent’s offer contained in the *Calderbank* letter was lower than the sum the Authority awarded. Also, it:

- (a) Failed to address costs to that point;
- (b) Failed to address matters of public vindication; and
- (c) Had nothing to do with the separate cause of action about the disciplinary process.

[14] I accept and agree that the *Calderbank* letter is irrelevant to the questions now before me. I have put it to one side.

**Determination of the Authority**

[15] The applicant was successful in her claims. I accept that the costs which are the subject of this application occurred after:

- (a) The applicant's reinstatement reached between the parties (which costs were covered in the special damages award);
- (b) The interim injunction in regard to the respondent's procedure (which costs were the subject of a separate costs determination [WA157A/09]); and
- (c) The *Calderbank* letter (mentioned for completeness).

**The costs in the Authority**

[16] As the applicant was successful and costs follow the event, I am applying the principles in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 (the *PBO* case), on a tariff basis.

[17] In the circumstances of this case, the following applied:

- (a) The applicant was required to arrange 10 affidavits or briefs;
- (b) Call eight witnesses to address the respondent's issues;
- (c) Of the eight witnesses, six worked for the respondent and could have been questioned by it at any time before the litigation was commenced;
- (d) The applicant implored the respondent to talk to a number of people in order to put the matters to rest. The respondent decided not to do so and, if it had, that action may well have put matters to rest;
- (e) Six of the employees of the respondent gave evidence supporting the applicant;
- (f) The questions that could have avoided litigation were asked and answered by affidavit and witness appearances at the Authority. That has substantially increased the applicant's costs;

- (g) I accept that the applicant went to some lengths and cost in order to do what the respondent should have done in the first place. This is a matter relating to the cost that the applicant has been put to and not an attempt by the applicant to punish the respondent;
- (h) The applicant, not unreasonably, presented evidence including affidavits to explain the cultural issues concerning the impact on her which were aspects of the dispute. These partially could have been avoided by the respondent, but also it was the applicant making various claims that required her to provide evidence to support her claims.

[18] Other matters included:

- (a) The requirement for documents to be produced, including orders of the Authority;
- (b) Documents produced involved the respondent later providing a quite different position, for example, the sick leave accrual;
- (c) There were several attempts to have inadmissible documents, for example, a *Calderbank* letter and a single page purporting to be part of somebody else's employment agreement produced. This was after the respondent gave evidence that no such agreement existed;
- (d) Phone calls and emails between the parties;
- (e) Preparation of submissions and other documents have been a cost to the applicant.

[19] I am satisfied that the actions of the respondent have involved the applicant incurring unnecessary costs, which could have been avoided. This was a case with more than the usual time involved in an investigation, necessary preparation associated with the issues that emerged and that Mrs Masoe needed representation.

[20] It has been submitted by Mr McBride that the daily tariff should go beyond the notional daily rate to ensure that the applicant's success does not constitute a pyrrhic victory. To start the daily tariff should be from \$5,000 per day.

[21] The details of the applicant's costs involved were:

- (a) Preparing for and conducting the substantive case in the Authority meeting. The investigation meeting involved 2 days and submissions;
- (b) Addressing matters of admissibility of evidence and the associated preparation of submissions and other actions for the above (a);
- (c) Preparing and presenting the application for damages;
- (d) Preparing this application for costs.

[22] I am satisfied, first, that the disbursements claimed are reasonable. I award the applicant the filing fee (\$70), photocopying (\$29.90) and courier (\$11.95). The total for disbursements is \$111.85

[23] Secondly, I am satisfied that this is a matter for costs to be awarded beyond the notional tariff of \$3,000 per day. However I have not had the benefit of scrutinising the actual items and amount of costs, but I accept there have been a considerable amount of costs incurred by the applicant. I award \$5,000 per day for the two days investigation meeting to cover attendances, and \$5,000 for preparation as a contribution for the work in the investigation and submissions. In addition, the applicant is entitled to costs for the damages matter that included preparation and submissions and costs. I assess this at \$3,000. Te Roopu Awhina Ki Porirua Trust is to pay Paula Masoe \$18,000 in total as a contribution towards reasonable costs plus the disbursements above.

### **Orders of the Authority**

[24] I order Te Roopu Awhina Ki Porirua Trust to pay Paula Masoe:

- (a) \$18,000 contribution towards her costs; and
- (b) \$111.85 disbursements.

P R Stapp  
Member of the Employment Relations Authority