

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 16
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

Investigation Meeting: On the papers

Submissions received by: 9 September 2010

Determination: 31 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Findings on an employment relationship problem were made in earlier determinations dated 19 October 2009 – interim reinstatement - (WA 157/09), 10 December 2009 – costs – (WA 157A/09), 22 April 2010 – substantive matters – (WA 74/10). The issue of a claim for damages for costs incurred by the applicant during her employment was reserved. Also, reimbursement of any unpaid sick leave was reserved.

[2] The parties have not been able to reach any agreement on an outcome to resolve this part of the employment relationship problem. Thus, it has been left to the Authority to determine whether Mrs Masoe is entitled to any damages incurred for costs and unpaid sick leave. The legal costs relating to the Authority’s investigation remain reserved by request.

[3] Mrs Masoe has claimed special damages for legal costs involved with her treatment by the Trust when she was unjustifiably made redundant in June 2009. She is seeking full solicitor client costs in the sum of \$32,788 plus GST, plus disbursements of \$272, as financial losses actually and reasonably foreseeable resulting from the employer's breaches of her employment agreement. In the alternative she has claimed costs incurred other than those in the litigation in the sum of \$8,996 plus GST.

[4] Mr McBride has assured me that the claim is separate from costs that were found in the applicant's favour relating to an interim reinstatement application and is separate from any costs award arising in regard to the substantive matters heard by the Authority. The applicant has also requested that the costs for these proceedings be reserved.

[5] Mrs Masoe has sought an order for the reimbursement of unpaid sick leave in the sum of \$1,548 (net of tax).

[6] The respondent has denied the claim for special damages. Also, it has denied that Mrs Masoe is entitled to any wages for sick leave because she had used her sick leave entitlement. In its submission the respondent has included a claim for \$3,000 costs in this matter for the proceedings.

Issues

[7] Is Mrs Masoe entitled to damages and if so, how much?

[8] Is Mrs Masoe entitled to \$1,548 wages for sick leave?

The facts

[9] In brief Mrs Masoe was made redundant in 2009, but she was quickly reinstated after the intervention of her lawyers and when the respondent accepted that the proper process had not been followed. An issue for compensation arose out of that matter. After her reinstatement her employer set about to investigate a number of allegations and Mrs Masoe felt it was necessary to instruct her lawyers to represent

her. This resulted in an application filed in the Authority for an interim injunction restraining her employer in a disciplinary process. Mrs Masoe was successful and costs were awarded in her favour following the Authority's investigation. A full investigation meeting then followed in regard to the claim for compensation on her unjustified redundancy and the issues associated with the disciplinary process that included further claims for compensation, penalties, unpaid wages, damages and costs.

[10] Mrs Masoe has incurred costs because she says she needed legal assistance when her employer made her unjustifiably redundant. With the help of her lawyers she was reinstated quickly, and before any application was filed in the Authority. She was invoiced by her lawyers for this work in the sum of \$3,656 including GST (invoice A). She paid this sum personally. The invoice relates to that restructuring in her workplace and to her reinstatement. A subsequent personal grievance for compensation was brought before the Authority when the employer conceded that it acted unjustifiably, but the parties could not agree on a sum for compensation.

[11] Next there was an invoice for costs associated with instructions for involving the Employment Relations Authority in regard to a disciplinary process. The disciplinary process was later to be found by the Authority to be flawed. The invoice was for \$13,500 including GST (invoice B). Because the Authority awarded \$5,000 costs in another determination Mrs Masoe has claimed the balance of \$7,875. There were further costs of \$21,540 incurred (invoice C). These costs appear to relate to the Authority's full investigation on the substantive matters.

[12] Both parties agree that Mrs Masoe was entitled to 12 days sick leave per year. The applicant has claimed she is entitled to wages for unpaid sick leave of \$1,548.20 for the period between 21 September 2009 and 2 October 2009. She says she is entitled to the time but the respondent says there was a nil balance restricted by the amount that could be accumulated under the Holidays Act.

Determination

[13] I am satisfied that the costs incurred by Mrs Masoe to get her job back when she was made redundant should have been entirely avoided by a fair and reasonable

employer. This is supported by the quick reinstatement. The employer's actions unreasonably put Mrs Masoe to costs that should have been foreseeable and avoided, the sum of which was \$3,656 including GST (invoice A). Mrs Masoe is entitled to the full reimbursement of this sum because the loss was incurred by her being put to unnecessary expense when her employer should have acted and properly avoided such costs: given Mrs Masoe's right to have a representative and the information available to an employer on the dispute resolution procedures and the principles involved in restructuring and redundancy. The respondent has suggested the claims for damages for costs be considered along side a *Calderbank* letter. Another member of the Authority made an order that the *Calderbank* letter be sealed until all substantive issues were out of the way. I hold that the parties dealt with the redundancy unjustified dismissal matter themselves that resulted in Mrs Masoe being reinstated, and there was no application filed in the Authority at that point of time. Any costs would therefore have been difficult to recover except by damages. The applicant incurring that expense should have been avoided by the employer following best practice and acting in good faith, which in this case I can only conclude did not happen. I am satisfied that Mrs Masoe would not have been able to get a satisfactory result without representation. Moreover, the employer acknowledged that it was in error and I relate this concession to the fact that Mrs Masoe was represented. Damages are appropriate to remedy the situation and put Mrs Masoe back in position not less advantageous considering the costs were incurred through the fault of the employer because it failed to act fairly and reasonably.

[14] I agree with the respondent that there is an appearance that there is a double claim/recovery in regard to the next two invoices (B and C), but this may have more to do with the appearance of an overlap in costs. However, since there is the right to claim damages separate considerations apply. In regard to both invoices there is a reserved issue as to the amount of any costs incurred for the Authority's investigation on the substantive issues. The Authority's investigation meeting and its findings and conclusions were not out of the ordinary in regard to the types of employment relationship problems that often arise. This employer certainly got things wrong with its process, but I held that it did not set about to do so deliberately and wilfully. I have decided to dismiss this portion of the claim for damages as a remedy because there were other overlapping remedies pursued by the applicant to resolve her employment relationship problem; for instance injunctive relief and personal

grievance remedies. Mrs Masoe would have known that there would be a cost involved to instruct her lawyers and it was her right by choice to use lawyers in pursuing legal remedies and options with the potential underlying personal grievance actions available to her. There is nothing unusual about that in an employment setting. The employer genuinely defended its position notwithstanding that it has been found against. I hold that Mrs Masoe's loss has been attributed in part by her choice to instruct her lawyers, which is her right under the Act and to pursue her choice of legal remedies and options. I therefore conclude that the loss is not sufficiently linked to the employer's breaches alone.

[15] For completeness the applicant still has the right to pursue her costs for the Authority's investigation on the claims that she was successful in pursuing, and where costs follow the event. Furthermore, a full investigation was needed based on genuine issues to resolve, albeit the applicant was successful.

[16] Next I turn to the sick leave matter for wages as claimed by Mrs Masoe. I accept the applicant's claim because:

- a. Leave records that have been produced by affidavit since the Authority's investigation meeting are inconsistent with the records that the Authority required produced in the course of the investigation meeting.
- b. The applicant has relied in good faith on the original records produced.
- c. There was no record of any employment agreement and without any signed off employment agreement produced I am not willing to accept conditions that might apply in a standardised agreement in the workplace and given the differences that exist between the parties. Also there is a dispute about the existence of an employment agreement, but that has not been satisfactorily resolved by the evidence to apply any terms and conditions of employment followed elsewhere in the Trust.

- d. There is no maximum accumulation and previous records indicate an excess of 20 days accumulation previously. I base this conclusion on past practice in the employment relationship having regard to Ms Masoe's claim and her evidence of an entitlement.

[17] I accept that the applicant is entitled to \$1,548.20 as claimed.

Orders of the Authority

[18] Te Roopu Awhina Ki Porirua Trust is required to pay Mrs Paula Masoe \$3,656 including GST damages for legal expenses and \$1,548.20 wages for sick leave.

[19] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority