

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 81
5338375

BETWEEN	JUSTINE DANDO MCDONALD Applicant
AND	PORSE IN-HOME CHILDCARE (NZ) LIMITED Respondent

Member of Authority: Philip Cheyne

Representatives: Anjela Sharma, Counsel for Applicant
Maree Kirk, Counsel for Respondent

Submissions Received: 16 March 2012 from the Applicant
30 March 2012 from the Respondent

Determination: 2 May 2012

DETERMINATION OF THE AUTHORITY

[1] In a determination dated 14 December 2011 I upheld Ms McDonald's personal grievance claim against Porse In-Home Childcare (NZ) Limited (Porse), awarded her various remedies including reinstatement and reserved the question of costs. I have now received submissions from both counsel. This determination resolves the question of costs.

[2] It is convenient to deal with some points raised by counsel for the respondent.

[3] There is a submission that that the Authority cannot make any order of costs unless satisfied that Ms McDonald has actually incurred costs personally. Because Ms McDonald's was granted legal aid she has not personally paid any legal fees. I have no information about whether the Legal Services Agency has or will take a charge. The actual arrangements between Ms McDonald and the Legal Services Agency as to how much of her legal fees she must personally pay in due course are not a matter for the Authority. It is sufficient for the Authority to be satisfied, as I am,

that costs have been actually incurred by the Legal Services Agency on her behalf: see *Goodfellow v Building Connexion Limited t/a ITM Building Centre* [2010] NZEMPC 153 at [3].

[4] I am told that there was an agreement *in principle* between the employer while unrepresented and counsel for Ms McDonald that the respondent would meet all Ms McDonald's legal costs. Counsel for Porse says that there could have been no offer or acceptance based on the limited information made available at the time. I am not sure that is correct. My difficulty is that I do not have any evidence of an agreement except an assertion to that effect in correspondence from counsel for Ms McDonald. In the absence of evidence of offer and acceptance such as an exchange of correspondence or sworn testimony I cannot proceed on that basis.

[5] I agree with counsel that it is important to identify a party's actual costs as part of determining the present matter. I also accept that counsel has correctly identified a total of \$17,493.71 paid under legal aid. It would have been helpful if counsel for Ms McDonald had provided the invoices. However, doing the best I can with the information available and my knowledge of the proceedings, I am confident that at least 75% of the time and therefore the costs would have been spent on the substantive proceedings rather than mediation or the interim proceedings. I am also confident that the legal aid grant will have been limited to time spent on activities reasonably necessary for the litigation and the mediation. That is sufficient to deal with this matter, at least on a daily tariff basis.

[6] I agree with counsel for Porse that the submissions made for Ms McDonald based on the remedies awarded and the submission about *mental trauma* are not relevant for present purposes. I also agree that the *Calderbank* offer does not have any impact as Ms McDonald succeeded and recovered significantly more including reinstatement. Costs should be assessed on the basis of her being the successful party. Further, I agree that the discussions about a change in working hours are not relevant for present purposes.

[7] There is a submission that it was contrary to natural justice for the Authority to order the payment of interest on the compensation for lost wages, that claim having only been raised for the applicant in final submissions. I agree that it would have

been better for the claim to have been made in a timelier manner, such as in the statement of problem. However, there is no suggestion that the respondent was deprived of the chance to prepare and present relevant evidence. Counsel had an opportunity to make submissions in response. More significantly, the proper way of dealing with any dissatisfaction about the order would have been to challenge the determination on that point.

[8] The submissions about interest are really a preamble to the submission for the respondent that the Authority should take into account the fact that the respondent paid to Ms McDonald interest calculated on all the compensation awards, not just the lost wages compensation. As counsel correctly points out the Authority's order did not (and could not) extend to interest on the compensation award pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000. I have no evidence to establish that the payment was by mistake or accident. For that reason I decline to take it into account for present purposes.

[9] Overall Porse accepts there could be an award of \$6,000.00 costs in Ms McDonald's favour which includes an allowance of \$3,000.00 for its success in defending the interim reinstatement application. That offer having been made by the respondent prior to the exchange of submissions, I am also asked to have regard to it in the event that Ms McDonald is awarded \$6,000.00 or less in this determination.

[10] Both counsel refer me to the principles in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808. I have already indicated that Ms McDonald is entitled to an award of costs following her success.

[11] Ms McDonald's legal cost of about \$17,500.00 are modest overall, that being the result of the constraints imposed on time and particularly hourly rate charges under the Legal Aid regime. I expect that more than \$13,000.00 of those costs will relate to the substantive investigation meeting rather than mediation or the interim reinstatement application. I am asked to order costs on an indemnity basis. A point is made about the respondent's conduct in the interim reinstatement proceedings but I will deal with that later. I have already responded to the point about the quantum of compensation compared to Ms McDonald's actual losses. There is no valid reason to award costs on an indemnity basis.

[12] Recently the Authority has reviewed the standard daily tariff upwards to \$3,500.00 as a starting point: see for example *Cooper v Christchurch Casinos Limited* [2012] NZERA Christchurch 50. I will apply that rate in the present case subject to adjustments for the various following factors.

[13] The case was very important for both parties. In the end Ms McDonald should not have been dismissed and she was found not to have contributed in a blameworthy manner to the circumstances that gave rise to her grievance. Her claim for reinstatement was vigorously opposed across a number of fronts. Successfully answering these numerous claims made against Ms McDonald required significantly more work than usual especially in the form of increased preparation time. Counsel were also alerted to a legal issue regarding which some research was required. I consider it justifies increasing the applicable daily tariff to \$4,000.00 which generates \$12,000.00 as an award of costs for the substantive investigation meeting.

[14] There is a claim for a further \$5,980.00 in costs as Ms McDonald's costs of representation prior to the dismissal. As to claims for such costs to be treated as special damages see *Moxon v Pathways Health Ltd t/a Pathways* [2011] NZERA Christchurch 151 and *Booth v Hirequip Limited* [2012] NZERA Christchurch 53. There is no principled basis for the Authority to award costs to cover legal advice and representation before proceedings have been initiated, let alone before an employment relationship problem has arisen.

[15] There is a claim for costs involved in mediation. I am referred to *Jinkinson v Oceana Gold (NZ) Limited* [2011] NZEmpC 2. In that case the Court accepted that it was reasonable to regard a first attendance at mediation as discharging parties' obligations to one another to put some resource into trying to resolve matters: see *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 935. The Court went on to include in its assessment of reasonable costs of the litigation the time spent by the successful party in attending a further Court directed mediation. Applying that principle to this case, there is no basis for including the mediation costs for present purposes.

[16] There is a claim for hearing fees. I have been given a copy of the Department of Labour invoice for \$613.32. The respondent submits that it is unclear whether this is covered by the Legal Services Agency and is included in the payments mentioned above. Regardless, it is a disbursement that has or must be paid. Ms McDonald is entitled to reimbursement of that amount in full. I take the same approach in response to the respondent's submission about the fee of \$150.00 for medical evidence. However, it is unclear what the claim of \$91.40 for *office disbursements* relates to. Ms McDonald (or Legal Aid) had to pay a lodgement fee of \$71.56 which might be included in the \$91.40 and I will allow that as a disbursement. However, I make no further award on the basis that it is unclear what the claim relates to. The allowable disbursements total \$834.88.

[17] There is a submission that Porse should be allowed costs of \$3,000.00 for its successful defence of the interim reinstatement application. The starting point is that substantially less than a day was required. On that basis I would allow \$2,000.00 for costs in favour of Porse. At the interim stage the Authority's role was to apply the law regarding interim injunctions. The Authority relies on counsel to assemble and present all relevant information which includes material that may assist the other party. In the present case, the Authority was not made aware of the existence of the *MATES* agreement. Had I known of its existence and contents, it would have been part of the assessment about the balance of convenience. Counsel for Ms McDonald is critical of Porse for not disclosing the *MATES* agreement during the interim proceedings. However, Ms McDonald also knew of its existence and could have referred to it in her evidence in support of interim reinstatement. On balance this is not a factor which should affect the assessment of costs.

Summary and Orders

[18] In summary, Porse In-Home Childcare (NZ) Limited must pay Ms McDonald costs of \$10,000.00 plus disbursements of 834.88.

Philip Cheyne
Member of the Employment Relations Authority