

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 374
3031541

BETWEEN

CELIA POPKIN
Applicant

AND

INNOVATIVE LANDSCAPES
(2015) LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: Louise Taylor and Eric Yu, counsel for the Applicant
Charles McNoe for the Respondent

Investigation Meeting: On the papers

Date of Determination: 17 September 2020

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By determination issued on 12 February 2019, the Authority made findings and gave orders about Celia Popkin's employment relationship problem with Innovative Landscapes (2015) Limited (Innovative).¹ The Authority reserved the issue of costs and invited the parties to reach agreement between themselves. Ms Popkin was given 28 days from the date of the determination to lodge a memorandum on costs in the event that no such agreement could be reached. No memorandum was received during this timeframe.

¹ *Popkin v Innovative Landscapes (2015) Limited* [2019] NZERA 64

[2] The matter then went on de novo challenge (a full hearing of the entire matter) to the Employment Court (court) at the suit of Innovative. After a further factual inquiry, Ms Popkin was again successful. The court awarded Ms Popkin identical remedies to those she was granted by the Authority.²

[3] In a closely reasoned costs judgement subsequently issued, the court awarded costs in favour of Ms Popkin but directed these be paid to Community Law Canterbury, which had advanced her matter before the Authority and in the court.³

[4] Commonly, the court “stands in the shoes” of the Authority where it has not dealt with the issue of costs for a matter which has gone on challenge and renders an outcome.⁴ However, the court did not do so on this occasion. It may well be that it was not asked by Ms Popkin to do so. In any event, Ms Popkin then sought a costs award of the Authority in favour of Community Law Canterbury.

Ms Popkin’s position

[5] In a memorandum on costs subsequently lodged, Ms Popkin said her application for costs should be considered by the Authority notwithstanding that it was not made within 28 days from the date of the substantive determination because the entire process was overtaken by Innovative’s de novo challenge to that determination.

[6] Ms Popkin further said that the Authority had wide discretion under cl 15 of Sch 2 of the Employment Relations Act (the Act) to award costs and a costs order should be made for the benefit of Community Law Canterbury. She provided highly relevant information about the funding sources for Community Law Canterbury. This included information about its bulk funding by the Ministry of Justice and how this is apportioned between “representation” (around 75 percent) and other services and operating overheads accounting for the remainder.

[7] Ms Popkin in setting out her claim for costs said that although the investigation meeting went for less than one full day, costs should be awarded at the full daily tariff rate of \$4,500 because Innovative was “obstructive” of the Act’s dispute resolution processes. Specifically, Ms Popkin said:

² *Innovative Landscapes (2015) Limited v Popkin* [2020] NZEmpC 40 at [40].

³ *Innovative Landscapes (2015) Limited v Popkin* [2020] NZEmpC 96 (1 July 2020).

⁴ For example, *Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13.

- (i) Innovative refused to attend mediation prior to a statement of problem being lodged in the Authority;
- (ii) Innovative again refused to attend mediation after being directed to do so by the Authority; and
- (iii) Innovative declined to attend a case management conference convened by the Authority to set the matter down for an investigation meeting.

[8] Ms Popkin said costs recovered by Community Law Canterbury from Innovative will be used to fund additional services in the community. In that sense an award of costs would constitute a “refilling the pot” to assist others who face barriers in accessing legal services.

Innovative’s position

[9] Innovative said the Authority should not entertain Ms Popkin’s application for costs and that the judgment of court on costs was specific to that forum.

[10] Innovative said the Authority’s investigation meeting lasted only about 90 minutes.

[11] Innovative denied it was obstructive in the early stages of the dispute resolution process and said the parties saved money by not attending an “unproductive” mediation. It also noted that one of Ms Popkin’s witnesses was unavailable to attend the investigation meeting in person.

[12] Ultimately Innovative said the passage of time, the fact the Authority’s determination was set aside by the court and the lack of accurate record keeping by Community Law Canterbury meant there should be no order for costs.

The Authority’s view of Ms Popkin’s claim for costs

[13] It is convenient to deal with two of Innovative arguments which are pressed against Ms Popkin’s costs claim at the outset.

Power to extend time

[14] As to the requirement for Ms Popkin to lodge a costs memorandum within 28 days of the date of the Authority’s substantive determination, s 221 of the Act allows the Authority to

extend time within which anything is or may be done according to its substantial merits and equities. I have decided that in all the circumstances of this proceeding, including the proceedings in another forum which significantly changed the focus for the parties and the time dynamic, it is appropriate to grant Ms Popkin such an extension to bring her claim for costs in the Authority.

[15] Even if I am wrong in my view that s 221 applies in the circumstances of this matter, I would find, in the alternative, that s 219(1) of the Act applies. Consequently, Ms Popkin's claim for costs would proceed in any event.

Relevance of the court setting aside the Authority's determination

[16] As to Innovative's argument that costs should not be awarded because the court set aside the Authority's determination, it presently must do so under the Act even where the determination is confirmed.⁵ The costs relate to representation in the investigation, not the determination in circumstances where the outcome in both forums was effectively the same; not different.

Other matters

[17] While Innovative's approach to this employment relationship was unhelpful, I find it did not reach the level of obstruction in the sense that concept is used in the Act because its participation in the Authority's investigation meeting did assist in the resolution of several factual matters relevant to the disposal of the matter.

[18] As to the issue of time recording by the Community Law Canterbury, I do not believe anything turns on this. With finite resources a law centre should not be criticised for here nor should it be held to a particular practice normally associated with a for profit legal practice.

Result

[19] Having considered the submissions of the parties, I find, consistent with the approach taken by the court, Community Law Canterbury should be awarded costs for its representation of Ms Popkin.

⁵ Employment Relations Act, s 183(2)

[20] The investigation meeting lasted for less than one full day. I find half the Authority's daily tariff would be an appropriate award of costs in this matter.

[21] The amount of \$2,250 together with \$71.56, being the Authority's lodgement fee, is fair and reasonable to award in the circumstances. Innovative must pay this amount to Ms Popkin within 14 days of the date of this determination. Ms Popkin must in turn pay the amount of \$2,321.56 to Community Law Canterbury within 14 days thereafter.

Andrew Dallas
Chief of the Employment Relations Authority