

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 108/10

5126567

BETWEEN

Julie Shortland

Applicant

AND

Alexander Construction Limited

Respondent

Member of Authority: Denis Asher

Representatives: Trent Petherick for Ms Shortland
Stuart Webster for the Company

Submissions received: By 4 June 2010

Determination: 8 June 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 27 August 2009 (WA 118/09) I found against Ms Shortland's claim she had been unjustifiably dismissed by the respondent (the Company). Costs were reserved. In its so far unreported decision, *Shortland v Alexander Construction Co Ltd* [2010] NZEmpC 41 [Judge Couch, 13 April 2010] the Employment Court found in favour of Ms Shortland's claim.

[2] The applicant now seeks costs.

Applicant's Costs Submissions Summarised

[3] In submissions dated 14 May 2010 counsel for Ms Shortland advised she had received a legal aid grant and had incurred costs before the Authority in the sum of \$3,158.00. An order of that amount is sought.

[4] Concerns raised by the Authority at par 32 of its decision are of concern, are incorrect and demonstrate a lack of knowledge of the operation of legal aid under the Legal Services Act 2000. Ms Shortland was subject to a grant within the guideline rates and did not receive any extension of legal aid for the additional personal grievances which were not pursued. There is no loss to the taxpayer for any personal grievance not pursued.

[5] The comments are incorrect as the application to the Authority limits the investigation to a complaint of unjustified dismissal. The personal grievances related to unjustified disadvantage were never pursued before the Authority. The comment in par 32 relating to Counsel acting grossly unfairly to the taxpayer are accordingly completely unjustified. Counsel seeks an acknowledgement of this within the Authority's ruling on costs.

[6] It is not correct the statement of problem raised a whole series of potential personal grievance issues, as it plainly seeks an investigation into a complaint of an unjustified dismissal only. Even if that is not the case the applicant was successful with her substantive grievance and is entitled to a costs award.

[7] At the time of the Employment Court hearing the application for legal aid had been declined and was granted only following the court's decision and a formal review of the decision not to grant aid.

The Respondent's Position Summarised

[8] The respondent agrees the matter of costs in the Authority should be determined by the Authority and not the Employment Court.

[9] The applicant had applied for legal aid in respect of proceedings before the Authority but did not, until the day of the investigation meeting, disclose that the applicant had obtained a limited grant of aid. Details of that grant were not provided to the Company or to the Authority at the investigation.

[10] The status of a litigant with regard to the granting or otherwise of legal aid is vitally important in terms of early resolution of the employment relationship problem. That is because from the perspective of a risk analysis the opposing party (if successful) has a right to ask for a contribution to its costs. Where the opposing party is legally aided there is no prospect of recovery of costs except in exceptional circumstances.

[11] Counsel for the applicant has completely misconstrued the point made in the Authority's determination at par 32, which was directed at the series of personal grievance issues raised in the statement of problem which the Company believed were statute-barred. Despite an invitation to do so, Ms Shortland did not concede that point until the morning of the investigation when that part of her claim was abandoned. Counsel for the applicant is therefore out of order in what is submitted in pars 8-10 of the applicant's submission.

[12] The Company was therefore obliged to prepare for those allegations and incur entirely unnecessary costs of time, money and other resources.

[13] The applicant is effectively seeking a costs indemnity. Reliance is placed on the factors set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808, including: there is a discretion as to whether costs should be awarded and what amount; that it is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable; awards will be modest; and the nature of the case can result in costs lying where they fall.

[14] The Authority should exercise its discretion not to award the full amount claimed because of the matters noted in par 32 of its substantive determination which effectively have penalised the respondent already. The Authority's decision cited by the applicant (*Stevenson v Bentan Twisted Ltd* unreported, D Asher, 16 February 2009, WA

14/09) was equivocal (“*might*”) and therefore does not support the applicant’s claim. In fact it is not known what happened in respect of costs in that case.

[15] The lack of information concerning the legal aid grant had a material affect on the dynamics of the proceedings in terms of a possible resolution of the grievance. The same failure in the *de novo* Employment Court proceedings should be taken into account in determining costs in this matter. A full award of costs will penalise the respondent when its true position with regard to costs could not be known because of the refusal to provide information.

[16] Counsel estimates the preparation for the matters ultimately time barred and abandoned would amount to at least 50% and invites the Authority to apply the same percentage in its approach to costs in this matter.

Discussion and Findings

[17] In determining this matter my approach to costs will be informed by *Da Cruz* (above).

[18] Counsel’s letter filing the statement of problem properly noted legal aid was being sought. Confirmation of the grant was advised in the Authority’s telephone conference of 27 March (refer par 4 of the record).

[19] My comments in par 32 of the substantive determination have a plain meaning and do not require clarification other than to say the reference to the tax payer is in respect of costs to the Authority.

[20] The statement of problem contains an allegation of unjustified dismissal and, amongst other things, a claim for damages, but no details in respect of either. Attached to the statement of problem are documents which counsel “*thinks are relevant to the problem*” (par 4). Those documents include a letter from counsel for the applicant dated 29 May 2008 and headed “*private and confidential*”. It traverses at length Ms Shortland’s employment history including, by way of example, an allegation of “... *a further personal grievance...*” (second page, second par) relating to a

change of duties in 2006. On page 4, fourth par, reference is made to “*multiple personal grievances*”.

[21] As the standard statement of problem form makes clear (Form 1, Schedule 1, Application to Employment Relations Authority, Employment Relations Authority Regulations 2000), an applicant is required to “*Give enough detail to ensure that the Authority and the respondent are **fully, fairly and clearly** informed*” (emphasis added).

[22] I am satisfied a prudent respondent would prepare for all matters raised in that letter, particularly as the statement of problem did not make clear they were no longer being pursued. The duty of clarity is not onerous and counsel’s obligation in that respect relates as much to their client’s interests, as to those of a respondent party.

[23] Having succeeded with her allegation Ms Shortland is entitled to an appropriate contribution to fair and reasonable (but not actual) costs in respect of proceedings before the Authority. As noted in my record at the time, this was a half day investigation. Having regard to *Da Cruz* (above), the nature and length of the investigation and counsels’ submissions, I am satisfied costs of \$1,500 are appropriate in all the circumstances.

Determination

[24] The Company is to pay to Ms Shortland as a contribution to her fair and reasonable costs the sum of \$1,500 (one thousand, five hundred dollars).

Denis Asher

Member of the Employment Relations Authority