

[4] In support Mr McBride pointed out that an investigation meeting had been scheduled for 27 January 2009, and witness' statements were to be filed on 1 and 15 December 2008 by the applicant and respondent respectively.

[5] Advice of the withdrawal was given to the Authority on Friday 28 November 2008. The associated email trail indicates that, on that day, Mr Flaws advised the Authority and Mr McBride that his client could not afford to continue and he no longer had instructions. The response to the Authority's query about whether that meant the matter was withdrawn or whether the Authority should now contact Ms Smith directly does not appear to have been copied to Mr McBride. The Authority formally advised ISL, through Mr McBride, of the withdrawal by letter dated 1 December 2008.

[6] By then, some of the respondent's witnesses had been briefed and preparation of their statements had begun. ISL had also incurred costs in respect of the preparation of the statement in reply and participation in a conference call with the Authority.

[7] Mr Flaws says there should be no order for costs. He submitted that only expenses incurred in the investigation meeting itself should be taken into account in determining costs. However that is not the law. The scope of costs extends to costs reasonably incurred in the proceeding, and is not limited to the meeting. The activities to which Mr McBride referred are capable of being reflected in costs.

[8] Mr Flaws also submitted that the matter was comparatively simple and uncomplicated. According to the statement of problem Ms Smith experienced a series of difficulties with a less senior colleague, and made complaints which were not actioned by the management. Ms Smith had also been subjected to a disciplinary procedure and was reassigned to another position, in a process she said was unfair and defective. She felt she had not been provided with a safe working environment and had been harassed. She became so stressed, and so disillusioned with the management, that she resigned.

[9] The practical reality is that addressing allegations of that nature rarely proves to be simple and uncomplicated, and the contents of the statement in reply suggest the

present problem would be no exception. The statement in reply is relatively detailed and paints a different picture from that in the statement of problem. Further, it records that there were particular issues concerning Ms Smith's performance, and that her union had become involved in discussions about how the issues would be addressed. The union remained involved in further discussions about the employment relationship.

[10] Mr Flaws also questioned the necessity for the preparation which Mr McBride says was commenced, given the length of time before the meeting date. I find the indicated level of preparation was reasonable not least because of the extent of the matters likely to be covered, and because ISL's witness' statements were scheduled for filing on 15 December. These dates were discussed and set expressly to ensure all statements were filed before the commencement of the Christmas-New Year break, given the hiatus that was likely to occur in January.

Determination

[11] In all of the circumstances the costs incurred prior to the withdrawal of the employment relationship problem were fair and reasonable, and the request for a contribution in the sum of \$1,500 is also reasonable.

[12] The only factor that could affect whether that or any other amount should be awarded concerns Ms Smith's ability to pay.

[13] In that regard Mr Flaws' memorandum says only that the matter was withdrawn because Ms Smith could not afford to pursue it. That assertion was not sufficient, and required further information in support. Mr Flaws was more expansive in earlier communications with the Authority's support officer on the matter, saying he had observed Ms Smith's financial position deteriorate since the termination of her employment. For his information, if the Authority is to take material of that kind into account for the purposes of its determination, the material should be included in the memorandum rather than or in addition to the less formal communication with the support officer.

[14] However I remain uncertain of whether the informal communication was to be taken into account. If that was the intention, then Mr Flaws' observations and concerns cannot be a substitute for information about Ms Smith's actual financial position and hence her ability to pay. I am unaware, for example, of whether Ms Smith obtained an alternative source of income after her employment with ISL ended, or of any associated details.

[15] If I accept at least that Ms Smith could not afford to proceed, then I also accept there are some constraints on her ability to meet an award of costs against her. I am unaware of their extent. Ms Smith is therefore ordered to contribute to ISL's costs in the sum of \$500.

R A Monaghan

Member of the Employment Relations Authority