

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Raewyn Tailby (Applicant)
AND Commissioner of Police (Respondent)
REPRESENTATIVES Raewyn Tailby, in person
Helen Gilbert, Counsel for the Respondent
MEMBER OF AUTHORITY Janet Scott
SUBMISSIONS RECEIVED 28 July and 12 August 2005
DATE OF DETERMINATION 22 September 2005

COSTS DETERMINATION OF THE AUTHORITY

On 8 November 2001 the applicant filed with the Authority alleging she had been unjustifiably suspended by the respondent. The matter failed to resolve at a mediation held on 19 December 2001.

On 22 April the applicant resigned from her employment and a mediation held on 31 May 2002 failed to resolve the outstanding issues between the parties.

Between May 2003 and March 2005 two amended Statements of Problem were filed for the applicant necessitating new Statements in Response for the respondent. A hearing of the substantive matter was set for 16-18 August 2005.

By letter dated 30 June 2005 (received by the Authority on 11 July 2005) the applicant's counsel gave notice that the application before the Authority was withdrawn.

The respondent now seeks costs in the matter – claiming a proportion of costs incurred until the time the proceedings were withdrawn. It is submitted the respondent has incurred actual costs in the matter of \$10,960.20. The respondent seeks an award of \$3,000 as a reasonable contribution to costs incurred.

In support of its claim the respondent cites case law relevant to the setting of costs and in particular cites case law relevant to the award of costs in situations where proceedings are withdrawn prior to hearing. (*Sheiling Laboratory Ltd v Smith* (unreported, AED 48/95); *Kevey v Livestock Improvement Corporation Ltd t/a Livestock Improvement* (unreported, AC 83/02); *Toopi v Chemical Freight Services Ltd* (unreported, AT 167/95) and *Budden v Telecom New Zealand Ltd* (AA 167/02)).

It was submitted that the specific matters supporting an award of costs in this matter include the fact that:

- The applicant, by her actions, made this a very long and drawn out application involving many amendments to the Statement of Problem. There were numerous telephone conferences.
- Thirteen witnesses were required to be briefed by the respondent to adequately defend this matter. Because of the number of witnesses involved briefing had to commence well before the hearing and before the applicant's briefs were scheduled to be filed. (19 July).
- The applicant had put at issue the question of whether a *Stand Down* under the Police General Instructions was a suspension. This had not been argued before in the Authority or Court and accordingly required substantial legal preparation.

The applicant also made submissions. She explained that while she feels there was a case to answer she had withdrawn as a result of the frustration and stress the matter was causing her. She decided it was time to move on. She submitted in respect to the way the case was conducted that:

- At no time did she take any action to deliberately delay the matter.
- The amendments to the Statement of Problem were necessitated by changed circumstances as the matter progressed.
- It is believed that the numerous telephone conferences related to attempts by her initial counsel to resolve the matter without the necessity for a hearing

The applicant also submitted that she withdrew in good time.

Discussion

I accept the respondent has incurred costs in preparation for defending this matter. The same applies to the applicant.

However, a review of the relevant case law suggests that costs in these situations are only awarded when the substantive application is withdrawn on the eve of the intended hearing or within the days immediately prior to the hearing when it is likely that all the preparation has been completed.

In this situation the applicant had clearly communicated to her counsel by 30 June her intention to withdraw. That was six weeks prior to the commencement of the hearing. Unfortunately the notice of withdrawal was not received by the Authority until 11 July. It was copied to the respondent by counsel for the applicant and it is presumed it reached the respondent at approximately the same date (11 July). This was five weeks prior to the commencement of the hearing.

In all the circumstances I am not persuaded that a withdrawal five weeks prior to the commencement of the hearing warrants an award of costs in favour of the respondent.

Determination

I direct that costs in this matter will lie where they fall

Janet Scott
Member of Employment Relations Authority