

Attention is drawn to the
order prohibiting publication
of certain information in this
determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 50A/09
5125036

BETWEEN

V
Applicant

AND

DR W AND X LIMITED
Respondents

Member of Authority: Helen Doyle

Representatives: Gregory Martin, Counsel for Applicant
Michael Singleton, Counsel for Respondents

Submissions received: 5 June 2009 from Applicant
19 June 2009 from Respondent

Determination: 24 June 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] The order prohibiting from publication the party's names in my determination dated 16 April 2009 continues to apply.

[2] In my determination of the applicant's application for a compliance order I found that V and Dr W and X Limited entered into a binding agreement in terms of the employment relationship problem between them. The agreement was that there would be a discontinuance of the proceedings before the Authority by V in return for a payment of \$24,000 under s.123(1)(c)(i) of the Employment Relations Act 2000, together with the provision of an agreed reference and payment of legal costs in the sum of \$6,749.37. I adjourned the application made by the applicant for a compliance order for a period of two weeks from 16 April 2009 and reserved the issue of costs.

[3] The Authority was advised by Mr Martin that as at 28 May 2009 all payments had been received and the reference had been provided. Mr Martin advised he wanted

the Authority to consider making an award of costs in favour of the applicant. Submissions were duly provided by Mr Martin with respect to costs and they were responded to by Mr Singleton.

Submissions from the applicant

[4] Mr Martin submits that the Authority should make an award of costs against the respondent. After the amended statement of problem and affidavit in support were lodged the applicant herself incurred no further costs for reasons that were set out in submissions provided to the Authority in support of the application for a compliance order. Mr Martin submits that an award of costs should be made in terms of the preparation and filing of the amended statement of problem and costs associated in attempting to get the respondent to settle without the need for such an application to be made. Mr Martin provides an invoice in the sum of \$1,237.50 and submits that there should be an order for costs in that sum.

[5] Mr Martin submits that had the applicant actually incurred costs after the application affidavit was lodged in terms of preparation of submissions for the telephone conference with the Authority then the cost would have been considerably more.

[6] Mr Martin relies particularly on two matters. The first is that the respondent failed to take any steps towards settling any aspect of the settlement agreement reached and would have continued to avoid settlement if the application had not been made. The second is that the respondent was responsible for delay after the Authority had determined that there was a settlement agreement and the terms of that agreement.

Submission from the respondent

[7] Mr Singleton submits that this is an appropriate case for costs to lie where they fall for the following reasons:

- The applicant did not discontinue her proceedings prior to making her application for costs as required to do in terms of the agreement found to exist by the Authority.
- The respondent made a very generous settlement payment and performed its obligations in terms of that agreement.

- The costs are sought on an indemnity basis for an application that was not ultimately successful and which the respondent itself incurred substantial costs defending.

[8] Mr Singleton also relies on the fact that the applicant did not incur any legal costs herself with respect to submissions and the telephone conference with the Authority following which the matter was determined.

Determination

[9] It was arguable that the Authority did not have jurisdiction to make an order for compliance in the circumstances of this matter at the time it was lodged. Nevertheless the Authority is required to resolve employment relationship problems and it was apparent to counsel and the Authority that the primary issue was whether or not there was in fact a settlement agreement. The Authority determined that matter in favour of the applicant that there was and adjourned the application for a compliance order. The Authority can order compliance under s.137 of the Employment Relations Act 2000 where any person has not observed or complied with any order, determination, direction or requirement made or given under this Act by the Authority.

[10] I accept Mr Martin's submission that it was unlikely that the matter could have been resolved in terms of whether or not there had been a settlement unless there had been a determination from the Authority. There had been no steps taken by the respondent whatsoever to comply with any of the agreed terms or to deal in a prompt manner with the applicant's concerns where a substantive investigation meeting scheduled for two days had been adjourned on the basis that settlement was reached.

[11] In those circumstances I am not satisfied that the problem being lodged as an application for a compliance order prevents the Authority from considering costs and I do not accept Mr Singleton's submission that it would be just and equitable to make no order and simply let costs lie where they fall.

[12] Mr Singleton places weight on the fact that the proceedings before the Authority have not been formally discontinued. The only other step taken by Mr Martin is to provide submissions as to costs in relation to the application for compliance. I do not take into account the failure to formally discontinue the proceedings before the Authority in exercising my discretion. I also do not take into

account the delay after the determination by the respondent in terms of payment of a small amount of money and the provision of a reference.

[13] The applicant entered into a settlement agreement whereby all her legal costs as at the date of that agreement would be paid together with a compensatory sum and a reference. As a result of the respondent's failure to adhere to the terms of the agreement and by its attempt to introduce a variation to the agreement in terms of the timing of payments the applicant incurred further legal costs. These were in relation to corresponding with the respondent in terms of the settlement and preparing and lodging an amended statement of problem and affidavit in support of an application for compliance.

[14] I find the applicant is entitled to a contribution to her reasonable costs for communicating with the respondent in an attempt to avoid lodging an application for a compliance order and then preparation of an amended statement of problem and affidavit. I am not prepared to make an order for the full amount of the third invoice. It would be unusual for the Authority to award full indemnity costs. Costs in the Authority are usually modest and based on a daily tariff. The respondent has agreed to and has paid the applicant's legal costs in terms of two earlier invoices to the point of settlement.

[15] Mr Martin's charge out rate is \$220 exclusive of GST. I assess a fair and reasonable contribution toward correspondence and preparation of proceedings after the date of settlement to be 2.5 hours work at \$220. In exercising my discretion as to costs where V is unlikely to be registered for GST and is going to be unable to recover the GST component of the invoice I intend to adjust the award to reflect an amount including GST. That is the sum of \$618.75.

[16] I order Dr W and X Limited to pay to V the sum of \$618.75 being costs.

Helen Doyle
Member of the Employment Relations Authority