

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 550
5392167**

BETWEEN

PHILLIPPA WHAANGA
Applicant

AND

SHARP SERVICES LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Greg Bennett, Advocate for Applicant
Mark Keating, Counsel for Respondent

Submissions received: 11 October 2013 from Applicant
11 November 2013 from Respondent

Determination: 28 November 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By determination [2013] NZERA Auckland 354 the Authority found that the Applicant, Ms Phillippa Whaanga, had been unjustifiably dismissed by the Respondent, Sharp Services Limited (SSL).

[2] That determination is the subject of an appeal by the Applicant to the Employment Court for a hearing *de novo* (ARC 69/13).

[3] By determination [2013] NZERA Auckland 436 the Authority issued a costs award in favour of the Applicant.

[4] SSL has applied for the Authority to re-open the costs award made to the Applicant, and as a result applies for a stay on both the substantive and the costs determinations on that basis that by virtue of the application to re-open the costs determination, the Authority remains seized of this matter.

Determination

Stay on the Substantive Matter

[5] On 11 October 2013 when the application to re-open the costs investigation was filed with the Authority, the election to have the substantive matter heard by the Employment Court was still in process.

[6] Pursuant to s 187 of the Act:

(1) The Court has exclusive jurisdiction -

(a) to hear and determine elections under section 179 for a hearing of a matter previously determined by the Authority, whether under this Act or any other Act conferring jurisdiction on the Authority;

[7] Ms Whaanga had elected for a *de novo* hearing of the entire claim following the conclusion of the investigation hearing and the issue of a determination, including costs.

[8] I find that in these circumstances the Authority proceedings are at an end once the election has been made. In *Abernethy v Dynea New Zealand Ltd*¹ the Employment Court stated²:

...the determination resolved the employment relationship problem and, except for costs, the Authority had concluded its involvement. It had completed its statutory functions and, in legal terminology, was functus officio. .

[9] Mr Keating in his submissions has stated that Ms Whaanga has already taken steps to enforce the substantive determination. As this determination has been appealed by Ms Whaanga and is now awaiting judgment by the Employment Court, I find the enforcement proceedings to be somewhat premature and surprising. However it would be for SSL to make an application to the Employment Court for any stay of enforcement steps.

Re-opening Application in respect of the costs determination

¹ [2007] ERNZ 271

² *Abernethy* at para [57]

[10] SSL has applied for costs determination [2013] NZERA Auckland 436 to be reopened pursuant to clause 4, schedule 2 of the Act which states:

4 Reopening of investigation

(1) The Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.

[11] Mr Keating has submitted on behalf of SSL that the grounds for re-opening are:

- a. There has been a misunderstanding by SSL of the consequences of the appeal and cross-appeal of the substantive dispute to the Employment Court which resulted in SSL failing to file a response to Ms Whaanga's submissions in respect of costs.
- b. Ms Whaanga rejected a settlement offer made by SSL for substantially more than she was awarded by the Authority in the substantive determination.
- c. Ms Whaanga has failed to provide specifics detailing her actual costs in the substantive matter to justify any claim for costs, further that SSL is aware that Mr Bennett was engaged on a contingency basis, such that Ms Whaanga did not incur any costs in the substantive matter.

[12] Ms Bennett, for Ms Whaanga, submits:

- a. SSL did not file a submission in accordance with the timeline set for submissions by the Authority, and when contacted by an Authority support staff member to ascertain whether or not it intended to file such submissions failed to do so.
- b. SSL had sufficient time to file submissions as to costs, or to have applied for an extension of time to do so.
- c. Any discussion that has occurred concerning settlement was made on a without prejudice basis.

- d. It is incorrect that Mr Bennett was engaged on a contingency fee basis, Ms Whaanga having made an initial payment towards his fees and there is an agreed schedule of fee payment.

Determination

[13] Determination [2013] NZERA Auckland 354 set out clearly the timetable for costs submissions. Costs submissions for Ms Whaanga were filed in accordance with the timetable. SSL having failed to file its costs submissions in accordance with the timetable had been contacted by an Authority support staff member to ascertain if the submissions were in process.

[14] However no submissions were subsequently filed with the Authority, nor did SSL request an extension of time for filing submissions on the basis that it misunderstood the consequences of the appeal and cross-appeal of the substantive dispute to the Employment Court.

[15] I do not find that a re-opening is not justified on these grounds.

[16] Although SSL has filed some supporting evidence that an effort had been made to settle the substantive matter prior to the Authority determining it, that evidence is not by way of made a Calderbank³ offer, that is a without prejudice save as to costs offer.

[17] On this basis I find that a re-opening is not justified on these grounds.

[18] Mr Bennett has filed evidence in support of Ms Whaanga's submission that her legal costs were not subject to a contingency fee basis, which I accept.

[19] On this basis, I find that a re-opening is not justified on these grounds.

[20] I determine that the costs determination [2013] NZERA Auckland 436 should not be re-opened and consequently decline a stay in respect of that determination.

Eleanor Robinson
Member of the Employment Relations Authority

³ *Calderbank v Calderbank* [1976] Fam 93 (CA)

