

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 248A/08
5074991

BETWEEN A
 Applicant

AND B and C
 Respondent

Member of Authority: Marija Urlich

Representatives: Damien Chesterman, Counsel for applicant
 Danny Jacobson, Counsel for respondents

Submissions received: 18 September 2007, 6, 15 August, 11, 24 September
 2008

Determination: 30 September 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 14 July 2008 (AA248/08) the applicant's claim of unjustified constructive dismissal was upheld. Costs were reserved. The parties were invited to attempt to resolve this issue themselves and if unable, a timetable for filing costs memoranda set.

[2] Schedule 2, clause 15 of the Employment Relations Act 2000 provides the Authority with a discretionary power to award costs and expenses incurred in pursuing or defending an application to the Authority.

The applicant's submissions

[3] The applicant seeks an award to indemnify total costs of \$32,629.00. She has paid for some of the costs of her legal representation and received a grant of legal aid (\$10,989.50 to date, further costs of \$6,452.50 to be invoiced to Legal Aid Services) in relation to the remainder.

[4] Mr Chesterman submits indemnification of costs is warranted given the following factors:

- The conduct of B and C leading up to the hearing was reckless – filing three statements of problem, application to strike out and opposition to strike out, which needed to be perused and responded to ;
- Breached timetabling orders – filing over 100 pages of witness statements a week prior to hearing;
- The witness statements contained irrelevant hearsay evidence and offensive and inaccurate evidence offending against the sexual conduct evidence rule;
- B and C’s conduct during the hearing was inappropriate focussing on A’s alleged sexual conduct and physical appearance;
- Respondent witness statements contained identical passages;
- Throughout the hearing respondent witnesses acted in an insulting and disrespectful manner towards A; and
- But for this conduct the hearing could have been completed in one day.

[5] In the alternative, Mr Chesterman submits an award exceeding the daily figure of \$2000 to \$2500, as outlined in *PBO Limited v Da Cruz* [2005] 1 ERNZ 808, is warranted.

The respondent’s submissions

[6] Mr Jacobsen submits that this matter does not warrant indemnity costs. He submits the time spent and costs incurred are excessive given the legally uncomplicated investigation and reflect a failure to recognise the special nature of the Authority investigation process. He submits that there is nothing exceptional about this matter to warrant the Authority departing from the usual tariff based approach.

[7] Specifically Mr Jacobsen submits:

- The additional costs claimed by A concerning the adjournment should be specified;

- In any event B and C were not aware of breach of the timetabling orders because they were not advised of the Authority's directions by their then representative;
- B and C were not responsible for the length of the investigation meeting;
- The 18 December 2006 notification of grievance was not a valid *Calderbank* offer and should not be consideration in an assessment of costs;
- There is no basis for indemnity costs - A was legally aided, full details of legal aid invoices have not been provided, without approval of the LSB a legally aided litigant is not entitled to receive payments beyond the grant of legal aid;
- Costs should not be punitive;
- Costs at mediation are usually not recoverable;
- There is no evidence the LSB will require full reimbursement of the legal aid grant;
- The high level of award weighs in favour of the usual tariff based approach.

Determination

[8] In setting costs I am guided by the principles outlined in *Da Cruz*. Those principles seek to reconcile what are reasonable costs awards in the Authority, given the special nature of this institution, and the actual costs parties may have incurred in seeking resolution of their employment relationship problem.

[9] An award of indemnity costs is not warranted in this case. Though B and C's conduct throughout these proceedings is a relevant consideration the actual costs incurred are too high given the type of case and the length of hearing.

[10] A was the successful party; she is entitled to a contribution to costs reasonably incurred. Any award does not include costs associated with mediation. The award also does not include costs associated with the withdrawn application filed by B and C a separate matter not yet considered by the Authority.

[11] A has received a grant of legal aid. How that grant of legal aid is repaid is a matter between the applicant and the Legal Aid Board.

[12] This matter was heard over three days. Evidence was given by seven witnesses and closing submissions filed later. Given the nature of this case \$2500 is a starting point for the notional daily rate. There are factors which cause me to adjust that rate up to \$3000 per day:

- A reasonable settlement offer was made by A very early on the life of these proceedings;
- The adjournment was caused by the respondent's failure to comply with directions of the Authority. At the time of the adjournment they were put on notice that this issue may sound in costs. I accept that the consequent correspondence has put A to further cost; and
- Witness statements filed on behalf of the respondent contained strikingly similar passages. This casts doubt on the credibility of those statements and required thorough questioning of those witnesses, contributed significantly to the length of hearing;

[13] The adjusted notional daily rate is to be multiplied by the number of hearing days. A's disbursements claim of \$232.50 is granted.

[14] **The respondents, B and C, are ordered to pay the applicant, A, \$9,000.00 as a contribution to costs plus disbursements of \$232.50, pursuant to schedule 2, clause 15 Employment Relations Act 2000.**

Marija Urlich

Member of the Employment Relations Authority