

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 409A/10
5305771

BETWEEN JUDITH BRAKE
 Applicant

AND GRACE TEAM
 ACCOUNTING LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Submissions Received 4 October 2010, from applicant and respondent

Determination: 4 November 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In determining (under AA409/10 of 13 September 2010) that Mrs Judith Brake did not have a personal grievance arising from or in relation to her dismissal by Grace Team Accounting Ltd (GTA) for redundancy reasons, the Authority reserved the question of costs.

[2] An application has now been made and responded to within the time directed by the Authority.

[3] The matters before the Authority for determination were an application for interim reinstatement, which was discontinued before being heard, and an investigation of the claim by Mrs Brake that her dismissal for redundancy was not justifiable under s 103A of the Employment Relations Act 2000.

[4] For GTA its advocate Ms Macphail seeks an order requiring Mrs Brake to pay \$7,500 as a contribution towards costs incurred. Mrs Brake's advocate Mr Reid in his

submissions argues that costs should lie where they fall or alternatively that an award of \$1,500 would be an appropriate exercise of the Authority's discretion.

[5] The investigation meeting occupied about two days, although part of the second day was used for an attempt by the parties to resolve the claims using one of my colleagues as a facilitator.

[6] The Authority is advised that GTA made a without prejudice except as to costs settlement offer about two months before the investigation meeting, but this was declined. In the result Mrs Brake did not succeed at all with her claims and therefore the settlement offer, although a reasonable step for any party in an investigation to take, in this case does not have any great influence over the way costs must be determined. The usual principles apply.

[7] In seeking a contribution of \$7,500 towards its costs GTA has not disclosed what its actual costs were. It should have done, so that the Authority knows that it is not being asked to award more costs than were incurred, although that seems quite unlikely in this case, and can also get some idea of the proportion of actual costs being sought.

[8] Preparation by GTA for the interim reinstatement claim was necessary up to the point where it was discontinued. Also preparation of evidence and legal submissions for the investigation of the unjustified dismissal claim was necessary. In addition Mr Reid mounted a strong challenge to the dismissal based on arguments of estoppel and misrepresentation, which also extended the preparation required of GTA.

[9] The starting point when considering costs must be that GTA was found to have acted entirely lawfully in terminating the employment of Mrs Brake. She exercised her right to bring a personal grievance claim and, not having been able to settle it in mediation, was entitled to have it investigated and determined by the Authority. When its settlement offer was rejected GTA had no real option but to participate in the investigation, which it fully did by engaging a representative Ms Macphail.

[10] On normal principles as set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808, an order of \$3,000 or more for each day of investigation meeting would have been justified. As noted in that case the general discretion the Authority has whether to award costs and the amount, are matters within the equity

and good conscience jurisdiction of the Authority and may be considered on a case by case basis.

[11] While there may be other cases of nearly two day investigation meeting duration resulting in an order for costs approaching or even reaching \$7,000, there are compelling circumstances in this case pointing to an award of much less than that sum as being just.

[12] In the course of the investigation meeting personal circumstances adverse to Mrs Brake in several respects were disclosed, as they were in relation to one of the principals of GTA.

[13] I accept that as a consequence of her dismissal, in circumstances where GTA was not legally at fault, Mrs Brake has suffered significant deterioration in her already threatened state of health. I accept that she is at this time unable to work and that there are factors which will create hurdles for her in finding work if and when she is well enough to do that.

[14] Further, from Mr Reid I accept that Mrs Brake being without income has very limited means only from a modest benefit to meet an award of costs. I expect that she either owns or has equity in the accommodation she lives in, but this would seem to be of a standard no more than necessary to meet the requirements of a single person. I do not anticipate that she would be required to sell the place she lives in, if she owns it, to meet an award of costs.

[15] In the unusual circumstances of this case I am reasonably sure that Mr Reid, although on the face of it the representative of Mrs Brake, will because of personal matters, some of them historical, take it upon himself help his former wife meet an award of costs. Mr Reid is now running an advocacy or advisory business and his qualifications, skill and experience would suggest that the business is likely to be financially successful. The considerable efforts Mr Reid made in presenting Mrs Brake's case are an indication of support he gives to her in any way he can.

[16] I will therefore award costs of \$3,500 against Mrs Brake, doing so with some confidence that she is likely to be assisted by Mr Reid to meet the payment of that amount.

Determination

[17] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000, Mrs Judith Brake is ordered to pay Grace Team Accounting Ltd \$3,500 as a contribution to costs.

A Dumbleton
Member of the Employment Relations Authority