

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 46
5322986

BETWEEN
GWEN BROCKLEHURST
Applicant

A N D
KBM MACHINE
MAINTENANCE LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Memoranda Received: 1 and 19 March 2013

Date of Determination: 22 April 2013

COSTS DETERMINATION OF THE AUTHORITY

- A. The applicant is ordered to pay \$6,650 as a contribution to
the legal costs of the respondent.

Application for costs

[1] This application for costs, which has been made on behalf of the respondent, KBM Machine Maintenance Ltd against the applicant, Ms Gwen Brocklehurst, follows an investigation of the Authority that included a hearing in June 2012. Determination of the matter followed consideration of legal submissions received in July.

[2] The employment relationship problem investigated by the Authority comprised claims by Ms Brocklehurst that she had been unjustifiably constructively dismissed and unjustifiably disadvantaged, and that by failing to act in good faith KBM had breached her employment agreement and the Employment Relations Act 2000.



[3] The claims arose after Ms Brocklehurst's job had been changed in October 2009 and she resigned in January 2010.

[4] The unusual and unfortunate circumstances which occurred from the end of 2009 until the investigation of Ms Brocklehurst's substantive claims in 2012 have been set out by the Authority in its determination – [2013] NZERA Wellington 17.

[5] The Authority found that Ms Brocklehurst had not been dismissed or disadvantaged through the change to her job, and that there had been no breach of good faith by KBM in the employment relationship. None of her claims was successful.

[6] This application for costs relates only to legal costs incurred by KBM through retaining counsel, Mr Snell, during the period after mediation in January 2012 and up to the end of the investigation in July. Much greater costs have been incurred by both parties in the Authority and also in the Disputes Tribunal and District Court, because of collateral and preliminary matters requiring resolution.

[7] Mr Snell advises that \$18,857 is the actual costs in relation to the preparation for and conduct of the Authority hearing held over two days in June. He seeks an award of a "very high proportion" of those costs, which he submits Ms Brocklehurst caused KBM to incur.

[8] Several reasons are put forward in support of a higher rate of costs being awarded. They include the making of a *Calderbank* offer which Ms Brocklehurst rejected, and lack of success with any of her claims. Between mediation in January 2012 and the investigation meeting, Ms Brocklehurst was offered \$5,500, payable pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000, in full and final satisfaction of all her claims. That offer was rejected with a counter offer of \$25,000 she made to settle the claims.

[9] For Ms Brocklehurst, counsel Mr Oliver submits, for reasons given, that costs should lie where they fall or alternatively that any award should be modest.

[10] I cannot accept the submission of Mr Oliver that an award if made should take into account what he calls Ms Brocklehurst's "unfortunate circumstances", a reference to the poor advice she received from the advocate engaged by her before Mr Oliver was instructed. The competence of any representative retained by her cannot be any

responsibility of KBM, in the same way that the company is not accountable for the actions of the Police that Ms Brocklehurst complained about.

[11] After the disastrous start in 2010 to trying having her employment relationship problem resolved, Ms Brocklehurst in 2011 had the benefit of the Authority's warnings given about difficulties she might have in proceeding with her case. In my view her antagonism towards KBM has been misplaced or misdirected in bringing these claims. Ms Brocklehurst has insisted on having her day in Court, as Ms Snell put it. However the purpose of an award of costs is not to punish. That is one of the principles laid down in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, the leading Employment Court case on costs in the Authority.

[12] In accordance with another principle in *Da Cruz*, I consider that the daily tariff of \$3,500 currently should be applied but at a raised level to take account of the *Calderbank* offer made and rejected.

[13] I take no account of the 2011 meeting to hear the exceptional circumstances leave application brought successfully by Ms Brocklehurst, as an 'indulgence' was granted her by the Authority. Because of the adjournment on the first day of the 2012 meeting, the total hearing time was less than two full days and I allow about one and a third days. Applied to the daily tariff raised from \$3,500 to \$5,000 per day, the award of costs is \$6,650. That sum is to be paid by Ms Brocklehurst to KBM.

[14] This order is made by the Authority pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.



A Dumbleton
Member of the Employment Relations Authority



