

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 143
5295938

BETWEEN

ELENI DIAKAKI
Applicant

AND

GREEK ORTHODOX
COMMUNITY OF
WELLINGTON INC
Respondent

Member of Authority: P R Stapp

Representatives: P Cheng Counsel for Applicant
T Cleary Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 16 and 30 August 2011 from Respondent
30 August 2011 from Applicant

Determination: 14 September 2011

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The current issue arises out of reserving leave on costs in two determinations [2010] WA 138/10 (the out of time determination) and [2011] NZERA Wellington 114 (the substantive issues). The respondent has requested the Authority to determine costs since leave was provided. This is opposed by the applicant on the basis that the Authority's determination [2011] NZERA Wellington 114 has been challenged in the Employment Court.

[2] The respondent has asked for costs to be determined irrespective of the Employment Court challenge.

Issues

[3] Should costs be put to one side until after the Employment Court challenge?

[4] No details of the costs have been provided yet. If the issue is not put to one side then a timetable will be required for submissions on the issues in regard to the parties' costs.

The facts

[5] On 31 August 2010 the Authority dismissed an out of time application by the applicant and reserved costs: [2010] WA 138/10 dated 31 August 2010. The determination was not challenged. Costs were reserved, and have been left until after the substantive issues.

[6] On 20 June 2011 the Authority dismissed the applicant's substantive claims, with the exception of a minor arrears claim, and reserved costs: [2011] NZERA Wellington 114 dated 20 June 2011.

[7] On 18 July 2011 the applicant filed a challenge to the determination in the Employment Court. The statement of claim lodged in the Employment Court has been placed on the Authority's file as a matter of information for the Authority.

[8] The respondent has asked the applicant to agree to costs but this has been declined by the applicant pending the outcome of the Employment Court challenge.

Determination

[9] This is a most unusual situation because the practice has always been for costs that have been reserved to be dealt with before an Employment Court challenge involving an Authority determination, unless they are settled.

[10] This practice has been followed to ensure all the issues and Authority's decisions on the relevant issues are put before the Employment Court. That has become a guiding principle. Indeed no substantive reasons have been advanced for

the Authority not to deal with the issue of reserved costs until after the Employment Court challenge.

[11] I am further supported by there being no challenge to the out of time determination. The respondent is entitled to have that matter of costs dealt with. For completeness I hold that it was entirely proper for that reserved matter of costs to be left until after the substantive investigation meeting and it is entirely reasonable for that issue to be revived given the leave and there being no timetable put in place by the Authority at the time. I hold there can be no prejudice to the applicant. Indeed no argument has been advanced of any prejudice being suffered by the applicant. The desire by the respondent to deal with that matter of costs remains in reasonable time given the wait until after the substantive determination had been released.

[12] There is an issue of the existence of two *Calderbank* offers. That information was held back from the Authority (and that was entirely appropriate) until the substantive issues had been dealt with. The existence of the two *Calderbank* offers is a matter that can be put before the Authority and be dealt with no differently as any other issue on costs.

[13] Thus I conclude that the applicant has had her investigation in the Authority and was on full notice that costs was an issue and that it had been reserved to be dealt with after the substantive issues. Indeed the applicant has also claimed costs. So the issue was live as to which party was entitled to costs and how much?

[14] The applicant's memorandum (30 August 2011) canvases points that are more appropriate to the determination of costs rather than supporting waiting on the outcome of the challenge in the Employment Court.

[15] Finally I note that in the statement of claim for a challenge to the Authority's determination lodged in the Employment Court that there has been no claim made for the Court to determine costs in the Authority and indeed nothing mentioned about the Authority's role in dealing with the costs.

Orders of the Authority

[16] I agree with the respondent that it is entirely appropriate for costs to be determined on all the matters relating to costs arising from both determinations, and it is within the Authority's jurisdiction to deal with costs.

[17] Therefore, I set a timetable for costs to be dealt with. The respondent is to provide submissions on costs by 3 October 2011. The applicant has a right of reply and to make submissions by 25 October 2011. The respondent has a final right of reply by 31 October 2011. This timetable can be varied by mutual agreement and upon consulting the support officer, but all papers are to be lodged by 31 October 2011.

[18] Leave is reserved for any evidence if it is required, and in the first instance this should be provided by affidavit only if it is necessary.

P R Stapp
Member of the Employment Relations Authority