

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 123  
5358693

BETWEEN MALCOLM FRENCH  
Applicant

A N D ACCIDENT COMPENSATION  
CORPORATION  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Barbara Buckett, counsel for Applicant  
Peter Churchman, counsel for Respondent

Date of Determination: 8 October 2012

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**DETERMINATION OF THE AUTHORITY**

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**Application for costs**

[1] The applicant, Mr Malcolm French, first came to the Authority in September 2010 when he brought a personal grievance, claiming that his employer, the respondent Accident Compensation Corporation (ACC), had unjustifiably acted to his disadvantage in the employment relationship or terms and conditions of that.

[2] Following an investigation the Authority determined that claim in January 2011 – under [2011] NZERA Wellington 2 – by finding there was no evidence that Mr French had been unjustifiably disadvantaged.

[3] The determination was challenged by Mr French in February 2011 to the Employment Court, where the case has yet to be decided.

[4] Costs were reserved by the Authority (member Denis Asher) and to date no application has been made to the Authority for an award.

[5] In September 2011 a further application was made to the Authority by Mr French when he claimed once again that action had been taken unjustifiably by ACC in his employment, and he also claimed that the termination of his employment, purportedly for redundancy, was an unjustifiable dismissal.

[6] At the same time as he lodged his second application, Mr French sought removal of it to the Court, so that the matter could be heard there together with the challenge earlier made to the Authority's determination of his first application.

[7] In a determination dated 15 December 2011 – [2011] NZERA Wellington 202 - the Authority granted the removal application and ordered that the personal grievance claims be transferred to the Court in their entirety, for hearing and determination without the Authority investigating them.

[8] Costs on the removal application were reserved by the Authority.

[9] Mr French has now sought an order for payment by ACC of his legal costs incurred in successfully applying for removal. He seeks full solicitor/client costs of \$4,042 plus GST. The reasons for making the application on that basis have been given by his counsel Ms Buckett as follows:

- (a) *The opposition/challenge to the removal was un-meritorious, contrary to the provisions of the statute, and frivolous. It was obvious there could be no valid opposition and the Authority agreed with that view.*
- (b) *Counsel for the respondent predicated the opposition on outdated law.*

[10] As an alternative to indemnity costs, Mr French seeks an award based on the Authority's notional daily tariff of \$3,000-\$3,500.

[11] In response to the application, counsel for ACC, Mr Churchman, referred to it as an unexpected application and one that was completely misconceived. He described the unexplained 10 month delay in making it as "extraordinary." Mr Churchman rejected the submission that the opposition by ACC to the removal had been frivolous or based on outdated law.

[12] Mr Churchman referred to one of the grounds for having opposed removal being the potential for delay in getting the matter heard and decided by the Court. He submitted that that concern has proven to be well founded, as delays have occurred

since the matter was removed and that on two occasions the Court has awarded costs against Mr French to mark its concern at his behaviour which has resulted in further adjournment of the case.

[13] The Court's most recent decision given to the parties – [2012] NZEmpC 140 dated 22 August 2012 – raises a likelihood that the way Mr French's case has been conducted in the Court will have some bearing on the determination of the question of costs there.

[14] Mr Churchman submitted that the matter of costs in the Authority should remain reserved by it.

[15] The Authority sought the views of Mr Churchman and Ms Buckett about whether it should remove the matter of costs to the Court under s 178 of the Employment Relations Act 2000. Mr Churchman was not opposed to that course but Ms Buckett was.

[16] There is no dispute that the Court has jurisdiction to order costs in respect of proceedings before the Authority, although practical difficulties could arise because the Court may not be fully aware of how a particular Authority investigation proceeded. That problem, to some extent, arises even in the Authority, as in this case the original member Mr Asher who made the first determination is no longer in the Authority and another member will have to become involved in the exercise if costs are sought in relation to the first application made to the Authority. Mr Asher was clearly better placed to determine costs.

[17] In principle, an application for costs before the Authority is a matter that can be removed to the Court. The Authority may also grant removal of its own motion, and a ground for doing so may be that the Authority is of the opinion, in all the circumstances, that the matter should be determined by the Court.

[18] It is unusual to remove costs from the Authority to the Court but a feature of this case which compels me to take that step is the ongoing legal cost to the parties and the level of costs incurred by Mr French in particular.

[19] In granting removal of the dismissal grievance in December last year, the Authority in its determination noted that the final disposition of matters between Mr French and ACC arising out of his employment relationship and the associated

secondment agreement will not be by the Authority but may be in the Court, although even then there is some possibility, in a case of this kind, of application being made further to the Court of Appeal. The Authority noted:

*Mr French's evidence is that to this point he has so far incurred something over \$80,000 in legal expenses. It seems to the Authority unjust that he should have to remain before the Authority until his investigation is completed and determined and then, if there is a challenge, which is likely, duplicate if not increase that expense by going, or being taken, to the Employment Court for a "de novo" challenge.*

[20] I consider it likely that the question of costs in the Authority will be most effectually and economically addressed at the same time as questions of costs in the Court are considered, presumably at the conclusion of the hearings and after a decision has been given by the Court.

[21] Although the Court may find it a disadvantage not to have first hand knowledge of the investigation that was conducted in the Authority, in my view it is likely to be in a better position to look at the case and its history overall once a decision on the claims has been made.

[22] I consider that it will be in the interests of the parties if costs in relation to the Authority and Court proceedings are looked at in one place, by the forum that is likely to make the final decisions in this prolonged dispute.

### **Determination**

[23] For the above reasons, the application for costs is removed to the Employment Court under subsection (2)(d) of s 178 of the Act, the Authority being of the opinion that in all the circumstances the Court should determine the matter.

A Dumbleton  
**Member of the Employment Relations Authority**