

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 52
5310978

BETWEEN JENNIFER GINI
Applicant

A N D LITERACY TRAINING
LIMITED
First Respondent

A N D LINDA STURGESS
Second Respondent

Member of Authority: G J Wood

Representatives: P O'Sullivan for the Applicant
T Cleary for the Second Respondent

Submissions Received: By 17 February 2012

Date of Determination: 2 May 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] In my substantive determination I concluded that Ms Gini had been unjustifiably dismissed and also not treated in good faith by the first respondent (Literacy Training). I awarded Ms Gini \$10,140 gross in lost remuneration and \$5,000 in compensation. Ms Gini's claim for a penalty against the second respondent, Ms Sturgess, was dismissed.

[2] Only the second respondent, Ms Sturgess has applied for costs. Given the time that has passed I have determined to conclude the costs application I have received, even although I have not received a costs application from Ms Gini in respect of her successful claim against Literacy Training.

[3] On behalf of Ms Sturgess, who was separately represented from Literacy Training, Mr Cleary seeks indemnity costs of \$9,603 against Ms Gini. While Mr Cleary accepted that the standard tariff approach would lead to an award of around \$3,000, he sought a greater level of costs on three major grounds. First, after the initial claims by Ms Gini against Ms Sturgess (described as a very broad attack seeking to visit on her all and any liability of Literacy Training's), Ms Gini was on notice from the Authority that indemnity costs might be awarded if the full breadth of the original claims other than the penalty were not withdrawn. Second, there is no evidence that Ms Sturgess ever acted in the knowledge that Literacy Training was acting in breach of contract. Third, the penalty action was out of time.

[4] In response, Mr O'Sullivan noted that Ms Gini withdrew two of the three actions against Ms Sturgess personally (i.e. other than the penalty claim), soon after a determination from the Authority over a strike out claim by Ms Sturgess that was based on the ground that there was no employment relationship between her and Ms Gini (see [2011] NZERA Wellington 28).

[5] Mr O'Sullivan also claimed that the penalty claim was subsumed into the substantive claims, as Ms Sturgess controlled Literacy Training. (I note here that Ms Sturgess is the sole director of Literacy Training and owns almost all its shares.) It was also submitted that given that Ms Sturgess had to attend the investigation meeting as the principal of Literacy Training, there was no need for her to be separately represented. In addition, it was noted that preliminary issues such as the disclosure of documents did not need Mr Cleary's involvement. It was also noted that the penalty aspect of the claim took little time to investigate. It was Mr O'Sullivan's conclusion that costs should be left to the Court to determine, or that payment to Ms Sturgess be stayed pending the resolution of the challenges, or paid into Court, or safeguarded in some other way.

[6] Mr O'Sullivan is wrong to suggest that costs should simply be determined by the Court. The proper approach is for the Authority to determine costs, so that the Court can then assess that either as a separate issue for challenge, or, should it reach a different conclusion to the Authority on substantive issues, as a consequential issue.

[7] Any application for stay should follow this determination, but given that proceedings against Ms Sturgess have been dismissed, and there has been no challenge to that determination, there do not seem to be any grounds for a stay.

[8] Given that Ms Gini was successful in defending the “strike out” claim and that she did withdraw all claims other than the penalty claim soon thereafter, I conclude that no costs will be awarded for that part of the proceedings. I also conclude that the preliminary matters dealt with, such as the disclosure issues, were principally matters for costs between Literacy Training and Ms Gini. Therefore they will not be dealt with in this determination.

[9] As a consequence, that only leaves an assessment of whether there should be any uplift on the normal tariff that might be applied in respect of the costs awarded to Ms Sturgess, who was entirely successful. I accept that Ms Sturgess was entitled to be separately represented throughout. In my determination I concluded that Ms Gini knew or ought to have known of the time limits within which to claim a penalty, and that she was aware of all relevant factors that she now relies on. Because her claim was out of time it could never succeed. She has to bear responsibility for that delay. For these reasons a greater than usual contribution to costs is appropriate.

[10] In all the circumstances of this case I consider that an award of \$4,500 is appropriate. I therefore order the applicant, Ms Jennifer Gini, to pay to the second respondent, Ms Linda Sturgess, the sum of \$4,500 in costs.

G J Wood
Member of the Employment Relations Authority