IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 101A/09
5141287

	BETWEEN	SUSAN JANE GREY Applicant
	AND	DIRECTOR-GENERAL OF CONSERVATION First Respondent
	AND	THE SOLICITOR-GENERAL Second Respondent

Member of Authority:	Paul Montgomery
Representatives:	Moka Ritchie, Counsel for Applicant Hamish Kynaston, Counsel for First Respondent Joanna Holden, Counsel for Second Respondent
Submissions received:	28 August 2009 for First Respondent 10 September 2009 for applicant
Determination:	23 December 2009

COSTS DETERMINATION OF THE AUTHORITY

Recall

[1] Included with the submission on costs from counsel for the applicant was an application for the recall of the Authority's determination.

[2] The Authority has received, up to the time of writing this determination as to costs and the application to recall, no formal application to reopen the substantive investigation under clause 4, Schedule 2 and Employment Relations Act Regulations Section 10.

[3] The Authority refers counsel to Rule 11.9 High Court Rules in the light of which I have considered the application to recall and in particular to the commentary in McGechan on Procedure under HR11.9.01 which at (2) sets out the principles applying to a recall application. The commentary refers to the *leading statement in*

New Zealand remains that of Wild CJ in Horowhenua County v. Nash (No.2) *[1968] NZLR 632.*

> *Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled – first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.*

[4] I have considered the three categories set out herein and find none are relevant to this matter. Accordingly I decline the application to recall the determination.

[5] Further, the applicant filed a *de novo* challenged to the substantive determination in the Employment Court on 11 August 2009 almost one month to the day prior to the Employment Relations Authority receiving submissions from her counsel. That challenge renders nugatory any further involvement of the Authority in this matter apart from determining costs. The Employment Court is now seized of the total matter and there it rests for now.

Costs

[6] On the first day of the Authority's investigation meeting, 23 February 2009, the applicant withdrew her claim against the Solicitor-General who had proposed he would not seek costs in the event of a withdrawal. That offer was accepted and the cost issues between these two parties was thus resolved. The investigation meeting proceeded in respect of the applicant's claims against the first respondent.

[7] In his submissions on behalf of the Department Mr Kynaston observes:

> *In regards to the substantive applications, there were two investigation meetings, held in Nelson, spanning four days. The first investigation meeting was held from 23-25 February 2009 and the second took place on 4 May 2009.*
>
> *Ms Grey claimed she had been unjustifiably dismissed and unjustifiably disadvantaged in a number of respects, some of which related to events post dismissal. The Authority heard from five witnesses and considered hundreds of pages of documents. The briefs of evidence and submissions were lengthy due to the large number of issues raised by Ms Grey, and the legal issues were not straight forward.*

> *Moreover the stakes were high, not only for Ms Grey, but the respondents, as serious allegations were made personally against the Chief Executive of the Department and the Solicitor-General.*
>
> *In other words, relatively speaking, this was a lengthy and difficult investigation.*

[8] Mr Kynaston set out the actual and, he submits, reasonable costs incurred by the Department from 5 December 2008, the day on which the proceedings were filed, to the date of the Authority's determination. Those costs are:

• Legal fees excluding GST	80,420.00
• Disbursements – flights, accommodation and including GST	1,562.04
Total	$81,982.04

The relevant invoices were attached to counsel's submissions.

[9] For the applicant Ms Ritchie opposed the award of costs on the grounds that:

(i) The Authority exceeded its jurisdiction in its determination and made findings in the breach of the principles of natural justice;

(ii) The decision is void or voidable and should be recalled;

(iii) In these circumstances there is no jurisdiction to award costs; and

(iv) It would be contrary to the purposes of the Employment Relations Act 2000 and the interests of justice to award costs in all the circumstances.

[10] The principles set out by a full bench of the Employment Court in *PBO Limited (formerly Rush Security Ltd) v. Da Cruz* [2005] ERNZ 808 govern the appropriate determination of costs in matters before the Authority. Mr Kynaston, in his submissions, acknowledged this principled approach in respect of the current matter.

[11] For the avoidance of doubt I have considered the basic tenets from (a) to (k) in *Da Cruz* (supra) in coming to my determination on costs. I have also been mindful of the Court's dictum that *costs are not to be used as a punishment or as an expression*

of disapproval of the unsuccessful party's conduct, although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.

[12] However, counsel for the first respondent submits there were aspects in the preparation and conduct of Ms Grey's case which need to be considered by the Authority in a costs setting.

Settlement offers

[13] Mr Kynaston submits that the Department sought to resolve Ms Grey's claim at an early stage *taking into account its responsibilities as a public sector agency and the parameters refered to in a report of the Controller and Auditor General on severance payments in the Public Sector – May 2002.* Further, prior to proceedings being issued in the Authority, the first respondent made an offer of settlement to Ms Grey on a without prejudice except as to costs basis. The terms of that settlement offer were to pay Ms Grey three months salary in the sum of $23,000 and $7,500 under s.123(1)(c)(i) of the Act. The offer was made on the basis that neither party accepted liability or wrongdoing and were subject to standard terms of confidentiality and settlement.

[14] Two further offers of settlement were made to the applicant on 19 February 2009 on the same basis. In those offers the Department raised its offer to four months salary payment in the sum of $30,666, and section123(1)(c)(1) compensation of $7,500 and, in its final offer in the light of Ms Grey having recently instructed counsel, an additional $2,500 plus GST as a contribution to legal costs. Both offers were declined by Ms Grey.

[15] Although those offers were withdrawn prior to the beginning of the investigation meeting, the Department reinstated its last offer referred to above in the course of the investigation meeting, but that again was declined.

[16] Mr Kynaston submits that the Department incurred all of its legal costs relative to these proceedings after its first offer was declined. Those costs were approximately $30,500. Following the rejection of its 19 February offers, the Department incurred further costs of $55,695 in fees (exclusive of GST) and disbursements of $264.26. Counsel submits these latter costs need not have been incurred had the applicant accepted what the first respondent says was a generous offer of settlement.

[17] In accordance with the Authority's direction in its substantive determination, the parties have attempted to resolve the issues of costs but have been unable to do so.

Additional relevant factors

[18] After observing Ms Grey was unsuccessful in all her claims against the Department Mr Kynaston submitted that the costs incurred could have been avoided by the acceptance of its offers.

[19] Counsel also submits that a considerable amount of the Department's costs were incurred in attending to Ms Grey's requests for information and compiling the numerous documents referred to in her brief of evidence. Ms Grey appears not to have had many of the documents on which she was attempting to rely and it became necessary for counsel to search the files to match up the documents with the evidence in the applicant's briefs. The time and cost involved is reflected in the number of bundles submitted to the Authority for the investigation meeting. There were four substantial bundles, only one of which was agreed.

[20] Further, counsel advised the applicant on three occasions that in the light of the significant amount of work involved in complying with her requests, the matter might be raised in relation to costs. Mr Kynaston also says issues of relevance were raised with Ms Grey however, Ms Grey did not change her approach on either count in spite of the Department's counsel advising her of the risks. Mr Kynaston also submitted that as Ms Grey sought penalties and exemplary damages against the Department when case law is clear this type of remedy is awarded only in the most serious cases, the Department was put to the additional cost in defending itself against these claims. In conclusion, counsel says the Department considered an award of costs in its favour would be appropriate in the light of the conduct of the applicant's case.

The applicant's submissions

[21] In para.51 of her submissions to the Authority Ms Ritchie submits *if the Authority has lost jurisdiction to address natural justice related concerns because of the filing of an appeal, then it has presumably also lost jurisdiction to address costs related issues for the same fundamentally flawed decision.* Further Ms Ritchie goes on:

> *The jurisdiction to now impose costs seems particularly tenuous bearing in mind the outstanding concerns about the apparent failure to ensure natural justice and resulting lack of standing for its decision.*

[22] Counsel for the applicant goes on to submit that any award of costs would be contrary to the interests of justice *given the Authority has acted in a manner that puts in question the standing of the decision itself. This is not a matter that will be dealt with at challenge because the process of the Authority is not being challenged, the matter is being heard de novo.*

[23] In addressing the first respondent's submission in relation to settlement offers, counsel for the applicant submit all these offers failed to address the most important issues for the applicant, including her requests for an apology and steps to help restore the harm done to her reputation and reinstatement. Further, counsel submits:

> *The financial contribution offered by the respondent came nowhere near the actual losses suffered by the applicant, especially bearing in mind the damage to her reputation, the limited alternative employment option available to her in Nelson and the lost Government career options.*

[24] Further, counsel submits Ms Grey's very strong desire to promote a change in DOC and the Crown Law protocols and practices to ensure that nobody else was ever put through the trauma she was put through were not addressed in the context of the offers made.

[25] In summing up her submissions on behalf of her client Ms Ritchie says:

> *Given there are significant concerns regarding the Authority and whether the Authority complied with jurisdiction and natural justice requirements in making its decision [sic] of the 14 July 2009. In the circumstances it would be unfair and contrary to justice to make any costs award where the decision itself is flawed due to statutory requirements not being complied with.*

Determination

[26] Standing back and reviewing the matter as a whole in the light of counsels' submissions, I consider this is a case in which costs should follow the event. The appropriate approach is to apply the daily tariff as set out in *Da Cruz* (supra).

[27] This case took four days to complete and was neither legally straightforward nor devoid of irrelevant issues.

[28] While the Authority heard evidence of the financial difficulties Ms Grey and her family would suffer as a result of her dismissal, no corroborative evidence on this issue was put before the Authority by any other witness. Ms Grey has a personal partner, Mr Ian Ewen-Street. He did not appear as a witness before the Authority nor was there any evidence before the Authority to indicate Mr Ewen-Street was not in a position to provide ongoing financial input to the household regardless of the outcome of his partner's claims.

[29] I also acknowledge the need to avoid any element of punishment or disapproval at the applicant's conduct, while taking into account actions which increased the Department's costs.

[30] I find the daily tariff in this matter is to be fixed at $3,000. I order the applicant to pay the first respondent the sum of $12,000 as a contribution to what I find were its reasonably incurred costs.

[31] In addition, I order the applicant to pay the first respondent the sum of $1,500 inclusive of GST for its reasonably incurred disbursements.

One final matter

[32] While engaged in preparing this determination on Monday 21 December 2009, I was handed an email from Ms Grey requesting *an update on progress by the ERA in addressing my September 2009 request for recall of the Authority's decision and the Director-General's application for costs* … .

[33] I advised the senior support officer that I was in the process of preparing the draft determination in respect of costs and I understood the Chief of the Authority had addressed the matter of recall with Ms Grey. This understanding arose from a conversation between Mr Wilson and me upon my receiving the applicant's submissions, a copy of which was handed to Mr Wilson.

[34] In the light of some sections of Ms Grey's written submissions (paras.42 to 47) inclusive) I raised the issue of having the two matters in question referred to another member for determination. I understood Mr Wilson had addressed the recall

issue following a conversation with him some days after I handed him the documents. There was clearly a miscommunication between us which I genuinely regret. Accordingly, I have addressed the matter of recall in this determination in order to remove any doubt that this application has been properly considered.

Paul Montgomery
Member of the Employment Relations Authority