

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 149/09
5073866

BETWEEN MELISSA HOWARD
Applicant
AND INNER CITY INTER
AGENCY TRUST
Respondent

Member of Authority: Paul Montgomery

Representatives: Tim Twomey, Counsel for Applicant
Raewyn Gibson, Advocate for Respondent

Determination: 4 September 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] In the Authority's substantive determination, it found the dismissal of the applicant unjustified and made awards to Ms Howard while reserving costs.

[2] The respondent filed a challenge to the Authority's determination and a stay of proceedings pending the outcome of the challenge. Ms Gibson submitted this was a case in which it was appropriate to delay determining costs until the Court had determined that challenge.

[3] In the course of events, the challenge was withdrawn, the circumstances of that withdrawal is not known to the Authority. However, it leaves the issue of costs in the Authority to be addressed.

[4] Both representatives have cited the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 as the appropriate guidelines to be followed in this matter. Ms Gibson also cited *Hanover Group Ltd v. Finnigan* (unreported, AC41/06; ARC51/06) submitting that comments made by the learned Judge in exercising his discretion to deal with costs *waited until the ultimate merits of the matter had been resolved* was applicable to unresolved costs in respect to an Authority investigation where a *de novo* challenge has been filed.

[5] There is some merit in this submission, particularly in the light of the *hand to mouth* financial situation of the respondent Trust and its reliance on a donation to fund its now withdrawn application for stay and the *de novo* challenge.

[6] Mr Twomey submits Ms Howard was billed \$8,493.76 in respect to her claims before the Authority and this was below the actual costs incurred. He submits further costs were incurred in lodging a costs memorandum, but these are unspecified. Further, he seeks reimbursement of the applicant's filing fee of \$70.

[7] For the respondent, Ms Gibson submits the need for the Authority to consider its equity and good conscience jurisdiction. This submission focuses on the risk of a significant costs award prior to the Court determining the issues before it, would likely render nugatory the respondent's right of challenge. In that context, Ms Gibson submits any determination on costs in the Authority prior to the outcome of the challenge *should not be at a level which threatens the continuance of the respondent's service and therefore its right of appeal.*

[8] Weighing those issues at the time the stay application and the challenge were live issues, the Authority deferred its costs determination. The withdrawal of the application now leaves the issue of costs before the Authority to be decided. Were that this was a straightforward matter.

[9] While the Authority is mindful of the fragility of the respondent's limited income stream to fund its socially valuable work in the city, it must also be mindful of not rendering nugatory Ms Howard's awards in the Authority. If the awards made to her are to be absorbed in addressing her legal costs, the Authority's exercise of its equity and good conscience jurisdiction could also be called into question by the applicant.

[10] I have, in coming to this determination, attempted to balance the respective situations of the parties and also of the below actual solicitor/client costs charged to Ms Howard's account. While not privy to any arrangement between the respondent and its representative, I believe it possible Ms Gibson, aware of the Trust's financial situation, may not have charged her client on a standard commercial basis and may even have acted *pro bono*.

[11] Costs, in this case, should follow the event and having considered all aspects of the case and the financial circumstances of each party, I order the respondent to pay

the applicant the sum of \$2,700 as a contribution to her reasonably incurred costs. Further, I order the respondent to reimburse Ms Howard her \$70 filing fee.

[12] In what I find to be the exceptional circumstances of this case, I believe it appropriate to direct representatives to confer and agree on an instalment regime for the payment of the sums ordered. Leave is reserved, solely on the issue of costs, to approach the Authority for a further determination in the event the parties are unable to agree on an instalment schedule.

Paul Montgomery
Member of the Employment Relations Authority