

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 47
5425102

BETWEEN

NGAPARE JAY
Applicant

A N D

MANUKA COMMUNITY
HOUSE INCORPORATED
Respondent

Member of Authority: Helen Doyle

Representatives: Luke Acland, Counsel for Applicant
Kay Chapman, Advocate for Respondent

Submissions Received: 18 February 2014 from Applicant
20 March 2014 from Respondent

Date of Determination: 26 March 2014

COSTS DETERMINATION OF THE AUTHORITY

A I have ordered the respondent to pay to the applicant costs in the sum of \$1000.

[1] The Authority determined on 16 August 2013 an application for interim reinstatement. The applicant was unsuccessful in her application. The applicant was then successful in her substantive personal grievance for unjustified dismissal which the Authority determined on 5 February 2014. Costs were reserved in both the interim and substantive determinations. The applicant is legally aided.

The applicant's submissions

[2] Mr Acland refers the Authority to ss.41 and 45 of the Legal Services Act 2011 as they are relevant to the issue of costs. He notes that s.41 places an obligation on the applicant to recover costs from the respondent. He submits that the applicant has incurred legal expenses of \$11,151.55 which is clarified as an invoice for the interim

reinstatement application in the sum of \$2,346 and for the substantive matter \$8,805.55.

[3] Mr Acland submits an appropriate order is for the respondent to pay \$7,000 costs to the applicant to be directed to the Ministry of Justice for legal aid repayment. This is on the basis of two days investigation meeting at the notional daily tariff of \$3,500.

The respondent's submissions

[4] The respondent accepts that the notional starting point for assessing costs is \$3,500 per day of hearing. Ms Chapman then submits that the substantive hearing took one full day and the second day was three hours, not two full days. On that basis she submits that the appropriate starting point is \$5,000.

[5] Ms Chapman then submits that there are factors which should decrease the notional starting tariff. They are that the respondent was successful in the interim reinstatement hearing; that the applicant withdrew her claim for reinstatement two working days before the substantive hearing and the respondent's ability to pay.

[6] She submits that costs should be reduced by the amount of \$3,500 for the interim reinstatement hearing. Ms Chapman seeks a further reduction of \$1,000 for the late withdrawal of the reinstatement claim and costs associated with that.

[7] Finally Ms Chapman submits that the respondent has very limited ability to pay any costs. The Ministry of Health has identified that some lead paint must be removed from the building in which the respondent operates for safety reasons. This will require the paint to be professionally removed by a specialist to enable the Centre to continue. The areas with the paint have been cordoned off to protect the children. The building will have to close during the removal and Ms Chapman submits that the costs of that will not be met by the respondent's insurer.

[8] Since the building issues have been identified, the centre has not been able to enrol any children and Ms Chapman has attached a financial forecast which was completed in March 2014 by the Collective which shows that, at the current enrolment level, the centre is not viable. The Collective is meeting for a special general meeting on 2 April to determine whether the Centre should be liquidated and

Ms Chapman submits an adverse costs determination will almost certainly result in the Centre closing.

[9] Ms Chapman submits that costs should not be awarded against the respondent or, in the alternative, costs of \$500 would be appropriate, reducing the notional daily tariff of \$5,000 for the successful defence of the interim reinstatement and unnecessary additional costs relating to the late withdrawal of the reinstatement claim.

Determination

[10] The leading Employment Court judgment about costs in the Authority is *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. The Full Court of the Employment Court in *PBO* held at para. 45 that certain principles are appropriate to the Authority and consistent with its functions and powers recognising that each case has to be considered in light of its own circumstances.

[11] These principles include that there is discretion as to whether costs are awarded and in what amount. That discretion is to be exercised in accordance with principle and not arbitrarily. Equity and good conscience is to be considered on a case by case basis. Costs generally follow the event and awards are generally modest.

[12] There is no good reason in this case not to start with the usual principle that costs follow the event. The applicant was successful in her substantive application for a personal grievance. Costs invoiced to the legal services for the substantive hearing were \$8,805.55.

[13] Ms Chapman is correct that the second day was not a full day of hearing and that would normally result in a downward adjustment to the daily tariff. I accept that it is appropriate to have a starting point of \$5000.

[14] Ms Chapman submits that a further adjustment be made on the basis of the respondent's success in the interim application. That is an interesting submission. The applicant as a legally aided person is protected from an order for costs in a civil proceeding under s. 45 of the Legal Services Act 2011 unless the Authority was satisfied there were exceptional circumstances. There were no exceptional circumstances apparent in this case. Had the question of costs been addressed therefore as a discrete one in respect of the application for interim injunction no award

of costs would in all likelihood have been made in favour of the respondent as the successful party.

[15] That then raises the issues whether in the exercise of my discretion I should nevertheless approach the matter on the basis proposed by Ms Chapman and reduce the daily tariff for the substantive investigation meeting for costs incurred by the respondent in the interim application. I do not accept that would be a proper exercise of my discretion in circumstances where at best it was unlikely that costs would have been awarded for that successful defence of the application to the respondent. No adjustment is made on that basis.

[16] It was right at the last minute that the Authority and Ms Chapman became aware that the applicant did not intend to pursue reinstatement at the substantive investigation. That would have resulted in some increase in preparation but also reduced the time required for investigation. Balancing those two matters I make a deduction of \$500.

[17] Finally there is the respondent's financial position which on the basis of the information provided is perilous. The cash position of the Centre Ms Chapman submits is \$2,910 and there are no assets of significant value.

[18] This is a matter that I should take into account in the exercise of my discretion. An order as to costs of any significance could as Ms Chapman submits have influence over a decision to close the Centre.

[19] Had it not been for the financial circumstances of the respondent I would have ordered costs in the sum of \$4,500 in the applicant's favour. Taking into account the financial circumstances of the respondent I make an order for \$1000 costs.

[20] I order Manuka Community House Incorporated to pay to Ngapare Jay the sum of \$1000 costs.

Helen Doyle
Member of the Employment Relations Authority