

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 376/07
5053167

BETWEEN CATHERINE KORA
 Applicant

AND WEYMOUTH
 INTERMEDIATE SCHOOL
 Respondent

Member of Authority: Alastair Dumbleton

Consideration of Papers: 29 November 2007

Determination: 30 November 2007

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] The Authority has received an application for costs made on behalf of the Board of Trustees of the respondent, Weymouth Intermediate School. An order for costs is sought against the applicant, Ms Catherine Kora, who lodged with the Authority a personal grievance against the school, her former employer.

[2] The grievance claim did not require determination by the Authority because, the day before an investigation meeting was set to be held, Ms Kora withdrew her claim.

[3] The order for costs is sought largely on the basis that the respondent, which was represented by counsel, incurred expenditure up to a stage where it had fully prepared itself for the investigation meeting. Costs to that point were \$20,000.

[4] This is a case where there seems to be no good reason why it was left until the day before the investigation meeting to withdraw the claim from the Authority. If there is a good reason, then the applicant has not advised the Authority of it despite her being given the opportunity to reply to the application for costs.

[5] The applicant was represented by an advocate who wrote to the Authority and to the respondent's counsel on 1 August 2007, with the following advice:

As the result of a submission received by my office on July 27, 2007 my client has instructed me to withdraw the matter from the Authority.

[6] Counsel for the respondent in a memorandum assumes, reasonably in my view, that the "submission" referred to in the advocate's letter is the signed statement of a witness whose evidence was highly material to the investigation. That evidence was likely to be adverse to the case of Ms Kora, going by what she had presented in writing to the Authority and the respondent. Counsel makes the valid point that as the respondent had provided Ms Kora with the same statement in March 2007, she must have been aware of its contents during the several months that preceded the investigation meeting date.

[7] The difference between the statement provided in March and the one sent by the respondent to the applicant in July, was that the former was unsigned. Even so its significance should have been unmistakable, as it had been served expressly on a "will say" basis.

[8] For reasons that are clear from the file, the witness who signed the statement in July was not necessarily someone who was willing to give evidence at the investigation meeting, but she had been located by the respondent and served with a witness summons to attend the meeting set down for 2 August.

[9] It may reasonably be assumed that when the Ms Kora and her advocate saw that this witness was to be giving evidence, knowing what she would probably say they realised the applicant's case was unlikely to be upheld by the Authority.

[10] On ordinary principles, the respondent is entitled to an order of costs against Ms Kora, whose circumstances such as ability to pay are not known to the Authority because she has not taken the opportunity of presenting any submissions about costs. On the papers, the respondent's case appears to have been a reasonably strong one, yet the applicant continued to pursue her claim notwithstanding the information she had about evidence available to the respondent.

[11] I do not regard this as a situation where the Authority should compare what would have happened if Ms Kora had, in the face of the strong evidence against her,

nevertheless decided to attend the investigation meeting and proceed knowing that she was likely to lose her case. It may be in that event an order for costs might have been in the region to \$2,000 to \$3,000, but I see no reason why that should limit the award of costs to be made in circumstances where a party withdraws after taking the other party right to the wire.

[12] Counsel referred me to the decision of the Employment Court in *Sheiling Laboratories Ltd v. Smith* AEC48/95, where the Court awarded costs of \$5,000 to a respondent in circumstances where a personal grievance claim had been withdrawn by the applicant on the day of the hearing. The Court noted that the case had been dropped only after it had been fully prepared to the level that it was ready for hearing and the hearing was about to begin.

[13] That case has limited application because it concerned a claim in the Employment Tribunal claim where the procedure was adversarial. In the Employment Relations Authority, the procedure is investigative and representation, although a right of any party, is not a necessity because it is the Authority's obligation to establish the facts by investigation and make a determination according to the substantial merits of the matter.

[14] The respondent cannot be criticised or disadvantaged because it elected to engage a professional representative, but the point is there was less need if any to spend \$20,000 on the Authority's investigation than there would have been in a proceeding before the Employment Tribunal under an adversarial process.

[15] The respondent seeks an award of at least \$8,000 to contribute to its total costs of \$20,000.

[16] In all the circumstances I consider that an award of \$5,000 is appropriate.

[17] The applicant, Ms Catherine Kora, is ordered to pay to the respondent, Weymouth Intermediate School, the sum of \$5,000 as costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

A Dumbleton

Member of the Employment Relations Authority