

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 148
5306853

BETWEEN KYLIE KENNEDY
Applicant

AND PORSE-IN-HOME
CHILDCARE (NZ) LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Phil Butler, Advocate for the Applicant
Libby Inger, Counsel for the Respondent

Submissions Received: 3 July 2012 from the Applicant
17 July 2012 from the Respondent

Determination: 20 July 2012

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 31 May 2012 I concluded that Ms Kennedy had a personal grievance in that she had been unjustifiably disadvantaged and unjustifiably dismissed by Porse-In-Home Childcare (NZ) Limited (Porse). She received remedies totalling \$27,287.67.

[2] Costs were reserved and Ms Kennedy, as the successful party, now seeks a contribution toward those she incurred. Her costs total \$29,055.84 (including disbursements and GST). Toward that she seeks a contribution of \$22,070.

[3] It is well accepted costs follow the event unless there is a compelling argument to the contrary. Normally the Authority will use a daily tariff approach when assessing the amount (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[4] The investigation meeting took the better part of two days, so applying the above approach an award in the order of \$7,000 would appear appropriate.

[5] As already said Ms Kennedy seeks a larger contribution. In support she mentions the principles in *PBO Ltd v Da Cruz*, before referring to *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) where the Court urged a more steely approach to the reimbursement of costs incurred as a result of one party having rejected a reasonable settlement offer and *Chen v New Zealand Sugar Co Ltd* [2010] NZEmpC 81 where that principle was applied to the extent of an award of full indemnity costs.

[6] The legal submission is followed with:

- a. reference to the outcome;
- b. submission that Porse unreasonably added to costs by pursuing arguments which had little chance (this is a reference to paragraph 45 of the substantive decision and other factors);
- c. submission that Porse witnesses further added to the cost by displaying an *aversion ... to speak plainly* or, it is implied, honestly when answering questions. Here reference is made to various issues with an emphasis on what is portrayed as a 'smoking gun' e-mail (dated 27 April 2010) which was not initially supplied by Porse and which, when produced by Ms Kennedy, forced a rapid change to the way questions were being answered; and
- d. a description of settlement attempts.

[7] Porse, in its response, opens with reference to the legal principles before turning to the key issue and that is the parties attempts to settle. On 6 October 2010 Porse forwarded a Calderbank offer. It suggested the resignation be withdrawn, that Ms Kennedy have a period of unpaid leave prior to the commencement of parental leave thus retaining her entitlement to the government's parental leave payment and compensation of \$7,500. In addition Porse offered a post parental leave return to a CSA position (being the type of position it had earlier being trying to remove Ms Kennedy from). Ms Kennedy rejected the offer. Her counter sought payments totalling \$19,250 and dismissed the idea of returning to Porse's employ.

[8] Porse denies abusing the process or pursuing unmeritorious claims.

[9] I am not swayed by Mr Butler's first three arguments. The fact Ms Kennedy was successful gives her the ability to seek costs. It does not, in itself, provide a reason for an award exceeding the norm. The argument that Porse pursued argument

that had little chance of success is also weak – what is being referred to was their argument and Porse believed in it as is reflected in the Calderbank letter. Its chance of success were reflected in the outcome. Similarly I am not swayed by the argument about the way questions were answered – answers and the way they were given was a factor influencing the outcome and is therefore reflected in the substantive award. Last I note I have insufficient knowledge of the circumstances surrounding the production of the e-mail of 27 April to take it into account.

[10] The persuasive argument relates to the settlement attempts. Obviously Porse's letter is of little value - it was unsuccessful, the award exceeded the amount offered and I conclude the offer of reinstatement was of little value for reasons enunciated in the substantive decision and which led to a conclusion Ms Kennedy was constructively dismissed. From her perspective, the level of trust necessary for continuation of a viable employment relationship no longer existed.

[11] On the other hand Ms Kennedy's counter offer was exceeded by the award made. It must therefore be considered reasonable. Its rejection by Porse put the parties to costs that could have been avoided.

[12] The law is clear – such a letter provides grounds for an increased award. It should, in accordance with the principles in the *Health Waikato Ltd v Elmsly* decision, be recognised but it does not necessarily entitle a party to full indemnity of costs incurred after the offer's rejection.

[13] Having considered the arguments and the perused the figures provided by both parties, I consider a doubling of the scale to be appropriate. That means an award of \$14,000.

Conclusion

[14] The respondent, Porse-In-Home Childcare (NZ) Limited, is to pay the applicant, Ms Kennedy, the sum of \$14,000 (fourteen thousand dollars) as a contribution toward costs.