

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 37  
5349611

BETWEEN

HELEN MANOHARAN  
Applicant

AND

THE CHIEF EXECUTIVE OF  
WAIARIKI INSTITUTE OF  
TECHNOLOGY  
Respondent

Member of Authority: Alastair Dumbleton

Submissions Received 8 and 22 December 2011, 4 January 2012

Determination: 25 January 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] A costs application has been made after directions were given by the Authority in the last of its three determinations issued in the matter of a claim of unjustifiable dismissal and another action brought by Ms Helen Manoharan against the Chief Executive of Waiariki Institute of Technology.

[2] The determinations were given on 9 August, 3 October and 17 November 2011. In the first the Authority declined Ms Manoharan's application for interim reinstatement made following her dismissal, on 15 June 2011, from the position of Director of the School of Nursing and Health Studies at Waiariki. In the second determination Ms Manoharan and another employee dismissed at the same time, Ms Anne Robinson, were held to have been unjustifiably dismissed by Waiariki's Chief Executive, Dr Pim Borren. Both employees were held to have contributed to the situation that gave rise to their grievances but the extent of their fault was deliberately left undetermined by the Authority, which directed the parties to return to mediation and try to resolve the established grievances and other action.

[3] Ms Robinson's grievance was resolved and consequently she took no further part in the investigation. She was not the subject of the third and final determination which awarded remedies to Ms Manoharan for her personal grievance and for the actions of Dr Borren held by the Authority to amount to contempt and obstruction or delay of the Authority in its investigation.

[4] The high level of 80% contribution the Authority attributed to Ms Manoharan in its final determination resulted in a much reduced remedy of \$3,000 compensation ordered to be paid pursuant to s 123(1)(c)(i) of the Employment Relations Act. In addition she was awarded damages of \$7,500 for the actions of Dr Borren held to amount to contempt or interference in the grievance resolution process under the employment agreement. He was also ordered to pay a penalty of \$6,000 for breach of s 134A of the Act in relation to the finding that he had obstructed or delayed the investigation.

[5] In accordance with its directions the Authority has received from the parties memoranda with regard to the question of costs.

[6] One factor for consideration when costs are to be determined is the meeting time occupied by the investigation. The interim reinstatement application took approximately one half day. Two and a half days were taken up by the investigation meeting for hearing evidence in relation to the substantive claims of both Ms Manoharan and Ms Robinson, including the claim of contempt and obstruction or delay by Dr Borren. A further two half days were required for the hearing of submissions made on behalf of both applicants, giving a total of about four days meeting time.

[7] Counsel Ms Stewart for Ms Manoharan in submissions made in support of the costs application advises that total costs incurred by her client were \$45,944 and total disbursements were \$1,270. Application is made for an award of full costs plus disbursements or, in the alternative, an award of 'increased' costs of \$38,500 and disbursements.

[8] Counsel Mr Harrison for Dr Borren submits that costs should lie where they fall or, in the alternative, an award of \$4,000 made to Ms Manoharan. This latter amount is calculated by using a daily tariff of \$2,000 and applying it to time taken in

relation to the reinstatement claim, the contempt/obstruction claim and Ms Manoharan's claim separately from that of Ms Robinson.

[9] The relevant principles in relation to costs awards for Authority investigations have been set out by the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. The Authority has a discretion as to whether costs should be awarded and, if so, in what amount but usually the successful party will be entitled to a reasonable contribution to its actual costs from the unsuccessful party.

[10] In determining costs each case should be considered in the light of its own circumstances. From time to time the Authority has found that the circumstances justify an award of costs increased above the daily tariff, which currently is about \$3,000. The Authority's discretion to award costs is one appropriate for the exercise of its jurisdiction and equity in good conscience. It is a further principle that costs awards are not to be used as a punishment or as an expression of disapproval of a party's conduct in relation to a case, but conduct which has increased costs unnecessarily can be taken into account by increasing or reducing an award.

[11] Applying these principles to this case, to begin with I consider that in her grievance claim overall Ms Manoharan was largely unsuccessful. While the dismissal was declared to be unjustifiable because of a failure by the employer to act fairly and reasonably in one significant respect, in the practical result of the case Ms Manoharan recovered compensation only and only in a relatively small amount because of her substantial contributory fault.

[12] The contempt matter was one requiring immediate action to be taken to limit harm caused by Dr Borren's instruction given to staff not to assist Mr Manoharan in her claim. The work and time urgently put in by Ms Stewart was reasonably necessary if the problem was to be contained quickly. Although not without some delay the problem was addressed by Dr Borren and in my view irreparable harm was not done to Ms Manoharan. For that reason I do not consider this aspect of the case requires an award of full costs, or solicitor client costs, but it should attract increased costs. I will adopt Mr Harrison's approach of allocating one hearing day to this particular issue, although that is probably generous. Total costs billed to Ms Manoharan for the contempt/obstruction of authority matter were \$7,239. I consider that \$4,500 is a reasonable contribution to those costs, at an increased tariff level.

[13] I agree with Mr Harrison that lack of success with the reinstatement application, including interim reinstatement, should be reflected in an award of costs on the debit side of Ms Manoharan's ledger. On the credit side is the limited success in obtaining a declaration that she had been unjustifiably dismissed and in being awarded compensation, although in a greatly reduced amount.

[14] Taking that into account it is appropriate to award costs for two days rather than three and to do so at a mid-range tariff of \$2,750 per day. That gives \$5,500, making a total of \$10,000 costs. Full disbursements of \$1,270 are also awarded.

[15] The Chief Executive of Waiariki Institute of Technology is ordered to pay those amounts to Ms Helen Manoharan pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

A Dumbleton  
**Member of the Employment Relations Authority**