

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Lavinia Daini Matich (Applicant)

**AND** Christian Healthcare Trust (Respondent)

**MEMBER OF AUTHORITY** Alastair Dumbleton

**COSTS SUBMISSIONS  
RECEIVED** 8 and 30 March 2006

**DATE OF DETERMINATION** 12 May 2006

**DETERMINATION OF THE AUTHORITY AS TO COSTS**

[1] Following a three day investigation meeting (held on site for one day) the Authority issued a determination resolving Mrs Matich's employment relationship problem, being a claim that she had been unjustifiably dismissed by the Christian Healthcare Trust (CHT).

[2] To resolve the problem the Authority determined (on 8 February 2006 under AA24/06) that Mrs Matich had been unjustifiably dismissed, and it ordered that she was to be immediately reinstated by CHT to her job as a caregiver, reimbursed for lost wages and compensated for humiliation, loss of dignity and injury to feelings. The monetary remedies were subject to reduction by 50% in the case of lost wages and a little higher in the case of the compensation.

[3] CHT complied with those orders and although the Authority had left it open to the Trust to decide which of its two hospitals – St John's or St Margaret's – Mrs Matich would return to, it has allowed her to resume at the latter hospital, the place where she had worked for some 20 years before being dismissed in September 2005.

[4] Costs were reserved by the Authority which now must resolve that question since the parties have been unable to themselves.

[5] The principles relating to costs awards have been addressed in submissions received from counsel Ms Joslin for Mrs Matich and Mr Patterson for CHT. Those principles ought to be well known to the Authority and they have also recently been discussed by the Employment Court in *PBO Ltd v Da Cruz* unreported, AC 2A/05, 9 December 2005.

[6] A fundamental principle is that costs generally follow the event. In this case there is a divergence of view between counsel as to which party was successful in the event, and how great

that success was. Ms Joslin submits that the Authority gave its determination conclusively in favour of Mrs Matich. She seeks an award of \$4,500 costs plus disbursements of \$1,201.71. Mr Patterson submits that in the overall result neither party had appreciably more success than the other and to reflect that outcome costs should lie where they fall.

[7] As Ms Joslin and Mr Seagar represented Mrs Matich on a *pro bono* basis, no legal costs have actually been billed by them to her. The sum of \$4,500 sought has been calculated as a reasonable contribution to notional reasonable costs. For a three day investigation meeting an award of that amount is well within the range of what may be considered reasonable. There is authority from decisions of the Employment Court that the existence of *pro bono* arrangements does not preclude the recovery by a successful party of a contribution for the time and expense of their non-charging lawyer. The core question is whether Mrs Matich was to any extent a successful party in this case.

[8] For Mrs Matich, the ultimate outcome of the investigation was that she succeeded in getting most of what she had sought. She got her job back and she was reimbursed some of her lost wages and given some compensation for her unjustified dismissal. For CHT on the other hand findings were given by the Authority that;

In relation to Mrs Matich's conduct on 24 August 2005:

CHT had reasonable grounds for believing that Mrs Matich had failed to perform her duty and that the failure was a serious one warranting some disciplinary action, perhaps even dismissal. (See paragraph [33] of the Determination.)

In relation to Mrs Matich's conduct on 31 August 2005:

There had been a serious breach of duty through misconduct, and it was to a degree that would have justified dismissal. (See paragraph [53] of the Determination.)

[9] Mrs Matich was found to have been unjustifiably dismissed because of disparity of treatment with another employee who had conducted herself in the same way as Mrs Matich on 24 August yet had had no disciplinary action taken against her, and also because the 31 August conduct was not relied on by itself, as it could have been, as grounds for dismissal. CHT had found grounds for dismissal present only in the cumulative conduct of Mrs Matich on the two separate dates, rather than in her conduct on either occasion.

[10] Had CHT acted differently in responding to the conduct of Mrs Matich, the outcome of this case could quite easily have been a finding by the Authority of justified dismissal. Although CHT was ordered to reinstate Mrs Matich, the employer was held to have grounds for issuing her with a disciplinary warning if it wished, on her return to work. In the outcome of this case, more is owed by Mrs Matich to luck rather than success based on a finding of innocence of any misconduct.

[11] It is relevant that the "success" that has been achieved, as Mrs Matich might see it, could have been hers had she accepted the settlement proposals CHT made before the Authority's investigation commenced. She was offered reinstatement and reimbursement of lost wages. She declined that proposal because she would also have had to accept a warning and because she wanted the Authority in its determination to formally and publically exonerate her of all blame in respect of her conduct. She has not achieved success in that regard, as I found her conduct was blameworthy and reduced the monetary remedies accordingly.

[12] Mrs Matich, who had the benefit of legal representation, made the call to press on with the investigation when she could have achieved much the same result by accepting CHT's proposal,

without her lawyers incurring the costs she now claims to recover.

[13] On my analysis of the outcome of this case and taking into account the rejected opportunity of settling the claim and achieving an outcome comparable to that subsequently determined by the Authority, I find that to truly follow the event costs should lie where they fall.

[14] As a consequence, the substantial work put in by Ms Joslin and Mr Seagar will go financially unrewarded, as they would have known was a possibility when taking on this case *pro bono*, but in donating their services and for the standard of representation they gave, counsel are to be commended for commitment to their profession and dedication to a client's cause.

A Dumbleton  
**Member of Employment Relations Authority**