

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Elizabeth McGregor (applicant)

AND Mobil Oil New Zealand Ltd (respondent)

REPRESENTATIVES Russell Buchanan for Ms McGregor
Jenny Gibbs for Mobil

MEMBER OF AUTHORITY Denis Asher

SUBMISSIONS RECEIVED by 22 May 2007

DATE OF DETERMINATION 24 May 2007

COSTS DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In my determination WA 69/07, 2 May 2007, I found in favour Ms McGregor was unjustifiably disadvantaged by Mobil and thereby unjustifiably dismissed. Ms McGregor now seeks costs.

Ms McGregor's Position

2. In her submissions received on 7 May counsel for the applicant, Mr Russell Buchanan, seeks costs on various grounds including the respondent's greater resources ("*David v Goliath*"). Ms McGregor also relies on an open offer from Mobil made just prior to the investigation (and repeated on a without prejudice except as to costs basis in an email dated 3 April 2007) that it would not seek costs and provide an agreed statement expressing its regret for the distress

experienced by the applicant, If she withdrew her claim. The applicant therefore had no option but to pursue her application.

3. Ms McGregor's conduct has been entirely reasonable throughout and she has not incurred costs unnecessarily. Unless Mobil is ordered to make a significant contribution to the applicant's costs then, despite the Authority's findings against the respondent, Ms McGregor will be left out of pocket. In other words, Goliath will succeed because it can use its greater resources to bully the injured party.
4. It is submitted Mobil has not acted in good faith and that it has abused its dominant financial position to try to force the applicant to withdraw. The manner in which the respondent conducted its costs added unnecessary time and cost to the proceedings. It did not approach various settlement negotiations in good faith.
5. A key provision of the Act is to acknowledge and address the inherent inequality of power in employment relationships (s. 3 (a) (ii)). The only way the Authority can advance this provision in the present situation is by ordering costs to pay Ms McGregor's out of pocket costs.
6. Ms McGregor also relies on Mobil's "*guiding principles*" including a commitment to choose "*the course of highest integrity*" (not referenced; par 13 of the applicant's costs submissions).
7. Ms McGregor's out of pocket costs total \$16,612.65 inclusive of costs. Reimbursement of remuneration and compensation for humiliation totals a little over \$15,000.00. The Authority has a wide discretion in respect of costs. They should be applied in this instance to ensure the applicant receives the benefit of the sums awarded by way of compensation.
8. In response to Mobil's costs submissions, the applicant points out that she was originally advised by the respondent that there would be no deals and it was likely they would see one another in court. The position was repeated at a later date. The applicant does not accept the respondent's characterisation of her approach to, or conduct in, mediation and points out that her statement of problem was filed a little over 2 months subsequent to mediation. Details of a without prejudice offer are also set out in the applicant's closing submissions but I record here the fact that I am ignoring those details because I do not accept Mr Buchanan's claim that confidentiality has been waived: I note also that the respondent's costs position is not reliant on any Calderbank offer.

9. Costs are not a punishment imposed on a losing party but are compensatory at the level they are fixed: *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438 (CA), par 32.

The Company's Position

10. In submissions received on 16 May counsel for Mobil, Ms Jenny Gibbs, and amongst other argument, points out that – contrary to well-established legal principles applicable to the Authority (e.g. *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808) – the applicant is claiming full solicitor/client costs, apparently on the ground of the respondent's size and resources.
11. The investigation (leaving aside efforts between the parties to settle the matter on the day on their own terms) ran to a half-day, therefore an award of \$1,000-3000 is appropriate.
12. The claim Mobil's conduct increased Ms McGregor's costs is not accepted. The opposite is true. For example, following the issuing of the Authority's determination, there was no attempt by the applicant to negotiate costs in the usual way. Ms Gibbs received neither a letter, email nor a phone call seeking to discuss, negotiate and agree costs. Instead, a formal application was filed and served, forcing Mobil to respond with its own submissions.
13. Ms McGregor adopted a similar approach in relation to the substantive matter by filing and serving a statement of problem before mediation had been undertaken. Mobil's willingness to attend mediation was consistent with the spirit and intent of the Act and should not be punished. Settlement negotiations by the applicant on the day of the investigation were similarly lacking in good faith: a settlement offer was advanced on behalf of Ms McGregor which, when worked out, was more than the sum first claimed by her.
14. This is not a landmark case warranting special treatment in relation to costs. Nor was it complex or lengthy. The applicant's evidence amounted only to 8 pages and she produced only the one witness in addition to herself. The applicant complicated proceedings by significantly increasing, on the morning of proceedings, the remedies sought. Ms McGregor could not have been in any doubt that, if successful, she was not guaranteed sums so as to leave her with a clear surplus. The parties were reminded by the Authority of the risks involved in insisting it determine the case, the likely costs award to a successful party and that the applicant would not recover all costs.
15. Ms McGregor is seeking full solicitor/client costs. Costs for mediation cannot be recovered. At the investigation counsel for the applicant advised costs were then \$7,699 + GST.

Additionally, it was stated mediation costs for the applicant totalled \$2,370 + GST: it now appears costs for mediation are being sought.

16. In determining costs the Authority should take into account the fact that the applicant was by no means entirely successful with her claim.

Discussion

17. As is clear in my substantive decision, Ms McGregor approached the consequences of the termination of her employment because of redundancy with an absence of reality. Lost wages were sought for a period after her termination which could never be granted because, not only was she medically unfit for much of that period, but the applicant accepted from the outset the genuineness of her termination: the only issue was its timing. There was also no evidence to support the claim that Ms McGregor's poor health at the time of her termination was entirely related to Mobil's treatment of her.
18. I also observed that there was no reason to conclude Mobil set out to deliberately mislead or deceive the applicant and that Ms McGregor had failed to recognise the positive discretion applied by her former employer by way of lengthy periods of paid sick leave (equivalent to 21% of her working time with the respondent).
19. During the investigation I reminded the parties of the following:

... representatives of parties (are urged) to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in light of the amount that is likely to be recovered as remedies and costs from the Authority.

(Da Cruz, above, par 47)

20. These observations are relevant because I am satisfied they reinforce my finding that this employment relationship problem was no different from many others and therefore warrants similar costs awards.
21. I do not accept that exceptional grounds exist such as to warrant complete solicitor/client costs. This was a problem that could have, and should have been, by the application of experience and judgement, settled at mediation.

Decision

22. Consistent with relevant case law (*Da Cruz*, above), I am satisfied that Ms McGregor is entitled to recover from Mobil the fair and reasonable contribution to her costs of \$3,000 (three thousand dollars).

Denis Asher

Member of Employment Relations Authority