

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 242A/07
5076635

BETWEEN YUET MOI (ANN) NG
 Applicant

AND WHITIREIA COMMUNITY
 POLYTECHNIC
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Jaesen Sumner for Respondent

Determination: 29 October 2007

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination AA242/07 (10 August 2007) the Authority dismissed the Applicant's claims that she was unjustifiably dismissed through expiry of her fixed employment agreement and unjustifiably disadvantaged by being misled about the prospects of future work as a teacher for the Respondent.

[2] The parties were encouraged to resolve any issue of costs between them but if they could not do so, a timetable for lodging submissions was set.

[3] The Respondent subsequently lodged an application for costs in compliance with that timetable. The Applicant replied through different counsel from her counsel at the investigation. The Respondent provided a further submission. The Applicant has since advised that she is no longer represented as she could not afford the legal fees but was given an opportunity to make any further submissions she wished to and advised she had nothing to add.

Submissions

[4] The Respondent's submissions advised that, by letter of 18 June 2007, it had put the Applicant on notice prior to the investigation meeting that if she were unsuccessful it would seek costs and expected an award of costs would be between \$1500 and \$2500 together with disbursements ("the 18 June letter"). It says the Applicant had the benefit of counsel at mediation and at the investigation and must have been advised of the prospects of a costs award. The respondent says it incurred legal fees of \$10,000 defending the Applicant's claim and seeks a contribution of \$2500 towards its costs.

[5] Through her latest counsel, now no longer acting, the Applicant submitted that any costs awarded against her should be no more than \$250 and include provision for her to pay by instalments of no more than \$50 a month. The Applicant provided information that her annual income to 31 March 2007 totalled \$26,498 and was said to now have only uncertain, casual work with another tertiary institution. She also suggested that the Respondent's conduct was not blameless because of a reference in the determination that her manager "could have done more and done it earlier". She also noted that the investigation meeting did not require the whole day.

[6] I have considered the Respondent's response to the Applicant's submissions but no new points arise from them that need be added here.

Determination

[7] An award of a reasonable contribution to the costs incurred by the successful party in an Authority investigation is a matter of discretion, exercised on a principled basis, and usually results in a modest award within a 'tariff' adjusted for any factors necessary and particular to the case: *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

[8] Having considered the parties' submissions, an award within the usual range for a one-day investigation meeting is appropriate. In this case I set the contribution for costs to be paid by the Applicant to the Respondent at \$1500 for the following reasons.

[9] Firstly, the investigation meeting was more than half a day but not the full day. In that time evidence was heard from five witnesses, along with additional questions and closing submissions from counsel. Costs for a meeting of that length and relative efficiency are usually set at the lower end of the tariff range.

[10] Secondly, costs awarded are not to be reduced because of a critical comment in the determination about the timeliness of the manager's actions. That observation was expressly stated to be "in hindsight" and had already been weighed in the evidence, with the result that the Applicant did not succeed.

[11] Thirdly, the Applicant should have been aware of the prospect of an award of costs – through her own counsel and the Respondent's 18 June letter prior to the investigation. The Applicant has relatively limited means but it was a risk she ran.

[12] Fourthly, as stated in its 18 June letter, the Respondent was aware that the likely range of awards for costs was "in the vicinity of \$1500 to \$2500". It incurred its own legal costs in that light.

Payment of costs by instalments

[13] The Respondent's submissions did not oppose the Applicant's request that any order of costs against her make provision for payment by instalment although the Respondent did express unspecified "reservations" about the Applicant's alleged financial position and question why she had not applied for legal aid.

[14] On the information available to me, I accept that the Applicant is or is likely to be of relatively limited means and it is reasonable to make provision for payment by instalment of the award of costs. However I do not accept the amount should be as little as \$50 a month. Rather, if the Applicant wishes to pay by instalment rather than one lump sum immediately, she is to pay \$150 a month for ten months. The first payment is to be made by no later than the first Monday in December 2007 and subsequent payments on the first Monday of each of the following nine months. If any payment is not made on the due date, the full amount of the remainder of the costs awarded by then unpaid falls due and is to be paid in full to the Respondent within 28 days of the default.

[15] In summary, the order of the Authority is that:

- (i) the Applicant is to pay to the Respondent \$1500 as a reasonable contribution to its costs in this matter, and,
- (ii) if the Applicant wishes to pay that amount by instalments, she is to do so by making ten monthly payments of \$150 starting no later than 3 December 2007.

Robin Arthur
Member of the Employment Relations Authority