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Penney v Fonterra Cooperative Group Limited CA131A/10 (Christchurch) [2010] NZERA 703 (11 August 2010)

Last Updated: 10 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 131A/10 5155776

BETWEEN NICOLA PENNEY

Applicant

A N D FONTERRA COOPERATIVE

GROUP LIMITED Respondent

Member of Authority: Representatives:

Submissions Received:

James Crichton Applicant in person
Katherine Burson, Counsel for Respondent 20 July 2010 from Respondent
27 July 2010 from Applicant

Determination:

11 August 2010

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 23 June 2010, the Authority dealt with Ms Penney's application to re-open an earlier investigation by the Authority. Ms Penney's application to re-open was unsuccessful and although costs were reserved, the Authority did record its suggestion that if the matter were to conclude at that juncture, the parties might agree to costs lying where they fell.

[2] In the result, Ms Penney has challenged the Authority's decision not to reopen and as a consequence, Fonterra has made an application for costs, as they are entitled to do as the successful party.

The claim for costs

[3] Fonterra seek \$2,000 as a contribution to their legal costs actually incurred, plus disbursements of \$532.66. The disbursements essentially relate to travel and accommodation costs. Counsel for Fonterra advise that the total costs incurred by Fonterra in the matter were \$8,438.04.

[4] As well as demonstrating to the Authority's satisfaction that those costs were indeed incurred by Fonterra the costs submission from the respondent also helpfully attaches correspondence between counsel for the respondent and Ms Penney. That correspondence from Fonterra proposed that in return for Ms Penney agreeing to conclude matters as this point, Fonterra would pay her the settlement proceeds agreed between the parties last year pursuant to the partially completed settlement agreement and Fonterra would not seek costs in respect to their successful defence of the application to re-open

the Authority's investigation. Ms Penney rejected that proposal.

[5] It follows that Ms Penney is now at risk of a costs award being made against her. However, her own submissions on a costs award make clear that she is *a ward of the state*. She attaches a letter from Work and Income New Zealand dated 26 July 2010 which indicates that she qualified for an unemployment benefit from 15 December 2009. It follows from the foregoing that Ms Penney is impecunious and it is appropriate for the Authority to take that into account in fixing costs.

[6] Ms Penney makes a number of other observations in her costs submissions which are not relevant to the costs setting, including the suggestion that as she has challenged the Authority's decision, the matter should be left with the Court to *sort out this problem*. The Authority's invariable practice when there is a challenge is to deal with costs in the Authority before the matter is heard by the Court and there is no reason to depart from that principle now.

Determination

[7] Fonterra's submission on costs presents a cogent argument for a modest contribution to their properly incurred costs. It also amply illustrates the extent that Fonterra have gone to, endeavouring to resolve matters with Ms Penney by agreement.

[8] Despite my conviction that the costs incurred by Fonterra are realistic in all the circumstances and the acknowledgement that the contribution sought from Ms Penney is fair and just in most circumstances, I am duty bound to consider Ms Penney's ability to pay. There is no question that she is impecunious and her continuing determination to fight this issue will only add to the costs burden.

[9] However, the short point is that I am not satisfied that Ms Penney has any ability to meet the costs award that Fonterra quite properly seek. I have given consideration to whether a token award should be made to simply emphasise the point that litigation is not a free service and that there are costs in coming second, but in all the circumstances, have concluded that in the particular case, costs should lie where

they fall.

James Crichton

Member of the Employment Relations Authority

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