

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Beverly May Phillips (Applicant)
AND Bay of Plenty Polytechnic (Respondent)
REPRESENTATIVES Bill Nabney, for the applicant
Mark Beech, for the respondent
MEMBER OF AUTHORITY James Wilson
DATE OF DETERMINATION 16 August 2005

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] In a determination issued on 17 January 2005 (Determination AA 7/05) the Authority found that Ms Phillips had not been constructively dismissed by her employer, the Bay of the Plenty Polytechnic. However the Authority also found that the manner in which the Polytechnic managed Ms Phillip's request for *disregarded sick leave* created a situation that affected her employment to her disadvantage. The Authority awarded Ms Phillips the sum of \$4000 as compensation for the humiliation, loss of dignity and injury to feelings that she had suffered. The question of costs was reserved.

[2] In late February 2005 the parties advised the Authority that they had been unable to settle the question of costs. The Authority then advised the parties, in a letter dated 3 March 2005 that:

The applicant is to file and serve their submissions on costs no later than 4 p.m. on Friday 18 March 2005.

The respondent is to file and serve their submissions on costs no later than 12 noon on Monday 4 April 2005.

[3] On 1 April 2005, Mr Beech, on behalf of BoP Polytechnic, wrote to the Authority noting that Ms Phillips had not filed costs submissions *no later than Friday 18 March*. Mr Beech sort direction as whether to proceed on the basis that Ms Philips was now debarred from being heard on costs and advising that he would proceed to file submissions in respect to costs on behalf of the Polytechnic. On 2 April 2005 Mr Nabney responded, apologising for his oversight in not having filed a submission on behalf of Ms Phillips and advising that he intended to do so forthwith. He suggested that to now debar Ms Phillips from being heard on the issue of costs was unwarranted as there was no disadvantage to the Polytechnic that would warrant such a response. I agree with Mr Nabney.

[4] On 4 April 2005, Mr Nabney filed a memorandum on behalf of Ms Phillips seeking costs in the order of \$8,000. On 10 June 2005 Mr Beech filed a memorandum arguing (in direct contrast to Mr Nabney's submission) that costs should be awarded to his client in the order of \$4000. Mr Beech also requested that the Authority assess the costs that Ms Phillips would have paid if she had not been legally aided at \$35,000, and issue a certificate to that effect. On 13 June, Mr Nabney sort leave to file a submission in response but has since indicated that he is happy to rely on his earlier submissions.

The investigation process

[5] Ms Phillip's employment relationship problem was investigated by Authority Member Ken Raureti who is no longer a Member of the Authority. The following brief outline of the investigation process is therefore taken from the Authority's file and the submissions of the respective parties.

- [6] In her statement of problem, filed on 26 March 2004, Ms Phillips raised a number of issues:
- That her employer was in breach of its obligations in terms the State Sector Act 1988 to be a good employer.
 - That the Polytechnic had provided an unsafe workplace.
 - That she had been unjustifiably dismissed and
 - That the Polytechnic was in breach of her individual employment agreement and that she had been disadvantaged by her employer in the way in which it had managed her request for *disregarded sick leave*.

Ms Phillips sought reimbursement for lost income, compensation for humiliation etc of \$35,000, a penalty for breach of her employment agreement and costs.

[7] Prior to the commencement of the Authority's investigation Mr Beech (on behalf of the Polytechnic) had written to Mr Nabney (as Ms Phillips representative) making a settlement offer:

The terms of the offer are as follows:

1. \$3800 in compensation or toward your legal costs;
2. A written reference (which we understand from Mr Diver would be a favorable one);
3. A written apology.....

.....if you refuse to accept this offer of settlement and do not succeed or receive an award of less than that now offered in settlement, we will draw this offer to the attention of the Authority and seek costs on a solicitor client basis.

This *Calderbank* letter was endorsed *without prejudice accept as to costs*. The offer was not accepted by Ms Phillips and her employment relationship problem proceeded to formal investigation by the Authority.

[8] The Authority held an investigation meeting lasting 4 days (1, 2 and 3 September and 18 October 2004). In his Determination regarding Ms Phillips problem the Authority Member said:

[6] The investigation of this matter was conducted over four full meeting days. The written evidence and supporting documents submitted to the Authority exceeded one thousand three hundred pages, the respondent's bundle of documents totalled 197, and a further 7 documents were discovered during the investigation. In total, I received evidence from 19 witnesses and made further enquiries of 14 of those people at my meeting and allowed the parties

representatives an opportunity to further question and explore issues with each of those 14 witnesses.

And found:

[45] While it is my view that the Polytechnic must take some responsibility for its actions and inactions, there is in my view no compelling evidence demonstrating repudiatory conduct on the part of the employer to any degree serious enough to amount to a constructive dismissal.

[46] It is my determination that Ms Phillips was not constructively dismissed but the actions and inactions of the Polytechnic, and the manner in which it managed Ms Phillips' request for disregarded sick leave created a situation that affected her employment to her disadvantage

[47] Ms Phillips' employment was affected to her disadvantage by an unjustifiable action of her employer, she has a personal grievance under section 103(1)(b) of the Employment Relations Act 2000 and is therefore entitled to remedies.

As outlined above the Authority awarded Ms Phillips a total of \$4000 for hurt and humiliation in terms of section 123(c)(i) of the Employment Relations Act.

The submissions

[9] In his submissions on behalf of Ms Phillips, Mr Nabney says that while Ms Phillips was unsuccessful in a claim of constructive dismissal she was successful in a claim of unjustified disadvantage and received an award of \$4000. He argues that, being partly successful in her claim, Ms Phillips is entitled to a contribution to her costs. Mr Nabney points out that Ms Phillips is legally aided and that her liability for costs is governed by section 40 of the Legal Services Act 2000. He argues that, even if the Authority finds that she is liable to costs there are no exceptional circumstances (as required by the Legal Services Act) that would require her to make any payment exceeding the amount of her contribution in terms of that Act.

[10] Mr Nabney sets out the usual range of issues to be taken into account when an award of costs is being considered. He argues that, while the investigation meeting was lengthy, the evidence tendered on behalf of Ms Phillips was relevant. He suggests that most of the documents that were presented to the Authority were contained within a folder of documents presented by the Polytechnic and this added unnecessary complexity to the investigation process. He points out that while there were settlement discussions, and a *Calderbank* offer was made, this was for less than the amount subsequently awarded by the Authority. He says that amount of the grant from the Legal Services Agency was \$11,598 and Ms Phillips will be required to repay any proceeds of her application. He submits that as Ms Phillips was partially successful in her claim she is entitled to a contribution towards her legal costs and suggests a sum of \$8,000 is appropriate.

[11] The general thrust of Mr Beech's submission is that the Authority should find that:

- exceptional circumstances exist in this case (in terms of s.40(2) of the Legal Services Act 2000) and that Ms Phillips should be ordered to pay the Polytechnic the sum of not less than the sum awarded (\$4000); and
- the Authority should issue a certificate as to the costs that would have been ordered but for Ms Phillips being in receipt of legal aid and suggests that reasonable costs should be assessed at \$35,000.

[12] The exceptional circumstances, according to Mr Beech, include:

- the attempts by the Polytechnic to reach a settlement (he cites the Calderbank offer as evidence of these attempts).
- that Ms Phillips only succeeded in one of four claims,
- that the evidence brought by Ms Phillips in support of her unsuccessful allegations had neither substance nor merit
- that Ms Phillips may not have prosecuted her claim to such lengths if she had not be in receipt of legal aid; and
- Ms Phillips has the means to contribute something to the Polytechnic's costs.

Mr Beech itemised the Polytechnics legal costs as being just under \$63,000.

Discussion and determination

[13] Firstly, I do not accept that there are exceptional circumstances in this case which would suggest that costs should be awarded against Ms Phillips as a legally aided applicant. While it is true that Ms Phillips was not successful in all of her claims it is not unusual for applicants to put forward a range of employment relationship problems but, following investigation by the Authority, be successful in only some of those claims. Ms Phillips was entitled to test her claims by bringing a case to the Authority. In one of those claims she was successful and this should be recognised in any award of costs. It is also true that the Polytechnic put forward a Calderbank offer and it is regrettable that the parties were unable to reach a settlement. As it turned out the Calderbank offer was less than the amount awarded by the Authority.

[14] Both parties must accept some responsibility for the length of the investigation meeting. A perusal of the file and from the details as set out in the Authority's determination, it is apparent that both parties contributed to the complexities of the investigation – Ms Phillips by the breadth of her claims and the Polytechnic by the volume and magnitude of its response. The awarding of costs is discretionary and in applying that discretion it is not appropriate to make an award which would be inequitable. In this case it would be inequitable to require Ms Phillips, having been at least partially successful in her claims, to contribute to the Polytechnic's legal costs. On the other hand the Polytechnic has already been put to great expense in defending those claims and it would be no more equitable to require them to make any further payment. **Under all the circumstances the equitable solution is that costs lie where they fall. There will be no order for costs.**

James Wilson
Member of Employment Relations Authority