

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 256  
3012255

BETWEEN                      DEIDRE SLABBERT  
   Applicant  
  
AND                                IDEA SERVICES LIMITED  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Allan Halse, advocate for the Applicant  
   Paul McBride, counsel for the Respondent  
  
Submissions:                8 February 2020 for the Respondent, none for the  
   Applicant  
  
Determination:              26 June 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. Deirdre Slabbert must pay \$1,500 to Idea Services Limited as a contribution to its costs of representation relating to a jurisdictional issue in this matter.**

[1] On 4 February 2019 the Authority issued a determination on a preliminary jurisdictional issue concerning the scope of personal grievance claims Ms Slabbert could pursue against her former employer, Idea Services Limited (ISL).<sup>1</sup> The determination reserved costs pending the outcome of Ms Slabbert's grievance application.

[2] Ms Slabbert worked for ISL from December 2008 to September 2014. In November 2014, through her advocate, Ms Slabbert had raised a disadvantage grievance but did not apply to the Authority for an investigation of her grievances until

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<sup>1</sup> *Slabbert v Idea Services Limited* [2019] NZERA 52.

June 2017. ISL's statement in reply said parts of Ms Slabbert's application were outside statutory time limits for two reasons. Firstly, some of her claims were barred by the three year limitation period on Authority proceedings once a grievance has been raised. Secondly, other grievances had not been raised within the required 90-days of when relevant events occurred.

[3] In July 2017 the parties were directed to mediation on those jurisdictional issues. Part of the direction made at that time also required Ms Slabbert, once the mediation was held, to have her advocate promptly advise the Authority if those issues were resolved there and, if not, whether she then wished the Authority to proceed with its investigation.

[4] Those issues was not resolved in that directed mediation held on 6 September 2019. Despite subsequent inquiries by the Authority to Ms Slabbert's advocate, it was not until August 2018 that the Authority was able to elicit a response about going ahead with an investigation of the preliminary jurisdictional question. The representatives then agreed the Authority could determine that question 'on the papers' and they lodged submissions for consideration.

[5] The determination later issued largely agreed with ISL's contentions about the scope of grievances Ms Slabbert could pursue. As a result the aspects of the personal grievance proceedings Ms Slabbert was able to go ahead with concerned four allegedly unjustified actions taken by ISL after 14 August 2014. Those actions comprised what ISL representatives had done about a complaint made by Ms Slabbert, the confidentiality of ISL's investigation into that complaint, some queries that were said to have been made about her immigration status and ISL's response to a request from Ms Slabbert for a work reference from an ISL manager.

[6] The determination, issued on 4 February 2019, also directed the parties to further mediation to be held within the following 40 days. This direction also required Ms Slabbert, following that further mediation, to then promptly advise the Authority whether the matter had been resolved and, if not, whether she wished to proceed with an Authority investigation of her grievance.

[7] The mediation was held on 1 April 2019 but the Authority received no subsequent request, on Ms Slabbert's behalf, for an investigation to go ahead. Some seven or so months later, in November 2019, ISL's counsel wrote to the Authority

asking for the matter to be “disposed of” by the Authority. At that time, the Authority declined to take any steps in the matter given Ms Slabbert, through her advocate or otherwise, had not advised that she wished to proceed with an investigation.

### **An application for costs**

[8] On 18 February 2020 ISL lodged a memorandum seeking an order for costs as reserved in the 4 February 2019 determination on the jurisdictional questions issued just over one year earlier.

[9] An Authority Officer advised Ms Slabbert’s advocate that any memorandum in reply to ISL’s application for costs should be lodged by 16 March 2020. By email her advocate promptly replied that a memorandum would be lodged, criticised ISL’s costs application as being further bullying of Ms Slabbert and said he was considering applying to the Employment Court for leave to file an out of time challenge to the February 2019 determination. Since then no memorandum in reply on costs has been lodged on Ms Slabbert’s behalf and the Authority has not been advised of any applications to the Court in relation to this matter.

[10] Costs have been assessed and awarded in this determination in light of well-established principles on costs orders in the Authority and after considering the submissions made by ISL.<sup>2</sup> This determination has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed for the delay.<sup>3</sup>

### **ISL’s submissions**

[11] ISL sought an order for its full costs, described as “solicitor client costs”. These comprised invoiced costs of \$10,300 along with a further \$793 claimed as expenses for ISL’s counsel to travel to the two directed mediations (6 September 2017 and 1 April 2019). ISL’s memorandum described those costs and expenses as being incurred for the work of ISL’s counsel in taking instructions, lodging a statement in reply, attending the two mediations, attending case management conferences with the Authority member, preparing submissions on the jurisdictional issues and what was described as “seeking to advance matters”.

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<sup>2</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

<sup>3</sup> Employment Relations Act 2000, s 174C(4).

[12] ISL submitted costs could properly be addressed now because the February 2019 determination had dismissed “the vast majority” of Ms Slabbert’s proceedings as being dismissed for lack of jurisdiction and because, through her advocate, Ms Slabbert had not engaged in any steps to have the Authority progress the matter after it was not resolved at the 1 April 2019 mediation. ISL submitted her claim should be seen as abandoned or withdrawn, with ISL consequently entitled to an order for its costs.

### **Applying the relevant principles**

[13] Applying the established principles relevant to exercise of the discretion to order a party to pay such costs and expenses as the Authority thinks reasonable, ISL was entitled an order for costs to “follow the event” of its success on the jurisdictional issue. It was costs in relation to determining that issue that were reserved in the 4 February 2019 determination.

[14] Reasonably incurred costs in that respect cover preparation of its statement in reply back in June 2017, which was expressly headed “Protest to jurisdiction”, counsel attending case management conferences, and preparation of ISL’s written submissions on the jurisdictional issue to be considered ‘on the papers’.

[15] Costs associated with preparation for and attendance at mediation, whether by agreement of the parties or by direction under s 159 of the Act, are not typically included in costs awards made by the Authority (unless some particular or unusual circumstance of the case makes it appropriate to do so).<sup>4</sup> The parenthetical note in that proposition acknowledges that no blanket rule applies to the inherently discretionary exercise of assessing costs, on a principled basis, where much may turn on the facts of an individual case.<sup>5</sup>

[16] The two directions to mediation made in this case were given for reasons and at times where I, as the Authority member dealing with the matter, considered there was some real prospect that mediated discussions between the parties and their representatives on the factual and legal context would contribute constructively to resolving the matter.<sup>6</sup> The circumstances of this case did not warrant increasing the required contribution to costs to include some or all of the legal fees charged by counsel

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<sup>4</sup> Practice Note 2 – Costs in the Employment Relations Authority, 30 June 2016.

<sup>5</sup> *RHB Chartered Accountants Limited v Rawcliffe* [2012] NZEmpC 31 at [34].

<sup>6</sup> Minute of the Authority, 18 July 2017 and *Slabbert*, above n 1, at [54].

to prepare for and attend those mediations or to pay for the expenses of counsel travelling to Hamilton from Wellington for that purpose.

[17] Neither was the attempt to seek to widen the scope of the grievances Ms Slabbert wished to pursue, albeit misconceived, the sort of exceptionally bad behaviour required to cross the threshold that would have allowed for any order imposing ‘full’ or ‘indemnity’ costs on her.<sup>7</sup>

[18] Rather the jurisdictional issue was, eventually, efficiently dealt with ‘on the papers’. ISL was the successful party in that its argument on the permissible scope of Ms Slabbert’s grievance, for the most part, prevailed. Its entitlement to an award of costs followed that event.

[19] As far as is known to the Authority Ms Slabbert did not take any steps after the 1 April 2019 mediation to pursue those parts of her personal grievance application that the 4 February 2019 determination had found she could continue. ISL’s submissions said no correspondence had been received on Ms Slabbert’s behalf since then “despite repeated attempts by counsel to engage” with her advocate.

[20] While there was no formal withdrawal of the proceedings the situation had become at least akin to abandonment of them. Some consideration of a higher amount of costs might be warranted in circumstances where a party has been put to greater effort in preparing for an investigation meeting, such as preparing witness statements and assembling relevant documents, or the proceeding has been abandoned only shortly before or at an investigation meeting.

[21] In Ms Slabbert’s case however ISL has needed only to address its own protest as to her rights to pursue claims more widely cast than permitted by the various statutory perimeters. Nothing more has really been required, apart from the attendances at mediation for which costs have not been allowed. Requiring more from Ms Slabbert by way of costs for an apparent abandonment of her claim because, through her advocate, she appeared not to have engaged in any further steps to pursue it, might appear to be an expression of disapproval of an unsuccessful party’s conduct. That conduct has not been shown to have unnecessarily increased ISL’s reasonably incurred

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<sup>7</sup> *Bradbury v Westpac Banking Corporation* [2009] NZCA 234 at [28].

costs on the jurisdiction issue so, on the well-established principles applied in the Authority, an increase in the amount awarded was not permitted.

[22] What costs can be awarded are reasonably assessed in the particular circumstances of this case by applying one third of the Authority's notional daily tariff to ISL's costs for lodging its statement in reply, counsel attending case management conferences and the preparations of its submissions for the 'on the papers' investigation. The appropriate amount on that assessment is \$1,500.

[23] This is the amount Ms Slabbert must pay to ISL in respect of costs reserved in the Authority's determination of 4 February 2019. Those costs are to be paid within 28 days of the date of this determination.

Robin Arthur  
Member of the Employment Relations Authority