

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Raewyn Smythe (Applicant)
AND Westpac Banking Corporation (Respondent)
REPRESENTATIVES Ashley Sharp, for Applicant
Juliet Dobson, for Respondent
MEMBER OF AUTHORITY Y S Oldfield
SUBMISSIONS 22 March 2006, 31 March 2006
DATE OF DETERMINATION 6 April 2006

DETERMINATION OF THE AUTHORITY AS TO COSTS

Issue for determination

- [1] This matter relates to an employment relationship problem which arose back in September 2003, when Ms Smythe's position with the respondent was disestablished and she was offered redeployment to a new one. She did not accept that it was "substantially similar" to her old (in terms of the redundancy provisions of her employment agreement) and was not prepared to accept the redeployment. She resigned and came to the Authority seeking a determination that the proposed position was not substantially similar and that she was redundant. She also claimed that she had been constructively dismissed and sought the usual remedies for that.
- [2] With the agreement of the parties I proceeded on the basis that I would begin by investigating only the question whether the new position was substantially similar or not. If the outcome of this should be in Ms Smythe's favour, I proposed to send the parties back to mediation.
- [3] I did decide the first question in Ms Smythe's favour, in a determination dated 21 December 2004. As planned, I directed the parties back to mediation. However, the respondent challenged that determination. In due course the Court heard the challenge as well as the remaining issues which had not been investigated by the Authority.
- [4] The Court upheld the conclusions I had reached. Ms Smythe now seeks a determination of the issue of costs in the Authority.

Submissions of parties

- [5] The investigation of this matter began, as usual, with provision of witness statements and documents. In addition to a statement from his client, Mr Sharpe provided me with a

statement from a professional human resources advisor, Ms Woods, who gave her opinion on whether or not the jobs in question were substantially similar. (This was based on what Ms Smythe had told her and on a perusal of relevant documentation including job descriptions.)

- [6] I then proceeded to a one day meeting with the parties. During that meeting the respondent confirmed that it uses the “Hay” evaluation system. At my request it then provided “Hay” system evaluations which had been done for the respective positions and well as information on the respondent’s salary structure and how it related to “Hay” evaluations for occupations across the organisation.
- [7] I formed the view that in order to interpret this information properly I needed evidence from an expert on Hay evaluations systems. The investigation adjourned while the parties located a mutually agreeable and suitably qualified person. I then met with the parties for a further half day to hear from this person. The total time spent in investigation meetings was therefore a day and a half, with closing submissions following in writing.
- [8] Mr Sharpe told me that, well before my investigation meetings, he had requested the respondent to provide him with Hay evaluations and information on salary structures but the respondent had declined. Mr Sharpe says that if this request had been complied with, it would not have been necessary for the applicant to engage Ms Wood to examine the differences in the structures of remuneration between the two positions. He says that the expert witness fees of Ms Wood should be declared to be necessary witness fees and the respondent be directed as part of the cost order to pay those fees in full to the Applicant.
- [9] Mr Sharp submits that I must take into account the time involved for him in researching the technical issue of the evaluations and preparing to examine a witness on this topic. He says timely and full disclosure would also have reduced the applicant’s second day preparation costs to a mere refresher fee. Overall, he says, the Respondent Bank through its actions significantly and unnecessarily increased the Applicant’s preparation costs.
- [10] Mr Sharpe says his client’s costs in the Authority totalled \$9,705.48 (excluding costs of preparing for and attending mediation) plus Ms Woods’s fee of \$4,311.00. He says that a reasonable contribution to this would be \$6,405.00 plus Ms Woods’s costs.
- [11] For the respondent Ms Dobson argues that the nature of the case and, particular, the fact that the applicant’s claim ultimately failed, was such that costs should lie where they fall. Alternatively she says that if the Authority finds that some contribution is warranted, the applicant should only receive a modest award in accordance with the common principles of awards of costs in the Authority.
- [12] Ms Dobson noted that the respondent incurred costs of \$25,000.00 before the Authority, and argued that costs should lie where they fall. Applying the principles of the recent decision of a full bench of the Employment Court, *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* (unreported, Employment Court, Auckland, AC 2A/05, 9 December 2005) she noted:
- i. The applicant’s claim (for \$6,405.00 as a reasonable contribution to her costs, together with Ms Woods’ costs of \$4,311.00) is far in excess of the guidelines set by the Authority in previous cases, typically \$2,000.00-\$2,500.00 per day;
 - ii. Those guidelines have taken into account the uniqueness of the Authority;

- iii. In *Da Cruz* it was also held that given its unique role in controlling its own investigations, the Authority must judge the reasonableness of the parties' costs in the light of whatever procedure has been adopted.

[13] Ms Dobson also points out that the claim amounts to 76% of the applicant's actual costs.

[14] In response to submissions made by Mr Sharpe, Ms Dobson stated that the respondent did not disclose details of the Hay assessments prior to the investigation hearing as it genuinely believed that these assessments were not relevant to determining whether the positions were substantially similar (a view that appears to be supported by the Employment Court decision which does not rely on this evidence at all.)

[15] The respondent denies that its conduct during the proceedings increased the applicant's preparation costs. It notes that it was on its own initiative that the Authority made the decision to hear from an expert on the Hay system and that it is "*very likely that the Authority would have made this decision even if the respondent had provided the Hay assessment documents earlier.*"

[16] The respondent further submits that it should not have to bear the cost of the applicant's witness fees for instructing Ms Woods since the applicant engaged her of her own accord the evidence was not relied on by the Authority.

[17] Finally the respondent argues that it should not have to incur costs in preparing written closing submissions to the Authority since it was ready to present submissions at the second meeting and it was the applicant who was not ready and requested that submissions be taken in writing.

Determination

[18] In submissions Ms Dobson has referred to the Employment Court decision, reminding me that the respondent successfully defended the claims that Ms Smythe was entitled to redundancy compensation and that she had been constructively dismissed. However, this is not a matter to which I can have regard in relation to the question of costs in the Authority.

[19] As Mr Sharpe has pointed out, this application for costs relates to a matter where the sole question for determination was whether the position which the Applicant held and the one she was offered, were substantially similar. Since costs normally follow the event it is relevant that the Court has upheld my determination. It is also relevant that the Court has not disposed of the issue of costs in the Authority, so that it returns to me for determination. Apart from those two points however what happened to the employment relationship problem after it left the Authority is a matter for the Court to consider.

[20] I deal first with the question whether the respondent should be required to contribute towards Ms Woods's fee.

[21] In the context of an investigation process it is not advisable for representatives to commission supposedly independent experts without consultation with the investigating member, although it is of course their job to point out to the Member if they think that such evidence is necessary to the investigation. Matters such as who would be suitable and what qualifications they might require can then be discussed in telephone conference.

- [22] As Counsel for the respondent has pointed out, it was at the applicant's initiative that a statement was commissioned from this witness. Although I did come to the conclusion that I required expert information, the witness was not able to provide what I needed. For these reasons, I have decided that the respondent should not be required to contribute to Ms Woods's fee.
- [23] As for the question of contribution to legal costs I accept the respondent's submission that it did not by its conduct increase the applicant's costs. I consider it likely that the matter would have run into a second day in any event, and do not consider the fact of an adjournment necessarily increased costs significantly.
- [24] Regarding submissions, I consider there to be a cost involved whether they are presented on the day or subsequently and so I will have regard to the overall costs incurred inclusive of whatever was spent on preparing the written submission. I also accept that this matter was a little more complex than some other investigations that might be concluded in a day and a half and so I accept that a little more preparation than usual might be required.
- [25] Taking all these factors into consideration I conclude that the respondent's contribution to Ms Smythe's costs should be a little above the average.
- [26] **The respondent is therefore ordered to pay to the applicant the sum of \$5,000.00 as contribution to her costs.**

Y S Oldfield
Member of Employment Relations Authority