

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 14A/09
5108783

BETWEEN LENA TE AMO
 Applicant

AND REWORKS NZ LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Andrew McKenzie, Counsel for Applicant
 Peter Zwart, Advocate for Respondent

Submissions received: 2 March 2009 from Respondent
 12 March 2009 from Applicant

Determination: 13 August 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] The applicant's claims were dismissed in the Authority's substantive determination and the respondent now seeks costs. Mr Zwart set out the costs incurred by the respondent in defending a claim of constructive dismissal, those costs being \$16,250 for preparation and subsequent submissions and \$2,490 for attendance at the investigation meeting. The total is \$18,740 plus GST.

[2] Mr Zwart submits the Authority needs to consider the matter of costs in accordance with the principles set out in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808, and maintains in all the circumstances of this case a substantial contribution to costs is warranted.

[3] In particular, Mr Zwart submits *the extraordinary amount of work caused by the applicant's production of the secret tape evidence* gave rise to unusually high costs. Further, he submits *had this evidence been disclosed initially it could have been considered in any attempts to resolve and coming prior to mediation, could not have been factored into costs.*

[4] There is some merit in this submission as the transcript of this tape was central to the applicant's claim, yet was not disclosed until after mediation between the parties. It raises an issue of good faith in respect of the applicant's behaviour in a mediation setting.

[5] The Act requires both parties to participate in mediation in good faith. To withhold the existence of a clandestinely recorded tape of this critical meeting which the applicant and her father clearly regarded as a trump card, is nothing if not bad faith.

[6] The behaviour raises the question: is this an *exceptional circumstance* which justifies voiding the protection afforded Ms Te Amo by the Legal Services Act 2000?

[7] Having carefully considered this matter of *exceptional circumstance*, I find, in respect of the applicant's attempt at tactical cleverness in respect of the tape, it was the tape which, in concert with the respondent's evidence, left Ms Te Amo's claim unsustainable. The issue of exceptional circumstance is resolved in the applicant's favour. However, Ms Te Amo needs take no comfort from her behaviour which is at best deceitful and was intended to benefit her at the company's expense.

[8] The Authority is concerned at the expense incurred by the respondent in dealing with the late disclosure of this tape and its contents. Regrettably, given the legally aided status of Ms Te Amo, the Authority is limited to awarding the respondent the sum paid by Ms Te Amo to Legal Services to secure their assistance.

Paul Montgomery
Member of the Employment Relations Authority