

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 6
5289145

BETWEEN NICKI WEST
 Applicant

A N D OUTBACK NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
 Rachel Brazil, Counsel for Respondent

Submissions Received: 29 October 2010 from Respondent
 6 December 2010 from Applicant

Date of Determination: 14 January 2011

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] The applicant (Ms West) withdrew her claim at the end of the first day of a two day investigation meeting.

[2] Costs are sought by the respondent (Outback).

The claim for costs

[3] Outback seeks a costs award of \$7,500. Ms West proposes that there be no costs award at all and that costs lie where they fall.

The legal principles

[4] The legal principles are well known. Typically, costs follow the event, that is to say, the successful party is entitled to look to the unsuccessful party for a contribution to its costs. Typically, the Authority considers costs on a *daily tariff*

approach of around \$3,000 a day which base figure is added to or subtracted from depending on the particular circumstances of the case. Costs in the Authority are traditionally set at modest levels because of the informal nature of the Authority's processes.

[5] The particular circumstances of this claim for costs are unusual because the matter was not concluded in anything other than the most extraordinary way. The factual position is that Ms West did not attend the second day of the investigation hearing and sent her advocate along to explain the position. The applicant's advocate indicated that the applicant had confessed to him the previous night that she had perjured herself and had also solicited false evidence from another witness.

[6] In Ms West's submissions on the costs matter, she first denies that she committed perjury or solicited false evidence from another witness and then claims that the reason she withdrew from the hearing was because the Authority Member presiding was biased against her and there was no prospect of her winning. She says that she was advised to take that stance by her advocate. If her advocate did in fact make that representation to her, then it is completely at variance with what her advocate told the Authority Member, the respondent and the respondent's counsel on the second morning of the hearing. His remarks then were to the effect that he had recommended the applicant withdraw from the proceeding after she had admitted perjuring herself and soliciting false evidence from another witness. There was no suggestion from Ms West's advocate during the hearing or on the morning of the second day that Ms West's case was prejudiced by the Authority's bias or by the process that the Authority Member chose to use to conduct the investigation.

[7] Quite clearly, if Ms West believes that she did not get a fair hearing from the Authority, then she ought to complain to the Chief of the Authority who will investigate the matter. The Chief of the Authority can be contacted through the Support Officer who dealt with Ms West's file.

Discussion

[8] For present purposes, the issue is whether, in the unusual circumstances of this case, Outback is entitled to look to Ms West for a contribution to its fees in defending itself against a personal grievance allegation which was suddenly withdrawn at the end of the first day of the investigation meeting. In principle, it is

argued for Outback that it was put to significant trouble and expense in defending an allegation which it says had no merit but which, in any event, was not the subject of a determination by the Authority because it was simply withdrawn without warning at the end of the first day's hearing.

[9] Clearly, Outback is understandably exercised by the reason given by Ms West's advocate for the matter being withdrawn, namely her perjury and her soliciting false evidence from another witness. That she now denies both allegations is troubling as that was the basis that her advocate gave for her non-appearance on the second day.

[10] Arguably, if the basis for the withdrawal of Ms West is not the reported perjury but simply her conviction that she would be unsuccessful, Outback may have been more inclined to not seek a contribution to its costs. Certainly, it is fair to say that Outback was incensed at the alleged perjury and its submissions on costs suggest that outrage remains.

[11] The particular reason that Outback advances in its costs submissions for being incensed about the alleged perjury, aside from the principle of the matter, was its concern that, if the matter had gone to a determination by the Authority, it was likely that the Authority would have believed the perjured evidence and found for Ms West.

[12] But that puts the matter too strongly. Ms West's judgment of that issue in her costs submissions is, I think, better than that of the employer's. The aspect about which the perjury was alleged was a very small part of Ms West's claim. It is impossible to predict how the Authority would have assessed the competing evidence. Obviously, Authority Members regularly have to assess competing claims made by parties in dispute. What is unusual in this case is the allegation that, far from parties simply having a different recollection of an event or series of events, this was a situation where allegedly a party actually manufactured evidence in order to score the point.

[13] Given Ms West's claim that she did not perjure herself and nor did she solicit false testimony from another witness, I must treat with caution the submissions directed at her *reprehensible conduct* in Outback's claim for costs. If in fact there is missed communication of some sort (and arguably of the gravest kind) between

Ms West and her advocate, then it would be wrong to visit the consequences of that missed communication on her any further.

[14] However, there are a number of other factors in play. Outback had to expend money on preparing for an investigation hearing which, had the claim not been made, would be money that it would not have expended. Second, Outback made a *Calderbank* offer to Ms West which she declined. As she got nothing from the proceedings before the Authority (because of her own withdrawal), on general principles, the *Calderbank* offer can be considered. A *Calderbank* letter of course falls for consideration in a costs setting when an offer to settle is made at a figure greater than the recipient subsequently receives. This is such a case and, as a consequence, I cannot fail but to consider the impact of the *Calderbank* letter on the costs incurred by the respondent.

[15] Finally, I must consider the submissions from Ms West about her own financial circumstances and also about her instructions to her advocate on the question of costs. As to the first, she says that she was and is financially embarrassed and that she is in no position to meet a significant award of costs. She rejects the claims made by Outback about her financial position and indicates that her home in Queenstown which is presently for sale is heavily mortgaged and partly occupied by self-funding family members.

[16] As to the instructions that she gave to her advocate in withdrawing from the case, it is clear that her advocate made genuine efforts to get the respondent to agree to waive the issue of costs. But given the fact that Ms West did not even bother to turn up on the final day, she was in no position to bargain with Outback successfully. It knew she was not there and could not continue with the case so her bargaining position was weak indeed. Had she attended on the second day and been prepared to go ahead, albeit with a preference to withdraw, then her advocate might have been able to negotiate from a position of strength.

Determination

[17] The law is clear that where a party withdraws their claim especially at the last minute or during the course of the proceedings (as happened here) an award of costs may be made against the withdrawing party, provided the Authority is satisfied that

the other party has incurred costs in the proceeding up to the date of the withdrawal:
Sheiling Laboratories Ltd. v Smith AEC 48/95.

[18] In the instant case, the evidence of the costs incurred by Outback is clear enough. Further there is a Calderbank letter to take into account.

[19] Looked at in the round, I think it appropriate for Ms West to contribute the sum of \$5000.00 to Outback as a contribution to their reasonably incurred costs. That figure takes account of Ms West's ability to pay, the confusion about the reason for the matter being withdrawn, and the Calderbank letter.

[20] In the normal course, the Authority might consider the daily tariff approach at around \$3000 a day. Fixing costs at \$5000 for this present matter as I do, reflects one day's hearing together with an allowance for the refused Calderbank offer set off against Ms West's ability to pay and the confusion about the reason for her withdrawing.

James Crichton
Member of the Employment Relations Authority