

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Mr X (First Initiating party)  
AND Auckland District Health Board (Second Initiating party)

**AND** Auckland District Health Board (First Responding party)  
AND Mr X (Second Responding party)

**REPRESENTATIVES** Harry Waalkens QC and Penny Swarbrick, Counsel for Initiating party  
Andrew Caisley, Counsel for Responding party

**MEMBER OF AUTHORITY** Dzintra King

**SUBMISSIONS RECEIVED** 16 August from Applicant  
9 September from Respondent

**DATE OF DETERMINATION** 7 November 2005

**COSTS DETERMINATION OF THE AUTHORITY**

I determined two matters in favour of the applicant who now seeks costs in relation to those matters, one being an interim reinstatement application and the other being a application to remove the personal grievance to the Court, which the Court subsequently removed pursuant to an application for special leave.

The removal application took less than half a day and legal fees were in the vicinity of \$4,000. Ms Swarbrick submitted that costs for that matter should be made at the level of the rate of \$1500 to \$2000 per day of hearing.

With regard to the reinstatement matter, she submitted that the applicant should be awarded a substantial contribution to his costs. Costs were in excess of \$9,000 and that sum does not include fees incurred by senior counsel who was involved in the preparation of affidavit evidence. Total fees were in excess of \$12,000. Those costs were reasonably and necessarily incurred, the \$9,000 fee representing 25 hours of preparation and representation on the day plus the filing fee and disbursements. The hearing lasted a full day.

The matter was one of urgency and was of great importance to the applicant in order to protect his career and reputation. It was therefore necessary to obtain a number of witness statements and to apply for name suppression. It was also reasonable for the applicant to engage experienced and senior counsel to represent him and prepare for the hearing.

Ms Swarbrick accepted that an award of full costs would be unusual but submitted that this was a case where a figure close to that would be appropriate. The applicant was completely successful, as

he was when the matter was appealed to the Employment Court. The applicant seeks an award of around \$8,000.

The respondent wishes to have costs dealt with after the personal grievance is heard by the Court and argued that the applicant was not entitled to costs for the removal application given that that was subsequently granted by the Employment Court. The Court has delayed the fixing of costs on the successful removal application and the Authority should decline to make an award so that the entire costs position can be dealt with by the Court when it fixes costs on the successful application. Failing that, the respondent says that costs should lie where they fall on the removal application, or, if there is an award, it should be at a lower level than that sought.

As to costs in regard to the interim reinstatement application, the respondent submits that it is not appropriate to deal with those at this stage either as the issue of costs should stand or fall alongside the disposition of the applicant's substantive personal grievance claim.

The respondent says that although the applicant is entitled to counsel of his choice it is unreasonable for the respondent to have to bear the costs associated with his choice to engage Queen's Counsel together with an experienced barrister. The Authority dealt with the application by taking the affidavits as read. The Authority dealt with the matter without the appearance of witnesses and was confined to both parties taking the Authority through written submissions. The respondent submitted that the applicant did not take an economical approach to the selection of counsel and the respondent should not be penalized for that. The application for a suppression order was made orally at the beginning of the hearing. Mr. Kiely referred me to the Authority's determination in Graham v Airways Corporation of NZ Limited, unrep, A Dumbleton, 28 January 2004, AEA 223/03, which was also an application for interim reinstatement and the costs were dealt with after the substantive hearing.

### Determination

It is understandable that the Court has left the determination of costs until it has been able to deal with all related matter before it. The Authority's involvement is, however, at an end and I think the parties should have a decision on all costs issues before the Authority.

### Removal Application

Although the respondent was successful in having this matter removed to the Court, the applicant was obliged to defend the removal application in the Authority and was successful in the Authority. While this was a short hearing, there was nevertheless a need for preparation, which must be taken into account when assessing costs. The respondent is to pay to the applicant the sum of \$1,000.

### Interim Reinstatement Application

While all cases are important to the parties concerned, this case was of particular importance to the applicant because of the possible consequences of an adverse finding. It is understandable, therefore, that he employed highly experienced counsel. However, for the purposes of the costs determination I will consider solely the costs incurred in the employment of Ms Swarbrick. She is well versed in such matters and I agree that the respondent should not have to bear the additional costs of the employment of a Queen's Counsel.

While the suppression application was made orally it would nonetheless have required consideration by the applicant's counsel prior to the hearing. The hearing of the submissions and replies to my questions took a full day. A total of 24 hours hearing and preparation time would be

reasonable. The issue then is what portion of those reasonably incurred costs should the respondent have to bear. The charge out rate was \$320 per hour or \$7,680 for preparation and hearing time. While the figure I have decided to award is on the higher side of costs award I think it is appropriate given the urgency and the importance of the case to the applicant. The respondent is to pay the applicant the sum of \$3,840.

Dzintra King  
Member of Employment Relations Authority