

[2] The parties have attempted to settle the question of costs but have been unable to do so.

Applicants' Position

[3] The applicants are seeking full solicitor/client costs for both investigations and disbursements. The costs sought in respect of the interim reinstatement application total \$27,022.50 including GST. The costs in respect of the substantive investigation on 24 and 25 July (excluding the attendance at the second mediation) total a further \$22,644 including GST. Disbursements totalling \$1,084.74 are sought.

[4] In seeking such costs the applicants rely on various arguments including the following:

- a. The applicants sought from the Company, the day after the dismissal, undertakings (including interim reinstatement) which, if granted, would have avoided the injunction application. The Company refused to grant those undertakings.
- b. The Company's approach to the interim injunction application was high handed and unreasonable as, amongst other things, it failed to address the legal elements of such an application.
- c. Three quarters of the way through the injunction investigation the Company withdrew its opposition to reinstatement and did so on the record. The Authority noted to the parties' representatives that day that the respondent's approach would place the applicants in a very strong costs position.
- d. Following the interim reinstatement determination, and by letter dated 2 April 2007 the applicants provided a calderbank letter to the Company which proposed settlement at a level far below that which was likely to be achieved at a hearing – namely reinstatement, \$6,000 for distress compensation and \$6,000 plus GST for costs to date. The Company rejected that proposal. Costs after that offer amounted to \$19,588.50.
- e. Having put the applicants to the cost of the substantive investigation the Company, on the second day of that investigation, withdrew its opposition to permanent reinstatement. This conduct highlights the grave concerns that have arisen in relation to the Company's approach to this case.

- f. This case also involved the grave concern of intimidation of a witness. It would be unjust and unreasonable for the applicants to be left facing significant costs in these circumstances. In *Ho v Chief of Defence Force* [2005] 1 ERNZ 93 the Employment Court noted that an award of solicitor client costs may well be appropriate in such cases.

- g. The Company's case was devoid of merit as illustrated by its withdrawal of opposition to Ms Kurene's interim and then permanent reinstatement part way through both investigations. As the Authority found, Ms Kurene did not contribute to the employment relationship problem: why then should the respondents face a significant costs issue when those costs were generated by the conduct of the Company?

Company's Position

- [5] The principles for awards of costs by the Authority are well known: *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

- [6] It is appropriate for the Authority in this case to not exercise its discretion over and above the well established principles and not award full solicitor client costs for the following reasons:
 - a. Unlike *Ho*, no findings were made by the Authority as to intimidation of a witness by way of "reprehensible" communications (par 83). Instead, the Authority found that the Company's manager's actions were ill advised and clumsily put but were not intended to change evidence, and his actions therefore did not amount to a contempt of the Authority.
 - b. As illustrated by the dates of the Company's attendance at mediation, it attempted at all times to resolve matters in a timely fashion.
 - c. The Company made 3 genuine calderbank offers which should be taken into account by the Authority in determining costs: two were made prior to the substantive hearing and another in respect of the applicants' costs claim. The first offer, made on 23 March 2007, included Ms Kurene's reinstatement, \$1,500 compensation and costs of \$5,000 plus GST. The second, on 11 April, repeated the reinstatement proposal, offered \$2,000 compensation and costs of \$6,000.

- d. In a letter to the applicants dated 17 September the Company acknowledged its costs obligations and set out a realistic proposal of paying \$8,000
- e. Any award for costs, given the offers made by the Company, should be modest and no more than the general tariff set out in *Da Cruz*.

Discussion and Findings

- [7] During the investigations on 2 February and 24 and 25 July 2007 the Company conceded to, first, reinstate Ms Kurene on an interim basis and then, second, reinstate her on a permanent basis. Regrettably, those concessions came after the applicants' had incurred almost all of their costs in respect of those proceedings.
- [8] In my substantive decision dated 10 August 2007 I awarded Ms Kurene \$14,000 compensation for humiliation, etc and \$6,000 damages for breach of her contract (resulting from her managers "*ill-advised*" (par 50) approach and comments to a witness). The calderbank offers made by the Company fall considerably short of those awards and it therefore cannot derive any benefit from its offers.
- [9] The applicants seek solicitor client costs of \$27,022.50 inclusive of GST but excluding attendance at mediation, in respect of the interim investigation held on 2 February 2007. The applicants also seek solicitor client costs of \$22,644 inclusive of GST but excluding attendance at a second mediation, in respect of the substantive investigation held on 24 and 25 July 2007.
- [10] Disbursements of \$1084.74 are sought in respect of hearing fees (\$370), photocopying, courier charges, swearing of affidavits (\$421.88) and other items.
- [11] The costs sought reflect, amongst other things, the applicants' 'belts and braces' approach to the investigations: there was no shortage of affidavits/witness statements, documentary evidence and preparation. Few if any stones were left unturned. Many were revisited. Some savings were derived by utilising the affidavits as witness statements in the substantive investigation. The investigations themselves fully occupied the days allocated although some time was spent in unsuccessful efforts to settle the employment relationship problem.
- [12] Consistent with the Authority's low level status and statutory obligation to be speedy, the Authority's normal approach to costs, where they are found to be appropriate and when

costs follow the event, is to award a contribution to fair and reasonable costs and not to actual costs. As the Employment Court reiterated in *Da Cruz*, awards will be modest and frequently judged against a notional daily rate (par 44). The Court also urged *“representatives of parties to be conscious of the costs that are accumulating as the matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in light of the amount that is likely to be recovered as remedies and costs from the Authority”* (par 47).

- [13] I do not accept that the Company’s conduct, in this instance, has been so egregious as to warrant solicitor client costs: that it did not do as the applicants urged is not proof of any failure to participate in the employment relationship problem in good faith. I am satisfied that normal costs are warranted on this occasion, albeit – for reasons set out below – at the top of that spectrum. What are the applicants’ fair and reasonable costs?
- [14] The current legal aid senior practitioner’s rate is \$146.67 per hour. This case involved two investigations spread over 3 days. Multiplying the total investigation hours of 24 by the usual formula of 2 preparatory hours (and thereby reflecting the numbers of witnesses properly called and because of other complications such as the issue of witness intimidation for which Ms Kurene was awarded damages) results in a figure of \$7,041.
- [15] A September 2007 NZ Law Society report recommends that – after taking into account a Crown Solicitor rate of \$198 p. h. exclusive of GST – that figure be increased to \$170 p. h., GST exclusive. Using the same calculation, a figure of \$8,160 is derived.
- [16] Having regard to these figures, and to the overall circumstances of the investigations, in particular the Company’s late acceptance of Ms Kurene’s unjustified dismissal (a significant concession that should not be punished but which, because of its lateness and the resulting costs incurred by the applicants, cannot justify any reward) and because of realistic settlement proposals advanced by the applicants, I am satisfied the applicants should recover all of their fair and reasonable costs. I am satisfied also that a margin should be added to the examples set out above, so as to recognise the greater costs resulting from the demands of preparing for a substantial urgent interim application as well as the complexities of the issues that emerged in the substantive investigation.
- [17] Having regard to the above I am satisfied the Company should pay to the applicants the sum of \$12,000 plus GST and disbursements of \$1,084.74.

[18] The applicants are best left to determine how that sum should be allocated between themselves.

Determination

[19] By way of meeting Ms Kurene and the Union's fair and reasonable costs and disbursements, the Company is to pay to the applicants the sums of \$12,000 (twelve thousand dollars) plus GST and \$1,084.74 (one thousand and eighty-four dollars and seventy-four cents).

Denis Asher

Member of the Employment Relations Authority