

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:

WA 01/08

File Number: 5092211

BETWEEN

Jakki Cooper
Applicant

AND

Barry & Linda Jones t/a
Ashhurst Service Centre
Respondents

Member of Authority: Denis Asher

Representatives: No appearance by or for Ms Cooper
Alastair Hall for Mr & Mrs Jones

Submissions received: No submissions received from the Applicant
Submissions dated 29 November 2007 from the
Respondents

Determination: 9 January 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] In her statement of problem filed in the Authority on 2 July 2007 Ms Cooper claimed she had been constructively dismissed as a result of her employer unilaterally

varying her employment agreement and because of their allegations of serious misconduct involving dishonesty.

- [2] In a memorandum dated 16 November 2007 I recorded Ms Cooper's advice during the substantive investigation in Palmerston North on 15 November that she was withdrawing her employment relationship problem, and that no substantive issue remained to be determined.
- [3] I also recorded that the parties were advised at the investigation that costs were reserved, and in the event the respondents sought a contribution to their fair and reasonable costs then they were to file their submissions no later than Thursday 29 November 2007; Ms Cooper had until 6 December to respond while the respondents then had until 11 December to file any closing submissions.
- [4] Cost submissions on behalf of Mr & Mrs Jones were subsequently sent to both Ms Cooper and to the Authority; being received by the latter on 29 November. The Authority also sent a copy of the same to Ms Cooper, and advised her of its actions by email, on the same day. A follow up letter was forwarded to Ms Cooper on 17 December: the latter was returned marked "*gone no address*".
- [5] Because of the past effectiveness of communicating by email with Ms Cooper, the fact that no advice of any change of address has been received from the applicant, and because the issue as to costs was clearly explained during the substantive investigation on 15 November (and recorded in the memorandum of 16 November) I am satisfied I can fairly and reasonably proceed to determine the respondents' application for costs: clause 12 of Schedule 2 of the Employment Relations Act 2000 applied.

Respondents' Costs Claim

- [6] The respondents seek costs in the region of \$7,000 on various grounds including the following.
- [7] Costs are sought on the basis that: Ms Cooper raised her employment relationship problem in bad faith; a substantial defence to her alleged grievances was required as well as careful analysis of documentation; well in advance of the investigation

and prior to the bulk of the respondents' costs being incurred a sensible settlement offer was made, and the applicant added unnecessarily to costs by failing to meet Authority deadlines.

- [8] From the outset the respondents expressed their view that Ms Cooper's claims were baseless and unmeritorious.
- [9] From well before the Authority's investigation the respondents consistently denied the claim of unilateral change to Ms Cooper's employment agreement and resulting disadvantage: that position was confirmed during the course of the Authority's investigation on 15 November.
- [10] Similarly, the respondents consistently advanced the view it was responsibly and transparently working through an investigation arising out of matters disclosed on security surveillance footage. While not alleging dishonesty at that time it now seems the respondents' concerns were justified. That is because, subsequent to the commencement of the Authority's investigation, the respondents received copies of Ms Cooper's bank statements as ordered by the Authority. An analysis of those statements raised significant issues with the applicant's explanation in respect of matters raised by security surveillance footage, as set out in her resignation letter dated 19 April 2007. This, coupled with the letter sent by Police to the applicant relating to her paying the respondents back for items that were taken and not paid for, undermine Ms Cooper's veracity.
- [11] These matters are relevant to the applicant's conduct during the course of the investigation and the level of costs that should be awarded against her as a result.
- [12] The respondents believe the evidence established dishonesty on Ms Cooper's part and the problem raised by her was done in bad faith, motivated by a desire for financial gain.
- [13] While reluctant to employ the term, Ms Cooper's actions amount to attempted extortion.

- [14] In pursuing costs the principles set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808 are relied on, including that without prejudice offers can be taken into account.
- [15] By way of a reply dated 1 October 2007 the respondents rejected Ms Cooper's earlier offer to settle the matter for \$3,000 and said that if her claim was withdrawn at that point then each party would bear its own costs. The offer was refused by Ms Cooper on 6 October. As a result, and because of the scope of Ms Cooper's claims, the respondents were required to prepare lengthy witness statements and to analyse the contents of her bank statements (and relate them to its own till records).
- [16] Ms Cooper failed to meet her agreed deadline of 11 August 2007 for filing witness statements, or a later date ordered by the Authority. The applicant similarly also failed to provide bank statements by agreed and ordered dates. Additional costs were incurred by the respondents as a result of counsel having to communicate with the Authority's support officer as a result of these failures and to prepare for and attend various telephone conferences arising out of the same failures. These costs total \$375 and, it is submitted, should be fully indemnified.
- [17] The actual costs for the respondents were \$9,313.00 plus disbursements of \$31.80. An award in the region of \$7,000 is sought.

Discussion and Findings

- [18] The failures by Ms Cooper to meet her own deadlines and those ordered by the Authority were many; the applicant made no attempt to advise of delays or to fully account for them. I accept the respondents' claim they should be fully indemnified for the additional costs resulting from these failures, of \$375.
- [19] I also am satisfied that Ms Cooper was fully forewarned of the likely failure of her claim of unilateral variation and resulting disadvantage: the fact that the applicant was never required to work a proposed change to her hours of work was set out as

early as 25 July in the respondents' statement in reply. It was also discussed further in various telephone conference calls. The reality is that this claim had no prospect of success whereas Ms Cooper, despite being put on clear and early notice of the same, pursued the matter to the Authority's substantive investigation, before abandoning her claim. Ms Cooper's obdurate and unreasonable position should be reflected in the award of costs to the respondents.

- [20] The respondents were unfairly and unreasonably put to greater costs because of Ms Cooper's unreasonable refusal to provide them with (edited) copies of her bank statements. Her position was unreasonable because Ms Cooper responded to concerns about her actions as disclosed by security surveillance footage by claiming her bank statements were a defence to any allegations of failing to pay for her employers' property, but refused to provide them (refer to Ms Cooper's letter of resignation dated 19 April 2007; attachment L to her witness statement). In all the circumstances the respondents' request to view those statements was fair and reasonable.
- [21] Most significantly, and as is confirmed by the NZ Police letter of 17 August 2007 (see attachment to applicant's witness statement), and in respect of events in March 2007, Ms Cooper admitted to failing to pay for various items taken by her from the respondents' service centre; she was formally warned by the Police in respect of her non-payments. As a result I have no hesitation in concluding that Ms Cooper clearly appreciated from before her filing a statement of problem that the respondents were justifiably attempting to investigate her conduct, as recorded by the security surveillance footage. In fact, had that investigation been completed, and in the absence of bank statements that Ms Cooper claimed supported her position, then the respondents may well have been justified in dismissing the applicant. By pursuing a grievance claim against the respondents Ms Cooper was effectively continuing her dishonest conduct against her employer.
- [22] For the reasons set out above, and consistent with the principles set out in *Da Cruz* (above), and bearing in mind the respondents' earlier without prejudice except as to costs proposal to settle the applicant's grievance, and in particular because of Ms Cooper's demonstrable and deliberate failures to act in good conduct (her pursuing a claim against the respondents despite their repeated warnings, knowing that she

had acted dishonestly toward them), the respondents are entitled to a fair and reasonable contribution to their costs of \$7,000.

Determination

[23] Ms Jakki Cooper is directed to pay to Barry & Linda Jones the sum of \$7,000 (seven thousand dollars) as a fair and reasonable contribution to their legal costs.

Denis Asher

Member of the Employment Relations Authority