

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 92A/08
5079792**

BETWEEN MICHELLE DEBORAH HENRY
 Applicant

AND THE CHIEF EXECUTIVE OF THE
 MANUKAU INSTITUTE OF
 TECHNOLOGY
 Respondent

Member of Authority: Leon Robinson

Submissions received: 18 June 2008

Determination: 2 July 2008

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] By a Determination dated 17 March 2008, I determined that the applicant Ms Michelle Henry ("Ms Henry") had not been unjustifiably dismissed. I declined to make formal orders in settlement of the employment relationship problem. I invited the parties to reach agreement as to costs but in the event they could not, I set a timetable for the receipt of memoranda. The lawyers advised an agreement had been reached and they sought a consent determination in terms of that agreement.

[2] I advised by Minute that I declined to issue a "consent determination"¹ on the basis agreed and further, that I would only determine the matter on its merits. While there may be agreement between the parties, the determination of the matter is always for me. An agreement between the parties is no substitute for an assessment of the merits of a problem. However, where my assessment of the merits of the problem coincides with an agreement reached between the parties, I have no difficulty endorsing such an agreement as my determination in the form of what is known as a consent determination. But my preliminary assessment of the merits of this application for costs did not coincide with the agreement I was advised the parties had reached. For that reason I declined to issue a consent determination and I advised I

¹ The *Employment Relations Act 2000* does not provide for different types of determination. See section 174.

would determine the matter on its merits. I have now received memoranda from the lawyers.

[3] The Chief Executive of the Manukau Institute of Technology ("the Chief Executive") now seeks costs against Ms Henry. The Chief Executive's costs are advised as the sum of \$24,712.54 (excluding GST) incurred after an offer of settlement made to Ms Henry on 30 November 2007 on a without prejudice but subject to costs basis. The Chief Executive seeks an award of \$10,000.00 on the basis that he was successful and that an award higher than the daily tariff is appropriate.

[4] Ms Henry's counsel argues that it was not clear that Ms Henry's claim was unlikely to succeed and says the matter required proper consideration and determination on the facts. I am invited to assess costs using a notional hourly rate no more than \$250.00 per hour and a daily rate for hearing of \$2,000.00. It is ultimately submitted that a suitable costs award is \$6,500.00 - \$7,500.00 instead of the \$10,000.00 sought by the Chief Executive.

[5] The advice of 30 November 2007 certainly is of relevance and ought properly be considered. But I do not regard it as decisive of this application. It is a factor to be weighed in the mix and I do not disregard it.

[6] This is an equity and good conscience jurisdiction and costs awards in the Authority are generally modest consistent with the Authority's approach to its investigations. Literature published by the Department of Labour report that in the majority of cases, costs for one day investigation meetings fall between \$1,000.00 and \$2,500.00. The exercise of my discretion calls for a determination of what is a fair and reasonable contribution as between the parties.

[7] At the investigation meeting of the substantive matter, I heard evidence that Ms Henry has only modest means and income as well as the sole care of two young children. I regard this factor as most material, because this is an equity and good conscience jurisdiction. I am inclined to consider an award of \$10,000.00 or even the \$7,000.00 agreed is likely to have a punitive effect. So that it does not, and having regard to the circumstances and in particular the relative means of the parties, I

consider the lower bound of the Authority's daily tariff of \$1,500.00 for each of the two days of investigation meeting is warranted.

[8] Accordingly, exercising my discretion on a principled basis and for the reasons outlined above, **I order Michelle Deborah Henry to pay to the Chief Executive of the Manukau Institute of Technology the sum of \$3,000.00 as a contribution to his costs.**

Leon Robinson
Member of Employment Relations Authority