IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

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	BETWEEN	TANIA KA'AI, JOHN MOORFIELD and TANIA SMITH Applicants
	AND	VICE CHANCELLOR OF THE UNIVERSITY OF OTAGO Respondent

Member of Authority:	James Crichton
Representatives:	Mary-Jane Thomas, Counsel for Applicants Barry Dorking, Counsel for Respondent
Submissions received:	22 May 2008 from Applicants 28 April 2008 from Respondent
Determination:	23 September 2008

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] The respondent (the University) applies for costs occasioned by the extensive preparation it was put to in respect of a scheduled two week fixture in the Authority which was discontinued by the applicants (the applicants) immediately prior to the investigation meeting commencing.

[2] The applicants resist the claim for costs on the basis that their case before the Authority was meritorious and was withdrawn for proper purposes. The applicants say that costs should lie where they fall.

[3] The University seeks costs totalling $39,000 while the applicants' position is that there should be no award of costs at all.

[4] This is an unusual case in that no substantive hearing in the Authority was concluded although there were two interlocutory applications made by the applicants and each of those was successfully concluded.

[5] Despite the fact that the substantive matter never proceeded, the University argues that it has been put to considerable cost in defending a claim which required extensive preparation and which literally at the eleventh hour was withdrawn by the applicants, according to the University, on the basis that the applicants had decided that their claim against the University was completely without merit.

The course of the proceedings

[6] Two of the applicants filed statements of problem in the Authority in July 2007 and the third filed a similar claim in October 2007. Each claim alleged that the subject applicant had suffered disadvantage as the result of unjustified actions on the part of the University and that they had been constructively dismissed. The factual matrix to support each claim was similar. At an early stage, I directed that the matters would be dealt with jointly and heard jointly.

[7] One of the applicants, Ms Ka'ai, made allegations in her statement of problem about the University's conduct after the termination of her employment. Having heard the parties' counsel on the relevance of those post-termination allegations, I issued an interim determination on 19 December 2007, the burden of which was that the University's post-termination conduct was not relevant to Ms Ka'ai's personal grievance.

[8] When the University's briefs of evidence became available to the applicants on 11 April 2008, the applicants filed a further application with the Authority seeking to have some of the University's evidence struck-out and proposing an additional witness. I issued a further interlocutory decision on 15 April 2007 declining the applicants' application.

[9] Then, on 16 April 2007, the applicants sought to *appeal* the Authority's interlocutory decisions to the Employment Court.

[10] On 17 April 2007, having been unsuccessful in their *appeal* to the Court, the applicants, through counsel, advised the University of their intention to withdraw their proceedings before the Authority.

[11] The University encourages me to conclude that the applicants withdrew their applications from the Authority once it became clear to them that the evidence they sought to exclude was going to be heard and that the only inference one can properly draw is that the applicants felt that in consequence, they would be unsuccessful.

[12] The applicants say that the proceedings were discontinued for proper reasons. In particular there was an unwillingness on their part to implicate the wider Maori community. Further the applicants were concerned at the prospect they might have to defend themselves against criminal allegations. The University had referred certain matters to the Police and the Police had, at the time the Employment Relations Authority hearings were discontinued, not yet made a decision as to whether to prosecute or not.

Discussion

[13] It is a truism that there is a wide discretion given to the Authority in respect of the issue of costs. Clause 15 of Schedule 2 of the Employment Relations Act 2000 confers on the Authority the power to order any party to pay costs and/or expenses to any other party at whatever amount the Authority thinks reasonable. The discretion is a broad one and does not require, for instance, that the substantive matter be concluded.

[14] In the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808, the Employment Court's decision was given by Judge Shaw. Her Honour identified the *basic tenets* that ought to be considered by the Authority and specifically approved the *daily tariff* approach, provided it was not applied slavishly and without regard to the particular circumstances of the case.

[15] The University argues that, because the instant case involves effectively constructive dismissal allegations, the onus is different from that which would apply in a more common unjustified dismissal claim. It is not, the University says, a situation where the employer must justify its actions, but rather a situation where the employee must satisfy the constructive dismissal test.

[16] The University also relies on a decision of my colleague, Alastair Dumbleton, in *Kora v. Waymouth Intermediate School* (unreported, 30 November 2007, AA376/07) where the Member considered that the costs award should not be limited by a consideration of what might have happened if the matter had been determined in the usual way, but that the Authority could effectively apply different principles *in circumstances where a party withdraws after taking the other party right to the wire.*

[17] In the result, in facts not dissimilar to the present situation, Member Dumbleton awarded approximately twice the costs award that he indicated might have been contemplated by him were the matter to have been investigated in the normal way. It is suggested that by reason of the fact that the claimant party has incurred a significant chunk of its costs when a matter is withdrawn immediately prior to a hearing, it is only proper that a costs application can be made and responded to.

[18] The applicants say that, because the University indicated that it spent approximately $42,000 on legal costs in defence of the applicants' claim and that its application for costs is for $39,000, effectively the University is seeking costs on a full indemnity basis.

Determination

[19] I am satisfied on the balance of probabilities that the University is entitled to a contribution to its costs. It is clear that the University was put to significant cost in defending three claims brought by the applicants. The fact that none of those three applications proceeded to their logical conclusion in the Authority is neither here nor there; the University was still put to cost in defending the claims and the University had no way of knowing that, effectively 1½ working days before the commencement of the nine day investigation meeting, the applicants would withdraw their claims in their entirety.

[20] I am also satisfied that some of the cost incurred by the University is attributable to the unnecessary complexity of the applicants' claims, complexity which was not assisted when the briefs of evidence filed on behalf of the applicants themselves added further layers of complication.

[21] It is a well established principle in relation to the awarding of costs that unreasonable behaviour by parties who are unsuccessful may sound in costs. I

consider it appropriate in this case for some of that unnecessary complexity to be factored into the determination of an appropriate figure for contribution.

[22] Both parties refer me to the tariff-based approach as a useful tool in assisting in the fixing of costs. I do not find it so. The tariff-based approach relies on apportioning a daily rate for each day of an investigation meeting. Here, there was no investigation meeting, only a proposal that the matter be dealt with over a period of nine days.

[23] If the matter had proceeded and took nine days to dispose of, and the daily rate was say determined at $3,000 a day, then the total award without any other factors being considered might be $27,000.

[24] However, given the fact that the investigation meeting never proceeded, there is no way of knowing whether the matter would have taken nine days to investigate, or 19.

[25] I think the better approach is to start from the premise that the University has been put to cost, that it indicates that that cost amounts to $42,000 and to decide from there what percentage of that total cost, assuming the Authority considers that total cost reasonable, ought to be contributed by the applicants.

[26] In considering that equation, I must say that I am not attracted by the University's contention that the applicants' claim has no merit and that is why the applicants chose to withdraw. Certainly I think one can make appropriate inferences about the last minute withdrawal of the claim, but the applicants say it was for proper reasons and they identify those reasons as including an unwillingness to involve the whole Maori community and a desire to preserve funds in case they have to defend themselves against criminal allegations.

[27] Accordingly, just as I am not persuaded it is particularly helpful to rely on a tariff-based approach around daily rates when there has been no hearing, so I am not attracted by the argument that I can assume that the matter has been withdrawn from the Authority because of the applicants' fear that they would lose.

[28] In all the circumstances, I have reached the conclusion that an appropriate contribution to the University's costs is the sum of $15,000 which, as the University suggests, is to be paid by the applicants jointly and severally on whatever basis the

applicants see fit. In reaching that figure, I have taken into account the unnecessarily complex proceedings and evidence advanced in support of that claim by the applicants and also the applicants' two interlocutory applications which, as I noted above, were completed and were both completely unsuccessful.

[29] I also note in justification of the figure I have arrived at that a contribution of this magnitude would represent approximately one third of the costs incurred by the University which to a great extent represents some acknowledgment of the principle that costs awards in the Authority ought to be modest.

James Crichton
Member of the Employment Relations Authority