

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 11
5329440

BETWEEN

MARY-ANNE KINDELL
Applicant

AND

THE NEW ZEALAND
PUBLIC SERVICE
ASSOCIATION TE
PUKENGĀ HERE TIKANGA
MAHI INCORPORATED
Respondent

Member of Authority: P R Stapp
Investigation Meeting: On the papers
Submissions received by : 14 November 2012
Determination: 30 January 2013

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Kindell has applied for damages for costs, and costs for the Authority's investigation of her employment relationship problem as reserved in [2012] NZERA Wellington 18 October 2012. The respondent has asked for costs to lie where they fall.

Issues

[2] Is Ms Kindell entitled to damages for costs, and if so, how much?

[3] How much is Ms Kindell entitled to for costs or should costs lie where they fall?

The facts

[4] The Authority's investigation meeting was held over two days on 23 and 24 May 2012 and written submission followed. By consent statements were taken in when the witnesses were not called because time had run out during the investigation meeting. Ms Kindell was represented throughout, including the on-going employment relationship issues and the Authority's investigation. The latter involved the planning and preparation of her case and attendance during the investigation meeting. The PSA was also represented. Additional time was required for submissions.

[5] Before the employment relationship problem was filed in the Authority Ms Kindell was represented first by her union, the PSA. The PSA is also the employer. Ms Kindell decided for own reasons that she needed to get outside help and engaged a lawyer to act for her instead of the PSA.

Determination

[6] I will deal with the claim for damages for costs first. These related to Ms Kindell's ongoing employment relationship with the PSA. I have no hesitation to dismiss the claim because:

[7] Any conflict of interest was a perceived one lacking in specifics and proof.

[8] The PSA has satisfied me that measures exist to avoid such conflicts and that there are arrangements to cover any conflicts. There is a choice of union membership. The PSA rules make provision for independent action. There would have been alternatives for Ms Kindell than expensive legal representation.

[9] There is a partnership agreement to cover separation of interest. This involves independent delegates.

[10] Indeed should any problems arise Ms Kindell's rights to proceed with an employment relationship problem existed for a decision and enforcement, as she

would have been able to rely on an employment relationship problem to be resolved before spending any money.

[11] Ms Kindell's decision to obtain independent legal advice was her choice. It did not involve discussion with the PSA, and the dispute mechanism available was not invoked.

[12] I conclude that this is not a matter for special damages for the costs of legal representation incurred by Ms Kindell during her employment.

[13] I am satisfied that since Ms Kindell had some success in her claims that she should receive some contribution to her costs for the Authority's investigation. However I have decided to restrict it to within the range of the notional daily tariff because:

i. A number of Ms Kindell's allegations were not upheld. This included:

1. The issues relating to the absences from work.
2. The factual matter relating to the delivery of a letter after mediation.
3. Allegations about the workplace.
4. Remedies

ii. A number of claims for remedies were dismissed:

1. Reinstatement.
2. Damages for money she would have earned if she had remained in employment with the PSA.
3. Lost wages.

4. A compliance order.
5. Penalties.
6. Superannuation entitlements.
7. A Declaration.

[14] Taken together all of the above added to the time and preparation required when it was patently obvious that the real concerns in the employment relationship were much narrower. The employment relationship problem was escalated unreasonably, including the need for witnesses. All that could have been avoided. The number of claims had a correlation with the volume of information produced for the Authority's investigation meeting, and which needed a reply and response from the PSA. Taken together I assess that a reduction is appropriate. Such a reduction is equivalent to at least the tariff for the extra day.

[15] Even although responsibility rested with Ms Kindell for the way in which her case was presented she is still entitled to costs relating to the part of her claim that she was successful.

[16] For those reasons I hold that the PSA is to pay Ms Kindell \$3,500 as a contribution to her legal costs. In addition she is entitled to her filing fee of \$71.56.

Orders of the Authority

[17] The PSA is to pay Ms Kindell \$3,500 in costs and \$71.56 for the filing fee.