

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 269
5366361

BETWEEN

RAEWYN OLIEDAM
Applicant

AND

HAMILTON HARDWARE
RETAIL LIMITED trading as
MITRE TEN MEGA,
THE BASE
Respondent

Member of Authority: K J Anderson

Representatives: S McKenna, Counsel for Applicant
R Drake, Counsel for Respondent

Submissions received: 25 March 2013 from Respondent
12 April 2013 from Applicant

Determination: 25 June 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 27 February 2013,¹ the Authority found that Ms Oliedam was unsuccessful with her claim against the respondent that she was unjustifiably dismissed. The parties were invited to resolve the matter of costs but have not been able to do so. Submissions have now been received from both parties, in anticipation of the Authority determining the appropriate costs to be awarded to the respondent.

[2] The respondent has incurred costs of a total of \$7,329.00 (GST exclusive) and seeks an award of costs, consistent with the current daily tariff approach adopted by the Authority, of \$3,500. While acknowledging that the matter of costs is subject to section 45 of the Legal Services Act 2011 (the Act), the respondent submits that

¹ [2013] NZERA Auckland 69

exceptional circumstances exist in that Ms Oliedam engaged in misleading or deceitful conduct pursuant to s.45(3)(c) of the Act.

Section 45 Legal Services Act 2011

[3] It is accepted that Ms Oliedam is a legally aided person under s.45(1) of the Act and under subsection (2):

No order for costs may be made against an aided person in a civil proceeding unless the court [Authority] is satisfied that there are exceptional circumstances.

[4] And then at subsection (3), if the Court or the Authority is required to determine if exceptional circumstances exist, there are a number of criteria that can be taken into account in regard to the conduct of the legally aided party. Relevant to this case is:

(c) any misleading or deceitful conduct;

[5] The submissions for the respondent set out twelve purported examples of less than credible evidence that Ms Oliedam is said to have relied upon to support her arguments that her dismissal was unjustifiable. It is argued that because of these particular “discrepancies, contradictions and denials” the Authority is required to “seriously question” the credibility and validity of Ms Oliedam’s evidence.

[6] It is accepted that a certain amount of Ms Oliedam’s evidence was found to be wanting, but as has been submitted for her, it cannot be said that Ms Oliedam deliberately concealed or fabricated evidence. The Authority does not find that Ms Oliedam engaged in misleading or deceitful conduct. Rather, where inconsistencies or improbabilities in her evidence arose, this was not exceptional and regrettably, is a factor that arises in many such matters before the Authority.

Determination

[7] Given the successful outcome for the respondent regarding the determination of Ms Oliedam’s claims, it is understandable that the respondent believes that it has been put to unnecessary expense; and that it should be able to recover some contribution from Ms Oliedam. It could also be seen as unfair that Ms Oliedam should

be funded by the taxpayer whereas the business must meet its costs from its revenue. However, there is a high threshold to be met in regard to establishing exceptional circumstances under s.45(3)(c) of the Act and it has not been satisfied in this case. It follows that pursuant to s.45(2) of the Act, the Authority is not able to make an order for costs against Ms Oliedam.

K J Anderson
Member of the Employment Relations Authority