

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 155
5458198

BETWEEN OWEN ALLEN
Applicant

A N D CLEARWATER PAINTING AND
DECORATING LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Julie Allen, for Applicant
Tim McGinn, Counsel for Respondent

Submissions Received: 29 August 2014 from Respondent
12 September 2014 from Applicant

Date of Determination: 6 October 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] The applicant, Owen Allen, claimed he was unjustifiably dismissed (albeit constructively) by the respondent, Clearwater Painting and Decorating Limited (Clearwater) on or about 24 March 2014. His claim was filed on 1 May 2014.

[2] The application was forwarded to Clearwater but there was no reply. When an officer of the Authority queried this on 28 May she was told Clearwater was unwilling to put anything in writing. It was willing to meet provided the timing suited its commitments.

[3] On 11 June the parties were advised I sought a telephone conference. Clearwater advised it was not prepared to participate while Mrs Allen was involved. It was advised either party could use whatever representation it chose. The response was Mr McGinn's engagement.

[4] Mr McGinn advised that he considered the claim lacked sufficient specificity and that would impede his ability to furnish a statement in reply. Mrs Allen responded with further particulars on 16 June but Mr McGinn remained dissatisfied. The issue was discussed during a telephone conference on 24 June during which Mrs Allen agreed to amend the statement of problem. The amended version followed on 4 July.

[5] Mr McGinn provided a statement in reply on 16 July. Clearwater denied the claim had merit and responded with a counterclaim concerning the cost of rework it attributes to Mr Owen's workmanship.

[6] The dispute proceeded to mediation on 19 August. There was no resolution, but on 29 August Mr Allen withdrew his claim.

[7] Clearwater responded with advice it would seek a contribution toward its costs. The invoices show they total \$2,932.50 (including GST). Recognising costs associated with mediation are not recoverable, Clearwater seeks a contribution of \$1,000.

[8] In support of its application it refers to the fact the claim was first raised by filing in the Authority; that it lacked specificity and cost was incurred in addressing that and was, in all probability, a *try on* as was suggested by the fact it was withdrawn soon after mediation.

[9] Mrs Allen's reply is the issues were raised with Clearwater but a lack of response forced the use of a formal channel. It is denied the claim was a *try on* and said withdrawal is attributable to personal issues facing the applicant.

[10] There is no doubt there may be an order for a contribution toward costs in respect to a withdrawn application. The question is whether such an award is appropriate here?

[11] Case law does not support the argument it is inappropriate to initiate a claim by filing in the Authority (see for example *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79 at [10]). Here I also note the claim, albeit untested, that the grievance was raised directly with the employer but there was no response. Clearwater's initial uncooperative response to the Authority suggests these assertions may have validity but, ultimately that is irrelevant. A claim can be initiated by filing

in the Authority. Also the law enables a personal grievance to be withdrawn at any time.

[12] That raises the question of what may then have been expected of the respondent.

[13] I conclude the vast bulk of the costs referred to in the invoices would have been incurred even if the matter had settled in mediation. Mr McGinn would have had to receive initial instructions, give some advice in response and file a statement in reply. The only thing that might be exempt from that which would have been required for mediation was addressing the question of adequate specificity and even that is arguable. Most employers seek as much detail as possible prior to entering into any form of resolution process.

[14] Having reviewed the file I conclude all the costs Clearwater incurred would have been required for mediation. Both the invoices and Mr McGinn's commentary confirm no additional expenditure between mediation and withdrawal and definitely no preparation for an investigation meeting such as drafting statements of evidence.

[15] Costs to the point of mediation are generally irrecoverable and for that reason I conclude cost should lie where they fall.

M B Loftus
Member of the Employment Relations Authority