

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 169
5401880

BETWEEN

MICHELE DUMBLE
Applicant

A N D

AIRWAYS CORPORATION
OF NEW ZEALAND LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Memoranda Received: 2 April and 3 May 2013

Date of Determination: 6 May 2013

COSTS DETERMINATION OF THE AUTHORITY

Airways Corporation of New Zealand Limited is ordered to pay \$7,000 as a contribution to the legal costs of Michele Dumble and \$385 for fees and disbursements paid by her.

Application for costs

[1] This application for costs made by Ms Michele Dumble against Airways Corporation of New Zealand Ltd, follows the investigation and determination of a personal grievance claim Ms Dumble brought against Airways.

[2] The investigation included a meeting held over two days at the end of January 2013.

[3] The Authority determined in March 2013 – [2013] NZERA Auckland 85 – that Ms Dumble had been unjustifiably dismissed. To remedy her personal grievance she was reinstated to the senior management position within Airways of Manager – Towers. No award was made to reimburse remuneration lost by Ms Dumble or to

compensate her for humiliation and hurt feelings, both of which remedies she had claimed.

[4] A timetable was given for any costs application to be made by Ms Dumble and replied to by Airways. The Authority also suggested that given the mixed results of the investigation limiting the remedies to reinstatement, it might be appropriate for the parties to bear their own costs.

[5] In a memorandum filed on behalf of Ms Dumble seeking an award of costs, the Authority was advised that actual costs charged by her advocate, Mr Reid, were \$14,400. They included about \$400 for attendance at mediation, as had been directed by the Authority, and there were sums for disbursements in relation to travel and attendance at that mediation.

[6] Costs are sought by Ms Dumble on the basis of the Authority's daily tariff, currently \$3,500 per day, applied to the two day hearing, and an additional sum of \$750 for travel to Hamilton and attending mediation there. Fees and disbursements in relation to the investigation were \$314.

[7] Attendance at mediation is not compensated by awards of costs, as parties are expected to commit their own resources to that process, given the primary importance placed on mediation by the Employment Relations Act 2000.

[8] Although Airways' reply to the costs application was received outside the time limit set by the Authority, I am satisfied that the oversight was excusable in the circumstances where counsel Ms Hornsby-Geluk has recently changed her address for service after moving to another law firm and for that reason was not aware the application had been made.

[9] Airways submits that the parties should bear their own costs, as the Authority in its determination had suggested might be an appropriate way for any question of costs to be disposed of. In support of that submission counsel refers to the mixed result achieved in the case and to a *Calderbank* offer made to Ms Dumble.

[10] I disregard the *Calderbank* offer, because it was for less than Ms Dumble obtained by proceeding to have the grievance determined. Although she did not recover lost remuneration or compensation, she obtained vindication through the Authority's public declaration that her dismissal had been unjustified, and she was

reinstated to her job. The offer rejected by her was for a payment of six months' salary (less tax) and to have her dismissal withdrawn and a resignation substituted. The offer was made expressly without any admission of liability and on that basis alone is inferior to the declaration obtained from the Authority that Airways was liable for an unlawful dismissal. In monetary terms permanent reinstatement to her position, for what is likely to be three or four years at least, is considerably more advantageous than payment of salary for a part of one year only.

[11] I consider in the circumstances of the case and by applying the principles in the leading Employment Court case on costs in the Authority of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808, that costs should follow the significant outcome of the case; Ms Dumble's personal grievance was established and she was reinstated. She was not awarded compensation because of her contribution but, as pointed out, in principle a party may not be penalised twice for such contribution, in remedies and in costs.

[12] It is incorrect as submitted that Ms Dumble was not awarded lost wages because of contribution. The reason for that result was clearly stated in the determination to be that Ms Dumble had not mitigated her loss or made any attempt to do so. I do not, however, consider that that aspect of her claim for remedies took up an undue amount of time so that the daily rate, if it is to be applied, should be reduced to any extent.

[13] I consider it is appropriate to apply the daily rate to the two days of hearing and accordingly I award \$7,000 to Ms Dumble, as a reasonable contribution to her actual costs in a greater amount.

[14] She is entitled to recover disbursements as claimed, which appear to be reasonable, for the preparation of an affidavit, photocopying, binding and postage. I also award \$71.50 as the cost of filing her application. Total disbursements, therefore, are \$385.

[15] Airways is ordered to pay the above amounts to Ms Dumble pursuant to clause 15 of Schedule 2 of the Employment Relations Act.

