

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Suzanne Giddens (Applicant)
AND Lisa Gillian Phelan (Respondent)

AND Andre Kini (Applicant)
AND Lisa Gillian Phelan (Respondent)

REPRESENTATIVES Sue Giddens and Andre Kini In person
Miles Edwards, Counsel for Respondent

MEMBER OF AUTHORITY Leon Robinson

SUBMISSIONS RECEIVED 20 January 2006
9 February 2006

DATE OF DETERMINATION 15 February 2006

DETERMINATION OF THE AUTHORITY

[1] By a Determination dated 7 December 2005¹, I ordered that Ms Lisa Phelan was to pay penalties. The parties have been unable to agree costs and both have now lodged memoranda to assist me in the exercise of my discretion.

[2] The principles and rules conventionally applied to applications for costs in traditional adversarial or trial litigation do not fit with the Investigative role of the Authority and the objects of the legislation which establishes it. Those principles and rules continue to remain relevant however and the overall question is to determine what is a fair and reasonable contribution as between the parties. The Authority adopts a principled approach taking into account relevant matters and having no regard for irrelevant ones.

[3] The Employment Court has held that the following principles are appropriate where the Authority is exercising its discretion in relation to costs²:-

There is a discretion as to whether costs should be awarded and what amount.

The discretion is to be exercised in accordance with principle and not arbitrarily.

The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

Equity and good conscience is to be considered on a case by case basis.

¹ AA466/05

² *PBO Ltd -v- Da Cruz*, unreported, AC2A/05, 9 December 2005

Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increase costs unnecessarily can be taken into account in inflating or reducing an award.

It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable.

That costs generally follow the event.

That without prejudice offers can be taken into account.

That awards will be modest.

That frequently costs are judged against a notional daily rate.

The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[4] Ms Giddens and Mr Kini claim their legal expenses against Ms Phelan. Ms Giddens produces two invoices from her solicitor dated 4 July 2005 for the total sum of \$3,733.00 and dated 1 September 2005 for the total sum of \$2,252.25 both of which are inclusive of GST and disbursements.

[5] Mr Kini produces two invoices from the same solicitors for the total sum of \$808.00 and \$675.00 both inclusive of GST and disbursements for the same respective dates. Both applicants further claim executive time based on hourly rates of \$120.00. In summary, Ms Giddens seeks an award of \$7,975.25 and Mr Kini \$3,473.00. The solicitor did not represent Ms Giddens and Mr Kini at the investigation meeting. The costs incurred relate to services provided prior to the investigation meeting.

[6] Mr Edwards submits the invoices are not sufficiently particularised and that Ms Giddens and Mr Kini have no foundation to seek reimbursement for their "executive time". He also refers to offers of settlement but I am not permitted to have any regard for matters concerning mediation.

[7] The Investigation Meeting proceeded over one day and Ms Giddens and Mr Kini succeeded in pursuing penalties against Ms Phelan. They are therefore properly regarded as the successful party and are entitled to awards of costs. They shall have costs but on a contribution basis.

[8] Ms Giddens and Mr Kini initially claimed recovery against the limited liability company Max Magazines Limited. As from the liquidation of that company on 9 August 2005, they proceeded only against Ms Phelan personally in relation to penalties. My perusal of the solicitor's invoices and the narrations therein, leads me to conclude that much of the legal services provided related to the recovery action pursued against the now defunct company, although it is true that the penalty action too was always present. That factual situation is relevant and I have concluded that it would not be right to hold Ms Phelan liable for legal expenses incurred in an application pursued principally against another initially.

[9] I consider that the actual costs incurred in respect of the successful penalty action against Ms Phelan, comprise only a portion only of the invoice dated 1 September 2005 (for services provided between 6 July 2005 to 30 August 2005). The legal fees on that invoice are \$2,000.00. Ms Giddens shall be reimbursed a portion of those fees. **I order Lisa Phelan to pay to Suzanne Giddens the sum of \$1,000.00 as a contribution to costs.**

[10] Similarly, Mr Kini shall have a portion of the 1 September 2005 invoice rendered to him. The legal fees on that invoice are \$600.00 (for services provided between 20 July 2005 to 30 August 2005). Mr Kini shall be reimbursed a portion of those fees. **I order Lisa Phelan to pay to Andre Kini the sum of \$300.00 as a contribution to costs.**

[11] I am not advised of Ms Phelan's means or ability to pay. I am therefore unable to give any consideration for the discharge of these orders by instalment.

Leon Robinson
Member of Employment Relations Authority