

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 3A/09
5122556

BETWEEN MAC KENNETH GILCHRIST
Applicant

AND WHITE GOLD LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Wendy Gilchrist, Advocate for Applicant
Peter Zwart, Advocate for Respondent

Submissions Received: 11 February 2009 & 1 March 2009 from Applicant
25 February 2009 from Respondent

Determination: 10 March 2009

DETERMINATION OF THE AUTHORITY

[1] In a determination dated 16 January 2009 I upheld some of Mr Gilchrist's claims against her former employer and reserved the question of costs to be determined following an exchange of memoranda. I have now received these memoranda and this determination resolves the disputed question of costs.

[2] The costs claimed are a day's pay apparently lost by Mr Gilchrist in attending the investigation meeting, petrol costs of \$40.00 for attending the meeting, advocacy costs of \$6,637.50 being Mrs Gilchrist's time in pursuing the claim at \$25.00 per hour, stationery and post costs of \$20.00 and reimbursement of the lodgement fee of \$70.00.

[3] The Authority's power to award costs is set out in clause 15(1) of the 2nd schedule to the Employment Relations Act 200 which says *The Authority may order any party to a matter to pay any other party such costs and expenses (including the*

expenses of witnesses) as the Authority thinks reasonable. Although this indicates a wide discretion it must be exercised in a principled manner and not arbitrarily.

[4] In *Murphy & Routhan t/a Enzo's Pizza v van Beek* [1998] 3 ERNZ 736 the Employment Court said:

The expression "costs" primarily refers to the fees payable by a party to that party's solicitor, including disbursements incurred by the solicitor, such as for a barrister's fee or Court filing and hearing fees. Expenses of witnesses and out of pocket disbursements which the party has incurred are usually authorised by separate statutory provisions

[5] In the present case, Mr Gilchrist was not represented by a solicitor or a professional advocate charging a fee for their work. Although Mrs Gilchrist has claimed for her time at \$25.00 per hour I understand that to be a notional claim in the sense that she has not actually charged her son for her time and he has not incurred any legal obligation to pay her, contrary to the situation where a professional advocate or a solicitor is engaged. Therefore Mr Gilchrist has not incurred any costs within the meaning of that term in the Act. The claim for \$20.00 to cover stationery and post also appears to be notional.

[6] The expenses payable by a party to a witness are covered by clause 6 of the 2nd schedule which in turn refers to regulations made under the Summary Proceedings Act 1957. Clause 15 of the 2nd schedule then permits the Authority to order any party to pay another party's witness expenses. Here, Mr Gilchrist did not pay anyone anything as far as I am aware. As for Mr Gilchrist's own situation, inevitably there will be a measure of inconvenience, lost opportunity and possibly some lost remuneration suffered by litigants. Typically that is not recoverable as expenses incurred and I see no reason to depart from that approach in the present case.

[7] Mr Gilchrist did pay a lodgement fee of \$70.00 and it the usual practice of the Authority to require an unsuccessful respondent to reimburse that fee to a successful applicant. The respondent's representative does not dispute that part of the claim. Mr Gilchrist is clearly the successful party and is entitled to an order against White Gold Limited for \$70.00.

[8] In the earlier determination I ordered White Gold Limited to pay Mr Gilchrist 4.7 days pay as arrears of holiday pay and reserved leave if there was any dispute

about quantum. The payment subsequently made to Mr Gilchrist was at a daily rate of \$123.63. In her memorandum Mrs Gilchrist raises that as an unresolved matter. The payment to Mr Gilchrist should have been calculated at the daily rate applicable when the employment ended (\$132.55) since that is when the obligation to pay outstanding holiday pay arose. There is therefore a shortfall of \$41.92 (gross) plus interest at the rate earlier specified that must now be paid.

Summary

[9] White Gold Limited is to reimburse Mr Gilchrist \$70.00 to cover the lodgement fee.

[10] White Gold Limited is to pay Mr Gilchrist \$41.92 (gross) plus interest at the rate earlier specified until the arrears are paid.

Philip Cheyne
Member of the Employment Relations Authority