

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Stephanie Henry (Applicant)
AND Patrick Distribution Limited (Respondent)
REPRESENTATIVES Michael O'Brien for applicant
Sheila McCabe for respondent
MEMBER OF AUTHORITY Y S Oldfield
SUBMISSIONS 26 July 2005, 17 August 2005
DATE OF DETERMINATION 23 August 2005

DETERMINATION OF THE AUTHORITY AS TO COSTS

1. In a determination dated 30 August 2004 I disposed of a preliminary application from the respondent. In it I concluded that there was no conflict of interest in Mr O'Brien's continued representation of Ms Henry. I advised that any costs issues arising out of this preliminary determination would be dealt with at the conclusion of the entire investigation. Subsequently, in a determination dated 27 June 2005 I concluded that the applicant had not established a personal grievance and that there was nothing more I could do to assist with her employment relationship problem.
2. I invited the parties to discuss costs however they have been unable to agree and I proceed to consider the issue in relation to the entire investigation.
3. The respondent, Patrick Distribution Limited, sought a contribution to costs but did not specify what this was or give a figure for the actual costs incurred. In attached correspondence to Mr O'Brien Ms McCabe indicated that the respondent would accept the sum of \$4,000.00 as a contribution to its costs.
4. In support of the claim for costs, Ms McCabe argued, firstly, that the applicant's claim lacked merit. In particular, earnings said to be lost as a result of the alleged personal grievance were not quantified until part way through the Authority's investigation when it emerged that there had in fact been little or no loss. Ms McCabe noted that the respondent's costs included representation at three full days before the Authority and the costs of flying a witness to Auckland for the investigation (this aspect was later quantified as being in excess of \$2,000.00). She also said that the applicant unnecessarily prolonged the meeting by canvassing matters which were personal and unrelated to the employment relationship. Finally Ms McCabe noted that the applicant rejected an offer to settle (made on 6 September 2004) of \$10,000.00 plus \$1,500.00 towards costs.

5. Counsel for the applicant responded by seeking costs for his client of \$6,734.00. In making this claim Mr O'Brien points out, first, that his client was put to unnecessary expense of \$2,193.00 arising out of the preliminary matter.
6. He also notes that additional expense arose out of what he describes as fabrication of evidence. This refers to the retraction (prior to the investigation meeting) of an assertion that a particular letter was dated in early December 2003. When Mr O'Brien challenged this (based on his instructions) the respondent conceded that the letter in question was not written, or sent, until two months later. Mr O'Brien says that the additional costs associated with this totalled \$4,541.00 (including \$1,113.00 incurred in the making of an application for disclosure of the respondent's computer records in order to establish the date the letter was written.)
7. In relation to what he says was deliberate fabrication of evidence Mr O'Brien cited authority that full solicitor client costs should be awarded (*Prasad v Michael Williams & Associates Ltd, AC 12A/00, 30 May 2000, Travis J*) or that costs should lie where they fall (*Rhodes v LSS Holdings Ltd t/a The Fat Ladies Arms Tavern* unreported, CC 10/99, 19 April 1999.)
8. Mr O'Brien also argued that the respondent made other changes to its evidence, and its position, at the investigation meeting, which increased Ms Henry's costs. Regarding this argument all I will say is that it is not accepted; it is not appropriate for me to do more after having made a final determination on the substantive employment relationship problem and associated factual matters.

Determination

9. The substantive employment relationship problem could have been thoroughly canvassed, in my view, in well under two days. It took as long as it did because of the scope of the material the applicant sought to place before the Authority and the extent of the questioning conducted by Mr O'Brien, which added little of relevance to the material before the Authority. Offset against that, as Mr O'Brien in his turn has pointed out, are the costs associated with the preliminary matter and in establishing that a key document was not authentic.
10. Each of the parties has made assertions that the other has unnecessarily inflated the length of the overall investigation and the associated costs, and both are in my view correct. Taking this into consideration, and in the absence of information about the respondent's actual costs, I have decided to approach costs on the following basis.
11. Costs in relation to the preparation for the investigation and the first day and a half of the meeting will lie where they fall, any liability on the part of the applicant being offset by the costs in the preliminary matter and the matter of the wrongly dated letter. However, a contribution is required to the costs associated with the remainder of the (unnecessarily prolonged) meeting. If the investigation meeting had proceeded over a day and a half rather than three, the respondent would have been saved at least \$3,000.00. (One and a half days of professional time at \$250.00 per hour.)
12. I consider two thirds of this to be a reasonable contribution. **I order Ms Henry to pay to Patrick Distribution Ltd, as contribution to its costs, the sum of \$2,000.00.**