

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Karin Hubber (Applicant)
AND Air New Zealand Limited (Respondent)
REPRESENTATIVES Jeff Goldstein, Counsel for Applicant
Kevin Thompson, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
SUBMISSIONS RECEIVED 12 October 2006; 26 October 2006; 3 November 2006
DATE OF DETERMINATION 24 November 2006

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination issued to the parties on 25 July 2006, I found that the applicant did not have a personal grievance and reserved the issue of costs. It now falls to me to determine that issue after studying the submissions from counsel for each party.

[2] For the respondent, Mr Thompson submits that the applicable principles guiding the Authority on a matter of costs are set out in the Full Court decision in *PBO Ltd (formerly Rush Security Ltd) v. da Cruz* [2005] 1 ERNZ 808. Bearing those principles in mind, Mr Thompson submits that the investigation meeting took a full day and that the respondent needed to meet the cost of travel and accommodation for its one witness which required that witness to travel from Brisbane to Christchurch and return. The respondent accepts that it is an airline, however, submits that there is still a cost involved in providing the travel and also in the accommodation and airport taxes and charges the airline has to pay. While acknowledging that the matter was clearly of importance to both parties, the respondent makes the point that the matter before the Authority was a disadvantage grievance concerning a final warning and that any monetary outcome for the applicant, had she been successful, may have been reasonably modest. Mr Thompson submits that in all the circumstances the respondent seeks an order of \$3,000 in costs.

[3] Mr Goldstein, on behalf of his client, submitted that as the matter is subject to a challenge *de novo* before the Employment Court, the Authority ought to await the outcome of that challenge prior to determining costs. He further submits that should I wish to determine costs at this time, that I need to be aware of several submissions on behalf of the applicant.

[4] Referring the Authority to *Reid v. NZ Fire Service Commission* [1995] 2 ERNZ 38, and other more recent decisions, counsel reminds me that an award of costs is entirely discretionary. Referring to the criteria set out in *Reid* (supra), counsel directs me to consider carefully two particular criteria which are that the respondent has not provided any details of actual costs in its

submission to the Authority and that the Authority has no evidence as to the applicant's ability to pay.

[5] In relation specifically to the latter criterion, Mr Goldstein submits that the lack of information about the applicant's ability to pay is a failure in the respondent's case and must weigh heavily on the Authority's mind if I choose to exercise my discretion and order the applicant to make a monetary contribution to the respondent's costs. Counsel submits that, without the above information, the Authority cannot meaningful exercise its discretion and that any costs award can only amount to a guess as to what is fair and reasonable in the circumstances. Finally, Mr Goldstein submits that the respondent had attempted to seek a higher costs award than might be usual on the basis that its witness had to come to the investigation meeting from outside Christchurch. He submits that it would be inequitable and unfair to place these costs, whatever they were, on the applicant.

[6] On behalf of the applicant, Mr Goldstein submits that the *usual tariff* for a one day hearing where the employee is unsuccessful is in the range of \$500-\$2,000 and submits that a fair and reasonable contribution by the applicant in this matter would be \$1,000.

[7] The onus to establish the inability or constrained ability of an unsuccessful applicant to pay costs rests not with the respondent but on the applicant. I note that Mr Goldstein is not claiming his client is in stretched financial circumstances, but simply submitting that the Authority's ignorance of Ms Hubber's circumstances places a fetter on the Authority's discretion in a costs setting. I do not share that view, however, and am mindful of the principles set out in *Reid* (supra):

The purpose of the costs award is not to punish or express disapproval, rather it is to compensate a successful party put to expense.

[8] While I accept that Mr Thompson has not outlined the details of costs incurred by Air New Zealand in defending the applicant's claims, he places his submissions specifically in the context of *PBO Ltd* (supra) and accepts the *tariff* approach to costs in the Authority.

[9] Having considered the issues put to me by counsel for each party, I think it just to award the respondent the sum of \$2,000 as a contribution to its reasonably incurred costs.

Paul Montgomery
Member of Employment Relations Authority