

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Judith Hutchinson (Applicant)  
**AND** Impexpersonnel Ltd (Respondent)  
**REPRESENTATIVES** Dylan Marriott, Advocate for Applicant  
Gregory Walker, Counsel for Respondent  
**MEMBER OF AUTHORITY** Leon Robinson  
**SUBMISSIONS RECIEVED** 18 January 2006  
20 January 2006  
**DATE OF DETERMINATION** 26 January 2006

**DETERMINATION OF THE AUTHORITY AS TO COSTS**

[1] By a Determination dated 23 December 2005<sup>1</sup>, I determined that Ms Hutchinson did not have a personal grievance. The parties were unable to resolve the question of costs between them and both Counsel 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<sup>2</sup>. 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 costs<sup>3</sup>:-

*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.*

*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.*

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<sup>1</sup> AA501/05

<sup>2</sup> *Harwood and Koia -v- Attorney-General*, unreported, AC8/04, 23 February 2004, Colgan J.

<sup>3</sup> *PBO Ltd -v- Da Cruz*, unreported, AC2A/05, 9 December 2005

*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] Impex Personnel (“Impex”) now claims costs. It produces a copy of an invoice detailing its legal costs of \$5,500.00 (GST exclusive) and disbursements of \$132.05. Its counsel Mr Walker asks for full costs. He submits that the applicant refused to specify the quantum of remedies sought which operated so as to preclude meaningful discussion aimed at resolution. He says too Ms Hutchinson’s claims were without merit and predicated by an unrealistic expectation of remedies.

[5] Mr Marriott says Impex ought to have properly notified Ms Hutchinson her employment had ended on 28 February 2005. He says Ms Hutchinson’s claims were properly brought and were not frivolous and that there were meetings aimed at settlement. He submits that costs ought to be left to lie where they fall. He informs the Authority that Ms Hutchinson is presently unemployed and is residing in rental accommodation.

[6] The Investigation Meeting proceeded over one day and Impex succeeded in resisting Ms Hutchinson’s claims. It is to be regarded as the successful party and is entitled to an award of costs, but on a contribution basis rather than a full indemnity.

[7] I now assess a notional quantum of reasonable costs. I consider a multiplier of 2 should be applied to total hearing time of 6 hours to yield total professional time involved of 12 hours. I apply an hourly rate of \$250.00 for counsel to yield a notional sum of reasonable costs of \$3,000.00. Ms Hutchinson shall contribute to that sum in the amount of \$2,000.00. That sum is inclusive of disbursements. Exercising my discretion on a principled basis, **I order Judith Hutchinson to pay to Impex Personnel Limited the sum of \$2,000.00 as a contribution to costs.**

[8] It is just and equitable to have regard to Ms Hutchinson’s personal circumstances. Although the legislature saw fit to amend the *Employment Relations Act 2000* to provide for payment of remedies, arrears, penalties and compliance orders by way of instalment, there was no such express amendment in respect of orders for costs. However, I note that the Court has held its identical costs discretion to permit payment by periodic instalment<sup>4</sup>. I do so too in this instance and invite the parties themselves to reach an accommodation between them as to a mutually acceptable payment schedule to discharge the award I have made. If they cannot agree, I will revisit the matter upon a written request to do so, but in any event no later than 60 days after the date of this determination.

Leon Robinson  
**Member of Employment Relations Authority**

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<sup>4</sup> *Christin Graham -v- Airways Corporation of New Zealand Limited*, unreported, AC1/06, 12 January 2006, Colgan CJ