

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Pauline Khan (Applicant)
AND Uno Design Limited (Respondent)
REPRESENTATIVES Harry Jordaan, Counsel for Applicant
Stephen Tee, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
SUBMISSIONS RECEIVED 23 January 2006
25 January 2006
DATE OF DETERMINATION 26 January 2006

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] By a Determination dated 23 December 2005¹, I determined that Ms Khan was not an employee and was not entitled to recover arrears of wages. 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 it². 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 costs³:-

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 AA501/05

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

³ *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] Uno Design Limited ("Uno") now claims costs. It produces an invoice showing GST exclusive costs of \$5,250.00. Its counsel submits an award in the higher proportion of 70% of actual costs is required.

[5] Mr Jordaan for Ms Khan, notes that the Authority's essential substantive finding was not argued by Uno and that the costs now sought are excessive and outside the range conventionally awarded. Counsel concludes that it would be reasonable and just to make no award of costs.

[6] The Investigation Meeting proceeded over one day and Uno succeeded in resisting Ms Khan's claims.

[7] I had earlier found that in August 2003 Ms Khan made request for shares to be transferred to her. She had met her end of the bargain she had reached with Ms Haines and Ms Greenwood. The shares she was entitled to were not transferred to her when they should have been.

[8] It weighs significantly with me that Ms Khan provided her labour to Uno for a year unremunerated. Uno received the fruits of her labour without charge. In those circumstances, and in equity and good conscience, I consider it right that costs ought to be left to lie where they fall.

[9] Exercising my discretion on a principled basis, **I order that neither party shall have costs against the other.**

Leon Robinson
Member of Employment Relations Authority