

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 51A/10  
5165205

BETWEEN

STEVEN JOHN PHILLIPS  
First Applicant

DEAN GEORGE PHILLIPS  
Second Applicant

AND

CRITERION GROUP  
LIMITED  
Respondent

Member of Authority: Alastair Dumbleton

Costs Submissions 22 February and 8 March 2010  
Received

Determination: 3 August 2010

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] Following the determination of the Authority issued on 8 February 2010 under AA51/10, costs were reserved. As directed, through their representatives the parties tried to settle that question themselves but could not. Submissions were then filed by counsel and advocate.

[2] The claim of both applicants investigated and determined by the Authority was that they had each agreed to enter into an employment relationship with the respondent Criterion Group Limited, but that shortly afterwards the company had disclaimed such agreement.

[3] The Phillips' application was a claim to recover \$300,000 each in total, comprising salary for a two year period, compensation for the loss of a share of profits

in their former business the Phillips claimed they had agreed to become re-employed in, and compensation for hurt feelings, humiliation and distress.

[4] The determination that followed the investigation meeting held by the Authority was confined to the issue of whether Criterion Group Limited had entered into an employment agreement with either or both of the Phillips. The Authority found that no agreement had been reached.

[5] In submissions made in support of its application for costs by Criterion Group Limited, counsel Mr Upton referred to the legal principles usually to be applied, as set out in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. The judgment notes a general trend of the Authority to award costs in the range of \$2,500 to \$3,000 for a one day hearing. Counsel has noted some advance on that in more recent determinations, to an average daily award in the range between \$3,000 and \$3,500.

[6] The company claims to recover \$3,000 costs from the applicants, to be paid either jointly and severally. Actual costs are stated to have exceeded \$7,500 excluding GST, an amount submitted as reasonable in the circumstances for a one day investigation meeting. That amount is also said to make appropriate allowance for financial hardship accepted as having been suffered by one or both applicants following the problems that beset their business.

[7] In reply Mr Courtney, advocate for the applicants, submits that the claim for costs is at the upper end of the scale and that both Phillips have suffered severe financial difficulties since the business went into receivership. He submits that the parties should be held responsible for meeting their own costs, or that if an award is made it should be at the lower end of the scale.

[8] The respondent company in effect faced two claims, either or both of which could possibly have succeeded. Preparation therefore required careful assessment of the factual material available in respect of the dealings between the Smailles and both the Phillips on the occasions it was alleged there had been entry into an employment relationship.

[9] The Authority has a discretion whether to award costs, and also as to the amount. In this case I do not consider it would be a just outcome for Criterion Group Limited to have to bear all of its costs.

[10] The claim of the Phillips was based on little more than a hope or a wish that they would become engaged in some capacity by some entity that would utilise their skill and knowledge in operating their former business for new owners. While as a matter of policy access to the Authority has been left unrestricted and readily available to parties, they must always bear some responsibility for making realistic assessments of their chances of success before committing other parties to an investigation. A long hard look by the Phillips before bringing the claim should have resulted in them realising the improbability that both would be found to have been employed following the informal discussions with the Smaills and on the terms they argued had been agreed.

[11] I consider therefore that Criterion Group Limited is entitled to a reasonable contribution to its costs incurred in respect of the claims brought jointly by the Phillips.

[12] In respect of a single applicant \$1,400 is a reasonable contribution and also allows some discount for the financial circumstances of one of the Phillips.

[13] As there were two claims, I award in total \$2,800 which is to be paid jointly or severally by Steven Phillips and Dean Phillips to Criterion Group Limited.

[14] This costs order is made pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

