

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Gemma Russell (Applicant)
AND KB's Bakery Ltd (Respondent)
REPRESENTATIVES Peter Macdonald, Advocate for Applicant
Jeff Goldstein, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
SUBMISSIONS RECEIVED 23 June 2005
30 June 2005
DATE OF DETERMINATION 14 July 2005

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 19 April 2005, the Authority determined the issue between these parties by dismissing Ms Russell's application in its entirety.

[2] Costs were reserved and the parties have now asked the Authority to decide them after a period of negotiation on the issue has been unsuccessful.

The claim for costs

[3] KB's Bakery Ltd seeks an order for full costs being the figure of \$8,600 plus GST. This amount is made up of a fee of \$6,000 plus GST for the respondent's counsel and a further fee of \$2,600 plus GST being the costs incurred by the respondent in conducting an investigation into the issues raised by Ms Russell.

[4] For her part, Ms Russell, through her representative, invites me to take notice of the fact that she is a young person with limited means and that by virtue of the fact that she is presently undertaking a training course is presumably not in full time employment.

[5] Further, I am invited to fix costs in the parameters that it is said the parties have negotiated around, namely between the figures of \$1,500 and \$2,500.

The principles

[6] The principles that govern the awarding of costs in the employment jurisdiction have been usefully summarised in the Employment Court judgment of *Reid v NZ Fire Service Commission* [1995] 2 ERNZ 38.

[7] In a number of recent decisions, notably *Harwood v Next Homes Ltd*, unrep AC 70/03, 19 December 2003, Travis J and *Graham and Airways Corporation of NZ Ltd*, unrep AA 39/04, 28 January 2004, Member Dumbleton, the average award of costs in the Authority is discussed.

[8] A further group of decisions including *Wilson and Grey Power Publishing Co Ltd*, unrep AA 58/03, 4 March 2003, Member Dumbleton has held that awards of costs in the Authority are modest, consistent with the Authority's investigative mode. Certainly it is clear that the rules as to costs which are commonly applied in traditional trial litigation do not marry well to the investigative approach of the Authority and the objects of the Authority's governing statute.

[9] In order to reach a conclusion on a costs matter, the Authority needs to consider the foregoing principles and in particular note:

- a. The need to consider the reasonableness of any costs sought;
- b. The general rule that costs should follow the event;
- c. The fact that costs are discretionary;
- d. That average awards of costs for a one day investigation meeting will be between \$1000 and \$1500.

Determination

[10] This matter was dealt with in an investigation meeting of a day and a half. The respondent asks me to reflect on the fact that in its view, Ms Russell's application had no merit and therefore she should pay all of the respondent's costs in meeting her claim. I am not minded to do that. Ms Russell has an entitlement to bring a claim and the fact that that claim has proved to be unsuccessful is not a matter that I would want to revisit on a young and inexperienced person by way of punishing them in costs. There is very clear authority for the view that unsuccessful litigants should not be punished in costs and I do not propose to adopt that stance here.

[11] However, the fact is that Ms Russell was unsuccessful and the matter took a day and a half to be dealt with and required experienced counsel to prepare and deal with the matter. Fees charged in that regard are in my opinion quite reasonable but their reasonableness does not require me to insist that Ms Russell reimburse them in full.

[12] In all the circumstances, given the relative youth and inexperience of the applicant and the length of time of the investigation meeting, I think a reasonable contribution to the respondent's costs is \$2,250.

[13] I order Ms Russell to make arrangements to pay the \$2,250 to KB's Bakery Ltd as a contribution to their costs.

James Crichton
Member of Employment Relations Authority