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Smith v Pacific Optics Limited [2011] NZERA 127; [2011] NZERA Christchurch 25 (8 February 2011)

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Smith v Pacific Optics Limited [2011] NZERA 127 (8 February 2011); [2011] NZERA Christchurch 25

Last Updated: 9 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

[2011] NZERA Christchurch 25
5290028

BETWEEN GEOFF SMITH

Applicant

AND PACIFIC OPTICS LTD

Respondent

Member of Authority: Representatives:

Submissions received:

Philip Cheyne

David Beck, Counsel for Applicant

Francis Reade, Representative for Respondent

27 January 2011 from Applicant 7 February 2011 from Respondent

Determination:

Tuesday 8 February 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 17 December 2010 I partly upheld Mr Smith's personal grievance claims and awarded him compensation for distress. Costs were reserved for any claim to be made *within 28 days* by lodging and serving a memorandum, with the other party having a further 14 days to lodge and serve a reply.

[2] On 31 January 2011 the Authority received a memorandum from counsel for Mr Smith setting out the basis of a claim for costs. Mr Reade for the company then responded on 7 February 2011. A point made for the company is that Mr Smith's application was made after the time allowed in the original determination for any costs application. I will briefly explain the sequence of events as apparent from the materials provided to the Authority.

[3] As noted the determination issued on 17 December 2010. The 28th day thereafter was 14 January 2010. On 24 January 2011 counsel sent an email to Mr

Reade alerting him to Mr Smith's intention to claim costs unless the company agreed to a proposal by noon on 28 January 2011. Mr Reade responded just before the deadline on 28 January 2011 by pointing out that the time for any application to the Authority had elapsed but nonetheless making an offer of a modest sum. Counsel's letter and submissions both dated 27 January 2011 were received in the Authority by post on 31 January 2011.

[4] In *Metallic Sweeping (1998) Ltd v Whitehead* [2010] NZEMPC 23 at [26] the Employment Court saw a similarity between the current position (an application for costs being made after the expiry of the stipulated date) and that of the statutory time limit for filing a challenge in the Court. Once the time has elapsed, a party otherwise at risk of challenge is entitled to assume the matter is at an end and take steps accordingly. In that case the Court upheld the Authority's determination not to allow an extension of time for a costs application.

[5] Here, I am told that Mr Reade advised his board of directors, some days before receiving the email dated 24 January 2011, that the litigation was concluded. In his response on 28 January 2011 Mr Reade describes the belated claim for costs as *somewhat surprising and embarrassing*, no doubt referring to himself given his advice to his board. Further, in his submissions to the Authority Mr Reade says *In the interest of closure and "getting on with things" we were of the opinion to accept the Authority's determination and trust that this will not be hindered by costs on top of this*. Pacific Optics let its right of challenge expire at least partly because its liability under the earlier determination (\$2,500.00) was a relatively small sum which it appeared would not be inflated by a costs claim. If Pacific Optics is exposed to an award of costs in accordance with the usual principles, it might come to a different view about the original determination without now having a right of challenge. That unfairness or prejudice could be avoided by declining to make an award of costs in favour of Mr Smith.

[6] Ordinarily, the Authority would expect an explanation for the failure to meet a timetable. For example, in the *Metallic Sweeping* case before the Authority, the application out of time properly included an explanation (counsel's oversight). Here, despite Mr Reade squarely putting the matter in issue, no explanation has been given to the Authority by or for the applicant. The delay here is relatively short but, in light of the absence of any explanation and the potential unfairness to Pacific Optics, I conclude that there should be no award of costs in favour of Mr Smith.

Philip Cheyne

Member of the Employment Relations Authority

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