

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Bernard Spink (applicant)

AND APN New Zealand Ltd (respondent)

REPRESENTATIVES Tony Wilton for the applicant
Susan Hornsby-Geluk for the respondent

MEMBER OF AUTHORITY Denis Asher

SUBMISSIONS RECEIVED by 19 February 2007

DATE OF DETERMINATION 20 February 2007

COSTS DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In my substantive determination dated 13 September 2006 (WA 122/06) I found against Mr Spink's claims that he was entitled to redundancy compensation and compensation for unjustified disadvantage.
2. Costs were reserved.

Respondent's Position

3. In its 5 February 2007 submission the Company's counsel, Ms Susan Hornsby-Geluk, says amongst other things that Mr Spink put it to considerable expense by the way in which he

pursued these proceedings, in particular by raising a second grievance a month prior to the hearing, and that his original claim was misconceived and should never have been brought.

4. The delay in pursuing costs occurred because of the applicant subsequently filing a second grievance against the respondent claiming unjustified dismissal. Mr Spink had advised the Company he would seek to pursue this second matter at the time of the Authority's determination into his first employment relationship problem. The Company expected to participate in mediation in respect of the claimed unjustified dismissal wherein it believed it would be sensible to address all outstanding issues, including the matter of costs. Mediation took place in December 2006: resolution was not achieved. The Company has therefore not been inactive.
5. Total costs are in excess of \$15,000 plus GST plus disbursements of \$155 (being travel costs for counsel). A contribution to its costs of \$5,000 plus GST is sought plus disbursements.

Applicant's Position

6. Counsel for the applicant, Mr Tony Wilton, rejects the claim the parties have been unable to reach agreement in relation to costs and says there has been no communication between them on this topic since the issuing of the determination five months ago. Where costs are reserved a successful party has a duty to pursue the matter promptly and diligently: *Sidebotham v Capital Coast Health*, unreported, WEC 36/95, Goddard CJ, 31 May 1995. A failure to do so in this case argues strongly, in equity and good conscience, for costs to lie where they fall.
7. In the alternative, the principles for awards of costs in the Authority are well known: *PBO Limited (formerly Rush Security Limited) v Eneida Leonor Christo Da Cruz*, [2005] 1 ERNZ 808. While the Authority found against Mr Spink in respect of his redundancy claim, the other matter under investigation was resolved by the Company – properly and inevitably – agreeing during the hearing to pay the arrears claimed by the applicant. Because both parties achieved a measure of success any costs award to the Company should be at the lower end of the scale for a one day investigation.
8. No award should be made for counsel's travel costs. While a party is free to choose its representative the other should not be required to subsidise the costs of an out of town representative: *Wolfenden v NZ Film & Television School Ltd* [1999] 2 ERNZ 21, 36.

Costs Decision

9. While noting the parties' conflicting accounts of whether or not they have spoken to one another in respect of the matter I am satisfied that, as the matter is now with the Authority, it is appropriate for me to proceed and determine the parties' costs issues.
10. I see no reason in this case to depart from the well-established principle that costs should follow the event: *Harwood v Next Homes Ltd*, unreported, 19 December 2003, Travis J, AC 70/03. I also reach this conclusion having regard to the principles set out in *PBO* (above).
11. I do not accept the claim that the way Mr Spink contributed to these proceedings put the Company to unnecessary or additional costs.
12. I also do not accept that Mr Spink has been disadvantaged by the time taken by the Company to seek costs. This is because no evidence has been adduced of any disadvantage resulting to the applicant.
13. For the reason advanced on behalf of Mr Spink, I do not accept he should bear the cost of engaging out of town counsel.
14. But for the Company's concession during the investigation it should restore to the applicant the monies deducted from his wages, and pay him a modest interest payment on the same, the respondent would have received a more significant costs award. Therefore, having prevailed in respect of the main issue brought by Mr Spink, I am satisfied the Company should receive, as a fair and reasonable contribution to its costs, the sum of \$1,000 plus GST. I reach this decision for the reasons set out above and because, notwithstanding the Company's claim, only a modest investigation was required to determine what proved to be a straightforward and uncomplicated matter between the parties.

Decision

15. Mr Spink is to pay to the Company, as a contribution to its fair and reasonable costs, the sum of \$1,000 (one thousand).

Denis Asher

Member of Employment Relations Authority