

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 130/10  
5286619

BETWEEN                      JAMES SWAN  
   Applicant

AND                              GPK GROUP LIMITED  
   Respondent

Member of Authority:      Robin Arthur

Representatives:           Applicant in person  
   John Ropati for Respondent

Submissions received:     10 March 2010 from Respondent  
   20 March 2010 from Applicant

Determination:              22 March 2010

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]      GPK Group Limited (GPK) seeks an order for an award of \$2000 as a reasonable contribution to its actual legal expenses of \$3500 in replying to a personal grievance application by James Swan. The application was withdrawn on the morning of a mediation meeting arranged at the direction of the Authority.

[2]      GPK submits an order for costs should "*follow the event*" of Mr Swan withdrawing his application.

[3]      In this case, exercising the Authority's discretion under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act), I decline to make an order for costs.

[4]      The Authority made a direction to mediation on 10 December 2009. This

followed Mr Swan lodging his grievance application on 11 November 2009. He claimed his resignation in February 2008 was really a constructive dismissal, meaning that his resignation was not freely made but resulted from GPK breaching duties to him. He also alleged money due to him was unlawfully deducted from his final pay.

[5] GPK's reply noted leave was required for Mr Swan to raise his grievance as he had not done so within the required statutory period of 90 days. It also alleged the grievance was motivated by other interests of Mr Swan's representative at that time, Maryjane Walker. Ms Walker was the director of a recruitment company pursuing GPK in the Disputes Tribunal over whether a placement fee was still owed for recruitment of Mr Swan.

[6] The Authority's direction to mediation noted that the dispute over the placement fee was not a matter in its jurisdiction. The direction was made under s159 of the Act and related to the issues of the statutory period to raise a grievance and whether leave might be granted for exceptional circumstances under s114(3) and 115 of the Act.

[7] After considerable efforts by the Mediation Service, dealing with difficulties in availability of the parties and their representatives, a mediation date was scheduled for the morning of 1 March 2010.

[8] Ms Walker advised GPK's solicitor that morning that Mr Swan was not attending the mediation. She subsequently withdrew the application on his behalf and shortly afterwards advised the Authority that she no longer acted for him.

[9] Mr Swan prepared his own submissions on costs with some guidance from a solicitor at the Mangere Community Law Centre. He complains of difficulties with Ms Walker regarding notice of the mediation and information about what was required to pursue his grievance. There is also some medical evidence that he was quite unwell at this time due to depression.

[10] Against that background I do not think an order for costs against Mr Swan is appropriate for the following reasons:

- (i) The Act promotes mediation as the primary mechanism for solving problems. In this case the direction to mediation ultimately resulted in Mr Swan resolving not to proceed with his claim. GPK was subsequently spared the costs of preparing for and participating in an investigation in the Authority.
- (ii) While GPK understandably feels aggrieved about the cost of addressing a grievance raised outside the statutory period, the legislation allows for that in certain circumstances where leave is sought and granted. The risk of having to respond to such an application is an incidence and cost of being in business and employing staff.
- (iii) Mr Swan says that he had expressed a desire to limit his claim to recovery of holiday pay he considered was wrongly deducted from his final pay. Such a claim was not out of time (s142 of the Act) and there was a real question for investigation and determination as to whether GPK was entitled to make the deduction from his final pay for the reason it gave. However it is clear from Mr Swan's submission on costs and correspondence on the Authority file that Ms Walker had also encouraged him to pursue a personal grievance. A successful grievance would have supported her own case for GPK to pay the disputed placement fee to her company. I cannot discount the inference that Mr Swan lacked the benefit of independent advice and representation in lodging the grievance which he then abandoned before the mediation.

[11] Given the nature of the case, costs are to lie where they fall.<sup>1</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>1</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 820 (EC).