

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Jamie Tapp (Applicant)
AND Mighty Mix Dog Food Ltd (Respondent)
REPRESENTATIVES Brent Climo, Advocate for Applicant
Brian A Fletcher, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 18 April 2005
DATE OF DETERMINATION 22 June 2005

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

- [1] By determination dated 27 April 2005, the Authority resolved the employment relationship problem between these parties by determining to dismiss Mr Tapp's application in its entirety.
- [2] Costs were reserved but the Authority expressed the view that costs should lie where they fell.

The claims for costs

- [3] Mighty Mix Dog Food Ltd, the successful party, seeks a contribution to the costs it incurred which it identifies as a total of \$3,101.11 inclusive of GST and disbursements of \$74.86.
- [4] Mighty Mix submits that the principle of costs lying where they fall is only applicable where both parties have acted reasonably and in the instant case, Mighty Mix allege that Mr Tapp's actions were unreasonable because his claim was without merit.
- [5] For his part, and not surprisingly, Mr Tapp seeks to have costs lying where they fall and denies his proceedings were without merit.

Was there a calderbank letter?

- [6] The respondent's submissions refer to a without prejudice offer made to the applicant on 24 June 2004 but that offer is not expressed to be a *calderbank letter* and presumably were it so, the respondent would have made that clear.
- [7] In his submissions as to costs, Mr Tapp objects to the reference to the without prejudice communication. Presumably, Mr Tapp's objection supports my conclusion that the 24 June offer was not a calderbank letter. Mr Tapp's submissions refer to the distinction between a calderbank letter and other without prejudice communications.

[8] Accordingly, the conclusion I reach is that the 24 June letter is not a calderbank letter and thus has no impact on the quantum of any costs order. Presumably it is referred to in Mighty Mix's submissions to support their contention that Mighty Mix behaved properly and that Mr Tapp was ill-advised in turning down that proposal.

The principles

[9] 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.

[10] 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.

[11] 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.

[12] 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

[13] This was a matter which was dealt with in a short investigation meeting of two hours so a contribution to costs of the order of a half day would, in principle, be appropriate.

[14] In all the circumstances, given the relative youth and inexperience of the applicant and the significantly greater resources of the respondent, I award the sum of \$650 as a contribution to the respondent's costs and direct that the applicant make arrangements to pay that sum to the respondent.

James Crichton
Member of Employment Relations Authority