

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Hemi Timu (Applicant)
AND Waitamata District Health Board (Respondent)
REPRESENTATIVES Paul Pa'u, Counsel for Applicant
Anthony Russell, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
SUBMISSIONS RECEIVED 7 October 2005
DATE OF DETERMINATION 25 November 2005

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 15 September 2005 the Authority resolved the employment relationship problem between these parties by determining to dismiss Mr Timu's application in its entirety.

[2] Costs were reserved by the Authority and the parties have tried unsuccessfully to resolve matters between them.

The claim for costs

[3] Waitemata District Health Board the successful party seeks a significant contribution to its costs which total approximately \$21,000. The Board seeks a contribution of \$9,000 to those costs which include investigative costs as well as legal costs.

[4] Mr Timu has not filed any submissions in relation to the matter of costs.

The principles

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

[6] In a number of recent decisions, notably *Harwood v. Next Homes Limited* (unreported AC70/03, 19 December 2003) Travis J and *Graham v. Airways Corporation of NZ Ltd*, (unreported AA39/04, 28 January 2004), Member Dumbleton, the average award of costs in the Authority is discussed.

[7] A further group of decisions including *Wilson v. Greypower Publishing Co. Ltd*, (unreported AA58/03, 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 trial litigation do not marry well to the investigative approach of the Authority.

[8] Accordingly in deciding a costs matter, the Authority needs to consider:

- (a) the reasonableness of any costs sought;
- (b) the general rule that costs follow the event;
- (c) the fact that costs are discretionary;
- (d) the commonly advanced view that average awards of costs for a one day investigation meeting in the Authority will be between \$1,000 - \$1,500;
- (e) the question whether any particular aspects of the way the case was conducted by the unsuccessful party impacted on the costs borne by the successful party.

The conduct of the matter

[9] Counsel for the respondent Board argues that Mr Timu unnecessarily prolonged the hearing, was guilty of delay in a number of significant respects and in particular made a very late application to have the hearing adjourned in order that his then counsel could give evidence on his behalf.

[10] In addition, there are arguments from the respondent Board about the hearing itself being unnecessarily prolonged because of the applicant's determination to challenge every issue and pursue matters which had not been previously flagged in the proceedings.

[11] The respondent Board says that the way in which the matter was progressed by the applicant was such as to put it to additional cost and expense.

[12] In the normal course of events I would have been minded to make a cost award of \$3,000 in favour of the respondent Board representing the higher limit of the average daily cost awarded by the Authority but in this particular circumstance, I do accept the argument advanced by the respondent that the applicant conducted matters in such a way as to put the respondent to additional cost and expense.

[13] I am particularly motivated in this regard by the last minute adjournment granted to the applicant by my colleague Member Oldfield and her observation in her minute of 31 May 2005 leaving it open to the respondent to pursue costs arising out of the adjournment.

[14] There is no question that the respondent suffered costs additional to those that would normally be occasioned, as a consequence of the last minute adjournment.

[15] Accordingly, I direct that the applicant pay to the respondent a contribution to the respondent's costs in the sum of \$5,000.

James Crichton
Member of Employment Relations Authority