Determination Number: CA 24/05
File Number: CEA 241/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Barney Taiapa (Applicant)
AND	Arai-Te-Uru Whare Hauora (Respondent)
REPRESENTATIVES	Susie Yeats, Counsel for Applicant Rhonda Tokona, Counsel for Respondent
MEMBER OF AUTHORITY	Paul Montgomery
SUBMISSIONS RECEIVED	22 October 2004 26 October 2004
DATE OF DETERMINATION	24 February 2005

COST DETERMINATION OF THE AUTHORITY

[1] The Employment Relations Authority registry in Christchurch received Mr Taiapa's personal grievance application on 9 July 2004 when counsel on his behalf lodged a statement of problem with the Authority. In response Ms Tokona lodged a statement in reply on 2 August 2004. The applicant in his statement of problem claimed that he was unjustifiably dismissed.

[2] The matter was set down for an investigation meeting in Dunedin however, prior to that investigation taking place the parties settled the matter between themselves. They are to be commended in achieving a resolution without the intervention of the Authority.

[3] On 22 October 2004 Ms Tokona on behalf of the respondent lodged an application for costs incurred in preparing to defend the allegations of the application. The grounds for the application in summary were:

1. *The Applicant/Taiapa took a personal grievance for an unjustified dismissal based on facts that were misconceived and entirely without merit;* and

2. *The Applicant was offered a settlement package that could have disposed of the matter but the Applicant rejected the settlement and persisted with his unmeritorious and vexatious claim;* and

3. *The Applicant's Representatives took matters in to their own hands and outside of the disciplinary process, began a malicious campaign of public besmirching of the employer's reputation.*

[4] In support of her clients claim counsel for the respondent referred the Authority to *Sheilling Laboratories Ltd v Smith*, unreported, AEC 48/95 citing the following passage;

> *…ordinarily speaking, a case which has been prepared for hearing but has not been heard is not likely to attract anywhere near as much in the way of costs as a case that has gone to a full hearing and involved the use of the skills of counsel 'on their feet' and hectic preparation on the evening of each day of hearing and on the following morning. Nevertheless, substantial costs can be incurred in pretrial preparation alone.*

[5] Further in support in the respondent's claim for costs counsel cited *Reid v NZ Fire Service Commission* [1995] 2 ERNZ 38, at 46, where Chief Judge Goddard remarked;

> *Where the losing party has brought an unmeritorious claim, and has persisted in it after clear warnings given sufficiently in advance that its further prosecution could involve the opposite partying great additional expense for which the losing party could be called to account, then that party may well be saddled with the financial consequences. A party so acting may legitimately be regarded as having caused costs to be occasioned unnecessarily and may be required to bear a higher proportion, that in the absence of a fair warning, of the costs incurred since the warning was given and a reasonable time has passed in which to act more prudently and conscientiously upon it.*

[6] In opposing the respondent's application for costs counsel for the applicant submitted that costs should lie where they fall contending that the grievance was not without merit and denied that her client personally was responsible for any public besmirching of the respondent's reputation as an organisation.

[7] Ms Yeats questions the level of full solicitor client costs in the sum of $8,830.25 claiming that it is difficult to determine from the respondent's submission what those costs actually were. Counsel observes that the matter did not proceed to a hearing, the applicant instructing her to withdraw on 13 September 2004.

[8] In respect of mediation Ms Yeats contends that costs incurred in mediation are generally not awarded and goes on to explain that mediation was undertaken by both parties with a mutually agreed mediator not employed by the Department of Labour's mediation Service. She contends that an arrangement was made to share the cost of this mediation equally, that is for the applicant and respondent to pay half the accommodation costs, airfares and services of that mediator.

Determination

[9] I have read and considered the submissions of counsel and have looked at the overall fairness of the matter in the context of the cited cases. In the light of the failure of the respondent to pay its agreed half share (namely $1,300.00) relating to mediation costs – the total of $2,600.00 being paid by the applicant to avoid embarrassment to the respondent and affront to the mediator I am not prepared to have costs lie where they fall, but am mindful of the applicant's financial position.

[10] I award the respondent the sum of $500.00.

[11] In the event that the respondent has not yet met its undertaking to pay the applicant $1,300.00 referred to above, I order the respondent to pay the applicant the sum of $800.00 without deduction within 14 days of the date of issue of this determination.

[12] If the $1,300.00 has been repaid to the applicant at the time of issue of this determination the applicant is ordered to pay the respondent the sum of $500.00 within 14 days of the date of issue of this determination.

Paul Montgomery
Member of Employment Relations Authority