

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Shannon Tindal (Applicant)
AND Elders New Zealand Ltd (Respondent)
REPRESENTATIVES David Feist, Advocate for Applicant
James Gibson, Counsel for Respondent
MEMBER OF AUTHORITY Ken Anderson
SUBMISSIONS RECEIVED For the Respondent – 9 May 2005
For the Applicant – 26 May 2005
DATE OF DETERMINATION 25 July 2005

DETERMINATION OF THE AUTHORITY AS TO COSTS

- [1] The substantive matter, an alleged personal grievance, was determined on 4 March 2005. The Applicant was unsuccessful with her claims. The parties were invited to resolve the matter of costs but have not been able to do so. I have now perused the respective costs submissions.
- [2] The submissions for the Respondent are that total costs of \$15,591.41 have been incurred and an award of \$6,700 is sought.
- [3] The Respondent points to an economic imbalance in that the Applicant was represented by Employment Disputes Services, an organisation that advertises representation on a “no win – no charge” basis. The point being, that the Applicant was in a position where she could make any allegation she wished against her employer and if unsuccessful with her case, she was only likely to incur nominal, if any expenses. Essentially, it is submitted for the Respondent that an award of costs should go some way to deterring would-be grievants from bringing unmeritorious cases.
- [4] It is submitted for the Applicant that currently she is only engaged in temporary work but no evidence as to her financial position has been presented. The submissions for the Applicant also include a rather novel proposition. That is, that her claims were not unmeritorious - there was simply an imbalance in the weight of the evidence against her.
- [5] However, Mr Feist is on sounder ground when he refers to the findings of the Employment Court in *The Order of St John Midland Trust Board v Greig AC 48/04, unreported, Colgan J, 20 August 2004*, where the issue of contingency fees was addressed. Colgan J held that:

“Awards of costs are to compensate a successful party having expended money to achieve that success. Awards for costs are not made to punish an unsuccessful party for having elected a

particular form of representation in circumstances where such party may have few or no other choices.

The real question is to determine a reasonable contribution to the reasonable costs of a successful party: the nature and extent of an unsuccessful litigant's costs should have no bearing on this question."

- [6] While I accept that the Respondent may be justified in feeling some aggravation in that they have incurred costs unreasonably, whereby the Applicant has probably incurred little, if any expense, an award of costs by the Authority can not be punitive in nature or take into account the nature of the representation involved.
- [7] The fairest way to assess reasonable costs is as follows. The investigation meeting took less than a day, but allowing for 8 hours and using a multiplier of 2 for preparation – that is 16 hours. Using a reasonable hourly rate of \$250 a sum of \$4,000 is arrived at. Applying the generally recognised two thirds "rule of thumb" produces a round sum of \$2,666, as being a reasonable contribution to the costs incurred by the Respondent. I also take into account that the arguments advanced for the Applicant had little or no merit and no evidence has been produced as to why a reasonable costs award should not be made.

Determination

- [8] Ms Tindal is ordered to pay to Elders New Zealand Limited the sum of \$2,666.00.

Ken Anderson
Member
Employment Relations Authority