

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Warren Gregory Tobin (Applicant)

**AND** Stayinfront Inc. (First Respondent)  
**AND** Great Elk Company Inc. (Second Respondent)  
**AND** Stayinfront (Asia Pacific) Limited formerly The Great Elk  
Company Limited (Third Respondent)  
**AND** Splashnet Inc. (Fourth Respondent)

**REPRESENTATIVES** Matt Young, Advocate for the Applicant  
Rob Towner, Counsel for the Respondents

**MEMBER OF AUTHORITY** R A Monaghan

**MEMORANDA RECEIVED** 16 September and 4 October 2005

**DATE OF DETERMINATION** 25 October 2005

**DETERMINATION OF THE AUTHORITY ON COSTS**

[1] In a determination dated 18 August 2005 in the above matter, I found the parties had reached an agreement in settlement of employment-related issues between them, so that Mr Tobin could not proceed with personal grievances he now wishes to have heard.

[2] Costs were reserved and the parties have filed memoranda.

[3] Mr Towner, for the respondents (to whom I will continue to refer as 'Stayinfront'), seeks an award of costs on a full solicitor/client basis, or alternatively that a contribution of two thirds of the actual costs should be awarded. In support he pointed to: the extensive nature of the negotiations for the settlement in question and the explicit terms of its release; the fact that it was two years before any attempt was made to pursue a grievance; the failure to mention the existence of the settlement in the statement of problem, with any possible misunderstanding of the matter being removed once the statement in reply had been filed; the extent of the remedies sought in association with the grievance; and the Authority's having found in the respondent's favour. Overall, Mr Towner said the application was frivolous and vexatious and should never have been made.

[4] In **Postles v Airways Corporation of New Zealand Limited (No 2)** (17 June 2002, WC 7A/02) Judge Shaw listed some of the authorities on full indemnity costs, then said that in considering the issues the Court should have regard to: the nature of the allegations made; whether on an objective view the proceedings were without foundation; and the means of the parties (at [6]). In **Binnie v Pacific Health Ltd** [2002] 1 ERNZ 438 the Court of Appeal said the approach to full indemnity costs should not be limited to cases where the losing party's case was wholly lacking in merit and its pursuit was reprehensible, although the existence of those criteria would create a strong case for full indemnity costs.

[5] Here Stayinfront has good reason in principle to seek full solicitor and client costs. I have not been able to see any merit in a claim that began by seeking to ignore the existence of the settlement agreement, then raised an argument based on s 238 of the Employment Relations Act 2000 which I would say was without foundation, then belatedly sought to introduce further reasons why a grievance should proceed which have also proved to be unmeritorious.

[6] At the same time, the amount of costs sought is very high - \$136,035 comprising Bell Gully's costs of \$77,225 and Stayinfront's US attorney's costs of \$58,810 (NZD). Further to the latter I understand Stayinfront's evidence was either prepared or worked on in the US, and there was also work done to obtain copies of part of the transcript of the depositions referred to in the substantive determination.

[7] In reply, Mr Young referred to the levels of costs usually awarded in the Authority and said that while costs should follow the event, they should be reasonable. I understood him to be suggesting that a contribution of \$1-3,000 would be reasonable. He also says that the conduct of the parties is relevant. That is true, but I doubt whether its scope extends to conduct such as the legal action I am told has been commenced in the US against Mr Young and his employer in respect of the bringing of Mr Tobin's claim in the Authority. I saw nothing in appropriate in Stayinfront's conduct of the matter before the Authority.

[8] Mr Young says further that the substantive application was not frivolous and vexatious, rather it was made after careful review of the authorities and law and only after obtaining an independent legal opinion. He says it is a test case.

[9] Unfortunately I could find no echo of a legal opinion in the way the matter was argued. That is no reflection on the opinion itself as I know nothing of what the author was asked to address or of the contents of the opinion, rather the comment relates directly to what was put before the Authority.

[10] As for whether the matter was a test case, the Employment Court has said this about test cases:

"In a sense every case which is novel, and this was such a case, can be described as a test case. In another sense of the term, a test case is a case of a kind which frequently comes before this Court and which, although decided as between two parties and perhaps in respect of a cause of action which is only a sample, is agreed or intended to affect not only those parties in respect of the sample cause of action but also those parties in respect of other similar occurrences and, in comparable circumstances, other parties bound by the same instruments. Another example of a test case is a case concerning the practice or procedure of this Court or some generalised ruling on a subject matter involving or affecting many parties."

**NZ Labourers & Ors v Fletcher Challenge Limited & Ors** [1990] 1 NZILR 557, 570.

[11] The nature of the 'test case' here was not specified, but I think the intended reference was to the application of s 238 to personal grievance settlements. The argument has not been raised before in the way it was here, but there is a reason for that. The reason will be apparent from my treatment of the argument in the substantive determination. The matter has been so free from doubt that I do not accept Mr Young's attempt to cast doubt on it is capable of turning it into a test case for the purpose of assessing costs.

[12] Mr Young did not say anything about Mr Tobin's financial position. He should have, especially because of the amount Stayinfront is seeking. Ability to pay is a relevant consideration. What I do know is that Mr Tobin has the means of securing an income of some sort, as the Authority was told he was overseas on business on several occasions when it sought input from him or on his behalf during the course of this investigation. One such absence even led to an investigation meeting being rescheduled because of his unavailability.

[13] Mr Tobin obviously wants very much to have his day in court. However he cannot ignore established legal principles in order to achieve that. He must take the consequences of the fact that he agreed to a settlement and is now bound by it. The unwillingness to accept this has led to unnecessary cost, which continues to escalate.

[14] Overall I assess an appropriate costs award with reference to the weakness of Mr Tobin's argument, warnings from counsel and less directly from the Authority that such was the case, and the extent of the costs Stayinfront has been forced to incur in defending itself. I further take into account that, because of the way the employment relationship problem was framed and some of the allegations made, Stayinfront was forced to prepare responses on a wide range of matters and incurred substantial costs in doing so.

[15] Even so, I have no information about exactly how the costs grew as high as they did. Without this I do not accept that Mr Tobin should be required to meet the amount specified or even two thirds of it.

[16] Since I do not know how the costs were incurred, hence have difficulty in assessing their reasonableness, what I can say is that Stayinfront filed in the Authority:

- (a) A statement in reply and amended statement in reply;
- (b) Memoranda in December 2004 following the conference call in which the nature and scope of the intended investigation meeting was addressed;
- (c) Comprehensive affidavits of Mr Buckley dated 14 February and 30 June 2005;
- (d) Extensive documentation by way of exhibits to Mr Buckley's affidavits, including transcripts of depositions;
- (e) Fully argued written submissions and submissions in reply, together with copies of authorities relied on.

[17] Obviously there were various attendances pursuant to the preparation of that material and other matters, some of which can be identified from the Authority's file and many of which may remain between the parties.

[18] From that material I assess a notional all-inclusive cost of \$30,000 as appropriate. Since Stayinfront should not have had to incur any of it, Mr Tobin is ordered to pay that amount to Stayinfront.

**R A Monaghan**  
**Member, Employment Relations Authority**