

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Peter Philipsen (applicant)

AND Esther Monteith t/a The Central Café, Lyndon Road East,
Hastings (respondent)

REPRESENTATIVES Douglas Abraham for the applicant
Dinah Kennedy for the respondent

MEMBER OF AUTHORITY Denis Asher

SUBMISSIONS 19 September and 17 & 28 October 2005

DATE OF DETERMINATION 1 November 2005

COSTS DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In my substantive determination dated 8 July 2005 (WA 110/05) I found for the applicant, Peter Philipsen's, claim that the respondent, Esther Monteith t/a The Central Café, had unjustifiably dismissed him.
2. Costs were reserved along with my anticipation that the applicant's approximate costs claim tabled during the investigation of \$3,000 would represent a reasonable

contribution to his costs. As it happens the parties have not been able to settle this matter.

Applicant's Position

3. In a submission received on 19 September, the applicant's advocate, Mr Douglas Abraham, advised that the respondent had failed to comply with the Authority's order and that his client's costs totalled \$3,000. In addition to citing well-known authorities and costs principles Mr Abraham says that his client's efforts to settle this matter in mediation were frustrated because of the respondent's refusal to attend. Furthermore, Ms Monteith also refused the Authority's direction of 30 May 2005 that the parties undertake mediation.
4. The substantive point of law involved was fundamental and the respondent's position, from the outset, was indefensible.
5. These factors warrant departure from the normal costs parameters and a full award is justified.
6. In closing submissions received on 28 October Mr Abraham rejects the respondent's argument that, because she is an immigrant, Ms Monteith was ignorant of New Zealand employment law: he points to the fact of her having signed an individual employment agreement that clearly provided for a procedure for the resolution of employment relationship problems – a procedure that she then refused to co-operate with. Ms Monteith had ample time to obtain advice. As it was, she enjoyed legal representation by counsel shortly after the filing of the grievance well in advance of the Authority's investigation. At the latter she was represented by an advocate (her second representative). Mr Abraham advises that a settlement offer significantly less than the amount ultimately awarded by the Authority was put to the respondent in an endeavour to settle matters before greater expense was incurred. He also advises that seven separate mediation times and dates were obtained and offered to Ms Monteith: these dates were arranged so as to be between 5 and 7 weeks in advance, so as to provide the respondent with sufficient time to obtain advice and make arrangements to attend. Ms Monteith refused to attend.

7. Copies of the invoices to the applicant are attached to the submissions received on 28 October: Mr Abraham says they have been significantly driven by the respondent's refusal to participate in any realistic way in addressing Mr Philipsen's grievance.
8. The applicant rejects the evidence adduced by Ms Monteith in support of a claim that her business has limited ability to meet a costs award. Advanced with Mr Abraham's submission are three land registration titles in the respondent's name. One is co-owned. Valuations dated 1 September 2004 indicate the value of the properties as \$425,000: Ms Monteith has the ability to meet a costs application generated by her failure to act in good faith.
9. Also attached to the applicant's submission was an advertisement taken from the *Hawkes Bay Today* dated 2 June 2005: it records the Café's success in winning the Hastings City Business Award *Excellence in Hospitality*, in June 2005. The advertisement records how well the business is performing.

Respondent's Position

10. Submissions by Ms Monteith's third legal representative, Ms Dinah Kennedy, were received on 17 October. They also rely on well-know case law. As set out above, they argue that Ms Monteith was ignorant of New Zealand employment law including a failure to understand the need to go to mediation: Ms Monteith holds her representative at the time responsible for not making clear to her the implications of that failure.
11. No issue is taken with the applicant's first submissions except to argue that it was a straightforward and simple case requiring only 3 ½ hours: applying a multiplier of 2 to 3 to the fees set out in the current legal aid manual suggests that the applicant should be awarded no more than \$850 plus reasonable disbursements including the filing fee.
12. Also as set out above, the respondent submits the payment of a costs award will put significant strain on the business which is having difficulty. There are no cash reserves and Ms Monteith's bankers are not prepared to advance further monies to

the business (draft statements of account for the year ending 31 March 2005 are attached).

Costs Decision

13. I see no reason in this case to depart from the well-established principle that costs should follow the event: *Harwood v Next Homes Ltd*, unreported, 19 December 2003, Travis J, AC 70/03. Should the applicant recover a contribution to his reasonable costs or, as he seeks, all of them?
14. I am satisfied that, whereas prior to dismissing Mr Philipsen, Ms Monteith may have been ignorant of New Zealand employment law (leaving to one side the issues of her responsibility as a businessperson to bring herself up to speed in this and other areas of law relevant to her election to set up a commercial operation, employ staff and cater to the public, etc) by the time the grievance was advised to her she had every opportunity to rectify the ignorance but has signally failed to do so. The applicant correctly points out that his employment agreement, signed off by Ms Monteith as the employer, contains a useful primer in respect of employment law, particularly in the area of what is to be done when a dispute arises. It clearly records the important role mediation plays in attempting to reach resolution.
15. From my previous experience of Ms Monteith's first and second legal representatives I find it unlikely that – as she claims – one of them (unnamed by the respondent) failed to alert her to the risks of not undertaking mediation is not credible.
16. The costs claim advanced by the applicant is, I find, and after a close perusal of the invoices, entirely fair and reasonable: clause 15 of Schedule 2 of the Act applied. I reach this conclusion because I am satisfied that a significant portion of the costs incurred resulted from Mr Abraham's efforts on behalf of his client, that ultimately proved futile, to arrange mediation. The rest of the costs largely relate to the preparation for, and attendance at, the Authority's investigation. The outcome of the matter going to investigation was, once the parties' statements of problem and reply were to hand, effectively self-evident. Ms Monteith has demonstrated throughout this matter – both before and at the Authority's investigation – a steadfast ability to refuse to accept the risks she faced, or to consider ways and means to find mutually

acceptable solutions to Mr Philipsen's grievance. For these, and the following reasons, I am satisfied that this is a rare and exceptional instance in which full client/representative costs should be awarded.

17. The ability of the Café to meet a costs award is irrelevant as the parties' individual employment agreement makes clear: Ms Monteith signed that agreement as the employer in an entirely personal capacity. It is Ms Monteith, not the Café, who must meet the burden of the substantive determination against her and this costs decision. I have no evidence in respect of any inability by Ms Monteith to meet a costs claim and I am satisfied that the costs claimed by Mr Philipsen are, in all the circumstances, fair and reasonable.
18. Mr Philipsen's actual costs as invoiced to him are in excess of \$3,000 but, clearly, he has fairly and reasonably rounded down the costs he seeks to that amount.

Decision

19. As is made clear above, I am satisfied that the respondent, Ms Esther Monteith t/a The Central Café, should pay to the applicant, Mr Peter Philipsen, all of his costs, the sum of \$3,000.00 (three thousand dollars).

Denis Asher

Member of Employment Relations Authority

