

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Helene Evan (Applicant)
AND Chief Executive of the Department of Corrections (Respondent)
REPRESENTATIVES Mark Ryan, for Applicant
Roanna Chan, for Respondent

DATE OF DETERMINATION 16 February 2005

COSTS DETERMINATION OF THE AUTHORITY

[1] On the 26th October 2004 I determined Ms Evan's employment relationship problem, and found in favour of the respondent. The respondent is now seeking an order requiring Ms Evan to contribute \$12,702.25 inclusive of disbursements towards the costs it has incurred. The total costs incurred by the Department were \$29,917.27 (GST inclusive) plus \$2,702.25 (GST inclusive).

[2] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 which is as follows:-

"15. Power to award costs –

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable."

[3] As was noted by the Employment Court in *Harwood v Next Homes Ltd, unreported, AC70/03, 19 December 2003, Travis J*, the discretion is a very wide one not constrained by any statutory requirements other than those contained in s157(3) of the Act. That provision is as follows:-

157. Role of Authority

...

- (3) The Authority must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with this Act or with the relevant employment agreement.

[4] The remaining provisions in s157 and s143 (f) of the Act make it clear that the Authority is a low level specialist decision-making body that is uninhibited by strict procedural requirements. This is the conclusion of the Court in Harwood.

[5] Since Harwood the process to be followed by the Authority in considering an application for costs was set out in *Christine Graham And Airways Corporation of New Zealand Limited, AEA 223/03, 28 January 2004, Member Dumbleton*.

[6] The first consideration must be given to the actual legal costs incurred, followed by a consideration of what level of expenditure reasonably incurred and finally what would be a fair contribution to the costs incurred. The nature of the application and the manner in which parties conducted themselves through the investigation process are relevant considerations when weighing these issues.

[7] The scope of Ms Evan's claim was wide, requiring investigations into a raft of issues including matters relating to jurisdiction. Whilst the investigation meeting took three days, the matter was not complex. The respondent has indicated that the duration of the meeting was largely due to the manner in which the applicant's claim was pursued, referring particularly to the late production on a number of occasions of relevant documents. Whilst this did occur, it did not unduly add to the duration of the meeting.

[8] Mr Ryan has indicated that the applicant is impecunious, and whilst she has obtained alternative employment, she will have to raise funds to finance payment of an award of costs against her.

[9] I have had regard for Mr Ryan's submissions, and although no supporting documentation or evidence has been produced to the Authority to substantiate Ms Evan's financial circumstances, from what I was able to glean and assess by way of evidence that came to my notice during the three days, I would respectfully tend to agree that an award of costs at the level sought by the respondent will place undue hardship on Ms Evan. In saying that though, I do not consider that this is a matter where the Authority should derogate from the underlying principle that an unsuccessful party should contribute towards the costs of the other party.

[10] After considering all of the circumstances of this matter, I am satisfied that the discretion under clause 15 of Schedule 2 of the Act should be exercised in favour of the Department, therefore Ms Evan is required to pay the Department of Corrections the sum of \$1200.00 towards the total costs (inclusive of disbursements) it has incurred.

Ken Raureti
Member of Employment Relations Authority