

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Ernest Hall (Applicant)

AND A-Mark Publishing New Zealand Limited t/a Academy Publishing
(Respondent)

REPRESENTATIVES Ian Thompson, Advocate for Applicant
Daniel Erickson, Counsel for Respondent

MEMBER OF AUTHORITY James Crichton

SUBMISSIONS RECEIVED 23 January 2004 from Respondent
21 January 2005 from Applicant

DATE OF DETERMINATION 23 February 2005

COST DETERMINATION OF THE AUTHORITY

[1] By decision dated 17 December 2003 my colleague Philip Cheyne issued a determination in respect to the substantive matter.

[2] That decision provided that costs were to be reserved. If the parties were not able to resolve costs themselves there was a timetable provided for cost submissions to be filed and served.

[3] The timetable was not complied with by the applicant although the respondent promptly filed their submissions as to costs. It took the applicant fully 12 months to file submissions and when they were received by the Authority on 21 January 2005 they were hardly helpful. They simply indicate that the representative for the applicant has lost contact with the applicant, that the applicant was legally aided at the time the matter proceeded to the Authority and that the Authority should refer to the Legal Services Agency. I do not consider it appropriate for the Authority to obtain any information in a matter before it other than through the parties' representative's and the parties themselves. It follows that the Authority must determine the issue based on the information it presently has.

[4] As the applicant was legally aided at the relevant time, the effect of the Legal Services Act needs to be considered in respect to costs. The relevant sections are s40 & s41 of the Legal Services Act.

[5] The effect of s40 is to create a general principle that a costs order that issues against a legally aided person must be reasonable and only in exceptional circumstances be in excess of the contribution that the legally aided person makes to his or her own legal costs. However, the section also provides that it is available to the tribunal to specify the amount of costs that would have been ordered were the person concerned not legally aided.

[6] Section 41 on the other hand confers a right on the successful opponent of a legally aided person to make an application to the Legal Services Agency for payment of the difference or part of the difference between the costs awarded and the costs that would have been awarded had the person on the other side of the proceeding not been legally aided.

[7] Those then are the relevant provisions from the Legal Services Act as they apply to this matter. I now consider the general principles relating to the award of costs and they are well known. The award of costs is a discretionary remedy and it is generally said to follow the event. In this particular case then I have a discretion to award costs in favour of the respondent because the respondent was completely successful in the substantive matter.

[8] I need to determine whether the costs that the successful party (the respondent) incurred are themselves reasonable and there are a variety of mathematical formulae that the decided cases recommend in matters of this kind. They include for instance the view that a one day hearing should attract a costs award of around \$1,500.00, a principle that two thirds of the costs is a useful basis for determining a costs award and a principle that 2 days preparation ought to be allowed for each day of hearing.

[9] In this particular case the respondent's legal costs amount to a sum of \$8,888.06 inclusive of GST. The respondent seeks a contribution of \$1,800.00 to \$1,850.00 in respect to this proceeding.

[10] The hearing itself occupied a half day. On the basis of the 2 days preparation for every day of hearing calculation, the respondent seeks a costs award in its favour of \$1,800.00 to \$1,850.00.

[11] I do not find that there are matters in this case that constitute exceptional circumstances but it is appropriate to indicate the award that would have been made were the applicant not legally aided.

[12] Having reflected on the various ways in which rules of thumb can assist in obtaining an appropriate figure in a costs determination, I have reached the conclusion that in this case an appropriate award that I would have ordered the applicant to pay if he were not legally aided would have been \$750.00. Given however that the applicant in this case was legally aided, I direct that the applicant pay to the respondent a sum equal to the contribution that the applicant was required to make pursuant to s15(1) of the Legal Services Act.

James Crichton
Member of Employment Relations Authority