

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Labour Inspector, Fiona Mary McQueen (First Applicant)
AND Labour Inspector, Fiona Mary McQueen (Second Initiating party)

AND Horlicks No.2 Limited (First Respondent)
AND Horlicks No.2 Limited (Second Responding party)
AND William John Funnell (Third Responding party)

REPRESENTATIVES Rebecca Denmead, Counsel for Applicant
Hamish Kynaston, Counsel for Respondent

MEMBER OF AUTHORITY Ken Anderson

SUBMISSIONS RECEIVED 20 April 2006

DATE OF DETERMINATION 28 April 2006

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] In a determination dated 24 March 2006, the Authority declined an application by the Labour Inspector pursuant to section 234 of the Employment Relations Act 2000. The parties were invited to attempt to resolve the matter of costs, but no resolution had been achieved and submissions have been now been received from both parties.

The Respondent's submissions

- [2] The Respondent submits that it has incurred external costs of approximately \$36,000. Invoices recording costs totalling \$35,046.64 have been provided to the Authority and the Respondent seeks a "significant" award of costs.
- [3] In support of such an award, the Respondent submits, in substance, that:
- (a) The Labour Inspector pursued an unmeritorious case;
 - (b) The matter was extremely protracted largely because of the unavailability of the claimants that the Labour Inspector was acting for;
 - (c) The Department of Labour aggravated the situation by seeking to adduce further evidence to rebut that given by Mr Funnell;
 - (d) The Department has the full resources of the Crown to draw upon and would not suffer hardship if a significant award of costs was made.

The Applicant's submissions

- [4] The Department of Labour (“DOL”) have provided detailed submissions referring the Authority to legal precedent in the area of costs.¹ The DOL submits, in substance, that:
- (i) The matter can be classified as a test case and there is little guidance as to the application of s.234 of the Employment Relations Act 2000 in particular circumstances;
 - (ii) If the matter is treated as a test case, then costs should lie where they fall, or alternatively, any award should be modest;
 - (iii) The Applicant did establish the “first hurdle” of s.234, that is that if judgment for payment was to be given, the company would not be able to pay;
 - (iv) The case was not legally difficult and was not without merit;
 - (v) Costs should be awarded on a calculation of reasonable fees basis and should be in the vicinity of \$2,000 - \$3,000.

Fair and reasonable costs

- [5] It seems to me that fair and reasonable costs in this matter should be calculated as follows. The investigation took the best part of one day. However, there was considerable time expended by the parties apart from the investigation meeting, hence that should be factored into the calculation of costs. Therefore; a day (8 hours) for the investigation meeting and using a multiplier of 3 for preparation and other time expended on what all agree was a very protracted matter, produces a total of 24 hours. Using a reasonable hourly rate of \$300 for the experienced Counsel engaged, produces a sum of \$7,200.
- [6] It is common practice to apply a “two thirds” rule in regard to the above calculation. This produces a sum of \$4,800, being a sum that is somewhat higher than the awards normally made by the Authority, given similar overall hearing time and preparation. However, I am bound to say that the Applicant’s case was largely without merit. While I accept that s.234 applications are launched mostly into uncharted waters, this particular vessel struggled to stay afloat from day one and probably should have remained in the dock.
- [7] The Respondent has incurred disbursements of \$412.50 for air fares for Counsel - Wellington – Taupo return, and in this particular case, I consider that it was reasonable for such Counsel to have been engaged and the cost of travel reimbursed.
- [8] The Department of Labour is ordered to pay to Horlicks No 2 Limited, or Mr William John Funnell, the sum \$4,800.00 plus disbursements of \$412.50, being the total sum of **\$5,212.50**.

Ken Anderson
Member
Employment Relations Authority

¹ In particular, *Okeby v Computer Assocs (NZ) Ltd* [1994] 1 ERNZ 613 and *PBO Ltd v Da Cruz* unreported, 9 December 2005, AC2A/05.