

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Leonie Dawn Gutsell (Applicant)  
**AND** Koru Blue Limited t/a Airport Lodge Motel (Respondent)  
**REPRESENTATIVES** Rob Davidson, Counsel for Applicant  
Anthony J Shaw, Counsel for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**SUBMISSIONS RECEIVED** 20 October 2006  
27 October 2006  
3 November 2006  
**DATE OF DETERMINATION** 11 December 2006

COSTS DETERMINATION OF THE AUTHORITY

*The application for costs*

[1] By determination dated 2 October 2006, the Authority (Mr Montgomery) resolved the employment relationship problem between these parties by determining the legal nature of Ms Gutsell's employment and by deciding that she had been unjustifiably dismissed.

[2] Costs were reserved.

*The claim for costs*

[3] Ms Gutsell, through her counsel, seeks *a significant contribution to the cost of prosecuting her case*. Her actual costs, exclusive of GST, on a time basis only are \$6,500 and there are disbursements on top of that of \$105.

[4] Ms Gutsell relies on the usual principles in seeking a costs determination in her favour except to the extent that she claims, through counsel, that her application to the Authority was *not necessarily straightforward*. She indicates that she was *required to conduct significant legal research on the issue of continuity of employment for a vulnerable employee*.

[5] I do not consider that contention is made out. My colleague, Mr Montgomery, was able to deal with the matter in its entirety in under four pages in his determination. His decision turns on the question of the legal status of the applicant, Ms Gutsell, and having determined the nature of her status as a matter of law, the balance of her claim is readily able to be dealt with. No doubt it can be

claimed by Ms Gutsell that, had she not done the *significant legal research* that she speaks of, the Authority's task would have been more difficult. However, if that significant research is a factor in Mr Montgomery's decision, it is certainly not evident from its face. He refers to one decided case only in his determination, and that is the leading case on consultation in respect of restructuring situations. In all the circumstances, I am not persuaded that Ms Gutsell's claim of legal complexity is made out.

[6] For its part, the respondent (Airport Lodge) concedes that the costs should follow the event, concedes that a *small* award of costs is appropriate and denies that there are any unique or peculiar circumstances in this particular case.

[7] Airport Lodge contends that the *significant legal research* required to be performed by Ms Gutsell was not in fact required, and therefore that Ms Gutsell's legal costs are unreasonably inflated by this unnecessary work.

[8] Airport Lodge goes on to contend that it feels entitled to assume that Ms Gutsell was advised of the likely outcome of her proceedings and the likely costs award if she was successful and that if she proceeded to incur legal costs beyond what was reasonably necessary, then it is unfair to expect the unsuccessful party to contribute to those unreasonably incurred extra costs.

[9] A further and rather unusual circumstance needs to be dealt with next. In the costs submissions of Airport Lodge, there is reference to the Authority member's decision to advise the parties of his preliminary view and then encourage them to consider settling the matter by agreement. Airport Lodge contends that those settlement negotiations were conducted on an open (that is, not a privileged) basis and its costs submission, as received in the Authority, proceeds on the footing that the actual amounts discussed by the parties, and in particular offered by Airport Lodge to Ms Gutsell, are actually included in the costs submissions.

[10] Mr Davidson, on behalf of Ms Gutsell, objects to this course of action, claims that the discussions were *without prejudice* and asks that the matter be referred to another member of the Authority with the appropriate amounts blanked out so that the costs issue can be determined without the influence of the parties' negotiations to potentially prejudice the outcome.

[11] For the sake of completeness, I can confirm that I was not in any way involved in the original investigation meeting presided over by my colleague, Mr Montgomery, and that in consequence I have no first-hand knowledge of the parties' discussion at Mr Montgomery's behest. I can also confirm that I have been provided by my support staff with a copy of the submissions of Airport Lodge in respect of costs with the appropriate numbers blanked out so I have no idea what those numbers were.

[12] As I was not involved in Mr Montgomery's investigation meeting in any way, I have no way of knowing whether the parties' discussion was *without prejudice* or not and on the basis that I am not influenced by material to which I have no access, nothing now turns on the issue.

[13] Airport Lodge contends that a costs award of \$750 would be appropriate in the particular circumstances of this case.

### ***The legal principles***

[14] Ms Gutsell, in her submissions, refers to the leading case on costs in the Authority, *PBO Ltd v. da Cruz* [2005] 1 ERNZ 808 which sets out the relevant principles.

[15] In that decision, the Full Court details the basic tenets which the Authority has applied to costs determinations since its inception and then indicates that those precepts are *appropriate* and *consistent* with the functions and powers of the Authority.

[16] The Court also observes in the same decision that the *tariff based* approach adopted by the Authority is not *wrong in principle* provided it is not applied rigidly and *without regard to the particular characteristics of the case*.

### ***Determination***

[17] Given the Authority's commonly applied tariff based approach to its investigation meetings, a half day investigation would typically only attract a figure of between \$750 and \$1,000 by way of a contribution to costs.

[18] Nothing in the instant case encourages me in the view that a significant award of costs is appropriate and accordingly I determine the matter on the footing that Airport Lodge is to pay Ms Gutsell the sum of \$1,000 as a contribution to her costs.

James Crichton  
Member of Employment Relations Authority