

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** John Gilbert & Company Limited (First Applicant)  
AND Peter Chiu (Second Applicant)

**AND** Peter Chiu (First Respondent)  
AND John Gilbert & Company Limited (Second Respondent)

**REPRESENTATIVES** Clive Bennett, Advocate for Applicant  
John Coyle, Advocate for Respondent

**MEMBER OF AUTHORITY** Vicki Campbell

**SUBMISSIONS RECEIVED** 5 October 2006 from First Respondent  
24 October 2006 from First Applicant

**DATE OF DETERMINATION** 27 October 2006

DETERMINATION OF THE AUTHORITY ON COSTS

[1] The first applicant claimed damages and a penalty against Mr Chiu for an alleged breach of the employment agreement and repayment of wages overpaid to him. In my determination of AEA1134/04 dated 6 April 2006 I found that Mr Chiu was not in breach of his employment agreement but that Mr Chiu had been overpaid and was required to refund the overpayment to the first applicant.

[2] Mr Chiu (second applicant), in application AEA106/05, claimed he had been disadvantaged in his employment, that the second respondent had breached the employment agreement and had failed to pay holiday pay. He sought compensation, payment of outstanding holiday pay and penalties. In my determination dated 6 April 2006, I found that Mr Chiu was disadvantaged in his employment as a result of the long hours he was required to work, but that there had been no breaches of the employment agreement for failure to pay overtime. Further, I found that Mr Chiu was entitled to be paid for outstanding holiday pay and a penalty was awarded against the Second Respondent for failure to provide wages and time records.

[3] I reserved the question of costs for both applications and invited the representatives to resolve the matter of costs between them. They have been unable to do so and I am now in receipt of memorandum from both representatives.

[4] Mr Chiu's total costs amounted to \$8,450.00 for a one day hearing. Mr Chiu was successful in his application, while John Gilbert & Company Limited was partially successful in its claim.

[5] The original application filed in 2004 by John Gilbert & Company Limited sought damages from Mr Chiu which Mr Gilbert quantified in his witness statement at over \$200,000. Given the importance of the case to Mr Chiu I find the costs incurred to be reasonable.

[6] There is nothing in this case to derogate from the principle that costs follow the event and that the successful second applicant should receive a contribution to his reasonably incurred costs.

[7] The following principles are appropriate where the Authority is exercising its discretion in relation to costs (*PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, unreported, AC28/06, 12 May 2006, Colgan CJ, Travis and Shaw JJ):

- There is a discretion as to whether costs should be awarded and what amount;
- The discretion is to be exercised in accordance with principle;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[8] It was said in *Harwood v Next Homes Limited*, unreported, AC70/03, 19 December 2003, Travis J, and *Graham v Airways Corporation of New Zealand Ltd*, unreported, AA39/04, 28 January 2004, Member Dumbleton, that average awards of costs fall between \$1,000 and \$1,500 for a one-day investigation meeting by the Authority. There was also agreement in those decisions of a recent trend towards a higher figure of between \$2,000 and \$3,000.

[9] The hearing took less than a day and was not an overly complex matter. I have considered the submissions made by the representatives and I am satisfied that the discretion under clause 15 of Schedule 2 of the Act ought to be exercised in favour of Mr Chiu.

[10] John Gilbert & Company Limited is required to pay to Mr Chiu the sum of \$2,000 plus disbursements of \$70.00 as a reasonable contribution to costs given the subject of the investigation and the duration of the investigation meeting.

[11] An order is made accordingly.

Vicki Campbell  
Member of Employment Relations Authority