

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 119/08
5118886

BETWEEN BARRY AND SHIRLEY
 PERKINS T/A ONEKAWA
 CURTAINS AND BLINDS
 Applicants

AND HEATHER PRITCHARD
 First Respondent

LINDA SUTHERLAND
Second Respondent

Member of Authority: G J Wood

Representatives: Gary Tayler for the Applicants
 No representation required of First Respondent
 David Oliver for Second Respondent

Submissions Received: By 9 September 2008

Determination: 17 September 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] In March 2008 Mr and Mrs Perkins brought claims against Ms Pritchard for breaching her employment agreement in relation to confidentiality and privacy and her duty of fidelity not to engage in competitive conduct during her employment. They also claimed that Ms Sutherland incited, instigated, aided or abetted such breaches. Ms Sutherland denied the claim. She also declined to attend mediation unless she received evidence in a sworn declaration of the claim.

[2] In her statement of reply Ms Sutherland noted that the lack of specificity over the claims meant that she was unable to properly respond. She also noted that she had already raised an employment relationship problem with Mr and Mrs Perkins, which she says led to her leaving her employment with them.

[3] Ms Sutherland continued to resist mediation until it became clear that the Authority would be involved by way of a directions conference. At that point Ms Sutherland agreed to go to mediation on the basis that she believed the Authority would order it anyway.

[4] As a result of mediation the claims against the first respondent were settled. The claim against Ms Sutherland was initially *withdrawn, but on a without prejudice basis*. This was because Mr and Mrs Perkins believed Ms Sutherland would file her own employment relationship problem with the Authority and if she did they wanted to resurrect their claim and have the two matters heard together. Subsequently, following the Authority's intervention, the claim against Ms Sutherland was properly withdrawn.

[5] On behalf of Ms Sutherland, Mr Oliver now seeks costs for having to respond to the claim and for mediation, in the sum of \$1,367.40. He does so on the grounds that Ms Sutherland was unnecessarily put to cost. In particular, she considers that the claim was vexatious and malicious, flowing from the alleged bullying of her by Mr and Mrs Perkins while in their employ, and that the claim before the Authority was effectively a pre-emptive strike to deter Ms Sutherland from filing an employment relationship problem with the Authority. No evidence (other than that highlighted above of an attempt at a without prejudice resolution of the matter) has been provided to support these claims. I am not prepared to accept, simply on Mr Oliver's say so, that the application was frivolous or vexatious, despite Ms Sutherland's consistent opposition to its merits.

[6] Mr Oliver also claimed that mediation had already been attempted in relation to the alleged workplace bullying, and that Ms Sutherland had no legal aid to engage representation for mediation.

[7] On behalf of Mr and Mrs Perkins, Mr Tayler submitted that the matters were ultimately all settled following mediation and that Ms Sutherland should meet her own costs, as is usual for filing the statement in reply, attending mediation and having to prepare a costs application.

[8] I do not accept that any costs award is appropriate in these circumstances. As a matter of public policy costs are not normally awarded for mediation. There is no reason to conclude otherwise in this matter. In respect of the cost of preparing a statement in reply, that is not something that necessarily required legal representation. In any event, it is part of the costs of justice that the parties ought to meet themselves. Were costs to be awarded for every time a respondent was required to file a statement in reply and/or attend mediation the

system would not result in a reduction for the need for judicial intervention, or promote mediation as the primary problem solving mechanism.

[9] I note that mediation appears to have been constructive in that since mediation this matter has been resolved. Furthermore, Ms Sutherland did not have to be represented at any conference calls with the Authority as none were held. Finally, she elected to make a costs application, and it would be inappropriate to her award costs just to compensate her for doing so.

[10] In all circumstances therefore it would be entirely inappropriate to require Mr and Mrs Perkins to contribute towards Ms Sutherland's costs. I therefore determine to dismiss Ms Sutherland's claim for costs.

G J Wood
Member of the Employment Relations Authority