IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

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	BETWEEN	CHANTELLE COUP Applicant
	AND	UNITE! UNION Applicant
	AND	MPA INVESTMENTS LIMITED t/a McDONALDS KAIAPOI Respondent

Member of Authority:	Philip Cheyne
Representatives:	Peter Cranney, Counsel for Applicants Eska Hartdegen, Counsel for Respondent
Submissions received:	15 September 2008 from Applicants 30 September 2008 from Respondent
Determination:	6 October 2008

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 29 August 2008 I issued separate but related determinations upholding claims by both applicants against the respondent. Costs were reserved with a timetable for each party to lodge and serve a memorandum. That has now been done and the present determination resolves the question of costs in respect of both proceedings.

[2] For the respondent, counsel accepts that costs should follow the event and refers to principles about costs in the Authority set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. In particular the respondent says that costs should not be used as a punishment and that awards in the Authority should be modest. Those principles in the circumstances of these cases lead the respondent to

accept that an appropriate award would be $6,000.00 plus GST apportioned equally between the applicants. The concession that costs should follow the event is appropriate.

[3] The applicants' costs total $18,000.00 plus GST for 48 hours being three meeting days and three days preparation. The circumstances of these cases lead the applicants to say that they should have an award of 80% of actual costs apportioned equally between them plus disbursements.

[4] Counsel for the respondent raises a point about Ms Coup's union membership meaning that her legal costs in this proceeding are probably covered by Unite Union. Assuming that is correct it makes no difference to an assessment of costs: see *O'Malley v Vision Aluminium Ltd (No 3)* [1992] 2 ERNZ 1043. In that case, Mr O'Malley's union met his costs but he was still entitled to litigation costs assessed in the usual way. The judgments reasoning on the point remains applicable despite the statutory changes since then.

[5] In considering costs here, the significant issues are the importance of the proceedings to the parties, the costs incurred and the way the case was conducted.

[6] Ms Coup's substantive problem was a dismissal personal grievance arising in the context of the respondent exercising undue influence over her and others relating to union membership. Unite Union's problem was the undue influence exercised on its members including Ms Coup. There were many factual contests that both parties had to prepare for and the intensity of the disagreements resulted in a number of irrelevant disputes. Overall, the grievance was very important for Ms Coup and the proceedings could scarcely be more important for the union. The legal resource expended by the applicants is not surprising in these circumstances.

[7] There are two main ways in which the respondent caused extra and unnecessary costs. First, the respondent initiated a counter claim about breach of good faith on the part of the union. To establish this breach the respondent had to refer to matters directly connected with mediation and to *without prejudice* attempts to resolve the problems. No attempt should have been made to canvass those matters in light of the strict statutory provisions about confidentiality. None of the costs caused by this should be visited on the applicants.

[8] The second problem was the respondent's failure to properly disclose relevant documents in advance of the investigation meeting. Counsel for the respondent says *There is no discovery in the Authority and ultimately the Authority Member must investigate and ask for documents, as occurred at the time of the hearing*. That is not an accurate statement of the Authority's powers or what happened in this case.

[9] The following direction was included in a notice of directions dated 14 March 2008, no objection having been raised by either counsel during the preceding phone conference: *The Authority expects that the parties will exchange all relevant documents/material in advance of the timetable for lodging statements of evidence. If there are any issues …then leave is reserved for the parties …for a further teleconference and/or directions.* The Authority is empowered to make such directions by sections 160(1)(a) and 221(d) of the Employment Relations Act 2000. My Support Officer's notes of the phone conference record that it was counsel for the respondent who was particularly concerned about getting all relevant documents from the applicants, especially documents held by the union. It follows that counsel for the respondent must have been satisfied at that time about the Authority's power to adequately deal with disclosure of relevant documents in this way.

[10] The obligation to disclose relevant documents arises at the beginning of the investigation process in any event. The Employment Relations Authority Regulations 2000 require statements of problem and in reply to be in Form 1 and Form 3 respectively. Both Forms require the relevant party to list and attach relevant documents. Often parties do not properly adhere to this requirement and routinely during directions conferences the Authority must ask and make directions about the disclosure of relevant documents. Where as here parties are legally represented by experienced practitioners the Authority generally trusts them to ensure full and timely disclosure by parties. It would be most unfortunate if the Authority had to resort to making directions that parties provide lists of documents verified by affidavit but there is no doubt the power to do so in an appropriate case.

[11] In breach of the Regulations and the Authority's direction, the respondent failed to disclose and exchange a significant amount of highly relevant material. It was not until I noticed during the investigation meeting that the respondent's principal (Mr Cornish) kept referring to documents that it became apparent that the respondent had undisclosed material. As it turned out that included notes, printouts of video

frames, roster information and handwritten resignation letters. Some of the undisclosed material made untenable (or pointed that way) the respondent's position on some of the central issues. Time was wasted preparing for and dealing with these issues at the meeting when proper disclosure might have clarified the facts in advance. Time was also wasted on arranging for the material to be disclosed and considered. None of the cost of this wasted time should be visited on the applicants.

[12] A central issue was a disputed incident between Ms Coup and her manager. The respondent had a video recording of the incident. It was never shown to Ms Coup or the union official despite their request at the time although it was seen by other staff. Later it was deleted, apparently by inadvertence. We therefore spent a considerable amount of time canvassing evidence about the incident. If the footage had been disclosed to Ms Coup or the union official at the time there may have been no need for her grievance proceedings. If it had been preserved we would have spent much less time at the investigation meeting dealing with that aspect of the dispute. The extra time that was spent should not be at the applicants' cost.

[13] Where this all takes me is to consider as a starting point a daily tariff of $3,000.00 at the upper end of the range typically used by the Authority. That gives $9,000.00 for three meeting days. It is not possible to be precise about the quantum of wasted costs but if the daily tariff sum is increased by a third that would give a total of $12,000.00. That would leave the respondent meeting two-thirds of the applicants' costs. In my judgement that figure does not adequately reflect the importance and complexity of the cases nor the issue of wasted costs. Justice requires a further departure from a daily tariff approach requiring the respondent to pay the applicants 75% of their costs apportioned equally between them.

[14] There is an issue about the relevance of GST. I assume that the Union has been invoiced for the whole of the costs and that it is registered for GST. On that basis the GST component of the invoice should not figure in an assessment of costs actually incurred. On the other hand, if Ms Coup has been invoiced for and must pay some costs personally, the GST component will be part of the costs incurred. See for example *Andrew Yong t/a Yong & Co Chartered Accountants v Chin* (Couch J, 7 September 2007, AC 37A/07). As indicated I will make the order on the assumption that the union has been invoiced for the whole amount but if I am wrong about that counsel should advise the Authority and leave is reserved.

[15] There are disbursements totalling $1,013.00 which are not disputed by counsel for the respondent. Not mentioned but no doubt paid are two lodgement fees of $70.00 each which must be included in disbursements. Also not mentioned but paid or payable by the applicants are meeting fees.

Conclusion

[16] The respondent is to pay Unite Union costs of $6,750.00.

[17] The respondent is to pay Ms Coup costs of $6,750.00.

[18] The respondent is to reimburse the applicants $1,013.00 for disbursements, $140.00 for lodgement fees and the sum charged for investigation meeting fees to be fixed by an Officer of the Authority if necessary.

Philip Cheyne
Member of the Employment Relations Authority