

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 34A/09
5127901

BETWEEN JILLIAN FAY PHILPOTT
 Applicant

AND LONDON LIMITED
 TRADING AS LADYBIRDS
 FOR GIFTS AND JAMES
 GREENWOOD
 Respondents

Member of Authority: P R Stapp

Submissions received: 13 May 2009 from Respondents
 26 May 2009 from Applicant

Determination: 16 June 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondents have applied for costs having successfully defended an investigation into an alleged employment relationship problem and where costs were reserved in a determination dated 23 March 2009 (WA 34/09).

[2] Adrian Tayler for Ms Philpott has informed me that Ms Philpott says she has no money to pay any costs, is unemployed and will not pay because she can not pay. The position was set out in her first affidavit and the circumstances have not changed. He has no instructions to say any more.

Issues

[3] How much contribution towards the respondents' costs should be awarded?

The facts

[4] The applicant was not successful in her employment relationship problem. The respondents' are seeking a total of \$12,000 contribution towards costs and to be apportioned equally between them.

Determination

[5] The respondents have requested more than the notional daily tariff because of the applicant's conduct. The respondents have raised for consideration a number of factors that include the following

- It was reasonable to prepare and present written evidence and submissions on the legal issues arising out of the applicant's claims.
- The respondents were put to costs where there was an absence of evidence in support of the applicant's allegations.
- Accounting and documentary evidence was required to refute the applicant's allegations.
- It was not reasonable for the applicant to raise further arguments and submissions after the conclusion of the investigation meeting, including a further affidavit, which had to be addressed.
- The nature of Ms Philpott's claims that required requests for her to produce relevant financial statements, tax returns and records and that in light of her claims her evidence omitted references and documents that would have been reasonably foreseeable and impacting on the respondent's expense and preparation.

[6] I do not accept that this is a matter for indemnity costs, estimated at \$14,432. However, it is clear from the conduct of the proceedings and consideration of the issues that Ms Philpott has put the respondents to unnecessary costs of an investigation in the Employment Relations Authority that could have been avoided. She was not successful on any of her claims, and the main claim on whether or not she was an employee or in business, was an extremely risky one at that, especially since credibility was involved. Parts of the claim were abandoned, the investigation involved two telephone conferences and further information was received after the

investigation meeting. I can not agree that the claim was vexatious, frivolous and improperly brought as submitted by Ms McEwan, because the documentation produced was open to interpretation. However if Ms Philpott had properly analysed the documentation she would have realised that her claim had some real and great risk of failure. Once she knew of the suggestion that the respondents would rely upon evidence from professional people, she should have considered dropping the claims. This is not to say that Ms Philpott commenced her application with any wilful disregard of known facts or clearly established law, but I conclude that her claims were misguided in the face of the evidence.

[7] The respondent could be forgiven for trying to link the applicant's employment relationship problem in the Employment Relations Authority with the personal relationship breakdown between her and Mr Greenwood and her financial hardship and any revenge in bringing the claims against him and the business. However, given the nature of the evidence, and submissions from Ms Philpott's representative at the investigation meeting, I am satisfied that Ms Philpott had no apparent ulterior motive. This is especially so as she did not fully appreciate the legal tests to establish the employment relationship.

[8] The investigation meeting lasted one day. That belies the considerable effort that went into the preparation and the need by the respondents to cover off the issues, especially where Ms Philpott omitted to provide relevant information that impacted on the factual matrix. Also, the respondents have been put to the extra cost of obtaining and organising the availability of professional people to provide evidence. The one day for the investigation meeting was adequate time to investigate the matter. There was no real loss of time due to any misconduct and the matter was not unduly prolonged during the fixture with any groundless contentions because the nature of the claims were within the scope of matters often included in statements of problem and dealt with in a day.

[9] The proposal that costs be split 50:50 between both respondents is a little artificial because Mr Greenwood had to give evidence anyway, as he was directly involved in the business and personally. In any case the main issue had to do with whether or not Ms Philpott was an employee or in business with him. The other

issues had a lower order of priority, and indeed, including the claims that were abandoned by Ms Philpott.

[10] I have noted that Ms Philpott may well have some immediate difficulties that will impact on her ability to pay the respondents their costs. However, Ms Philpott's circumstances may change and she may have an ability to pay in the future. Therefore it is appropriate that the parties know how much she owes on account of costs that she has put the respondents to in the Authority's investigation. Any such inability to pay is not a factor that can be fully relied upon by an unsuccessful party. It is entirely proper to award costs where the party that is required to pay may be able to pay in the future. I am supported in this conclusion by Ms Philpott being available for work and that she has a proven ability to purchase and sell assets.

[11] The investigation meeting was one day. Relevant documents needed to be produced and that included the Authority making an order for Ms Philpott to produce various documents to help. The nature of Ms Philpott's claims made it entirely reasonable for professional people to be called by the respondents to provide evidence of the parties' dealings with each other and to back up the respondents' contentions of the facts.

[12] Ms Philpott's allegation that Mr Greenwood forged her signature was unnecessary, unhelpful and in the end it was not used because of the existence of overwhelming evidence elsewhere. After the investigation meeting more costs were incurred by the respondents being required to make submissions and replies.

Conclusion

[13] It is my assessment that a one day investigation meeting would involve a starting point of \$3,000. There would have been extra costs for preparation given the issues, the production of the documents and the preparation of written statements, including those of the professional people. This was particularly so because the respondents were left to defend various allegations and issues that were unlikely to be successful, but that still required to be covered off. In addition there were the costs for submissions and replies as required. My assessment of costs amounts to a total

sum of \$4,500 contribution considering the costs for the respondent were considerably more.

[14] Jillian Philpott is ordered to pay London Limited trading as Ladybirds for Gifts and James Greenwood jointly and severally a total of \$4,500 contribution to costs.

P R Stapp
Member of the Employment Relations Authority