

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 122
5400214

BETWEEN JAMES CAMERON STUART
Applicant

AND M&L MANAGEMENT
LIMITED (FORMERLY
DIRECT FREIGHT
MANAGEMENT LIMITED)
Respondent

Member of Authority: P R Stapp

Representatives: Russell Ward, Counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 1 October 2013 at Palmerston North

Determination: 2 October 2013

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] This is an issue about costs for the investigation meeting scheduled on 1 October 2013 in which the respondent failed to appear. The applicant, Mr Stuart has requested costs due to the Authority's investigation meeting being delayed by the Respondent and the respondent not turning up at the meeting in Palmerston North. The meeting was abandoned because there is the possibility of the respondent having good cause for failing to appear, although there is an issue about whether or not the reason advanced by the respondent is genuine.

[2] The investigation meeting was due to start at 9.00am, but it was delayed to enable the support officer to check on the respondent's whereabouts and to get more particularised details for the non-appearance.

[3] The applicant has asked for costs to cover the representation at the abandoned meeting.

[4] Since the investigation meeting a medical certificate has been received. It confirms that there was an accident on 30 September 2013 when Mary Lindstrom "fell getting out of a truck and ended up with legs doing splits". The certificate confirms a groin sprain. Also, the certificate states that Ms Lindstrom is unfit for work and alternative duties from 1 October 2013 for three days. It does not mention any inability to travel and attend the investigation meeting.

Non-appearance of the respondent

[5] The respondent has filed a statement in reply and attended two telephone conferences with the Authority in regard to the case management of this matter. I am satisfied that the respondent was properly served at the company's registered address for service and that the company has been on notice of the investigation meeting, including an order made by the Authority for particular information and the Authority's timetable for witness statements. The respondent has had dealings with the Ministry of Business, Innovation and Employment (MBIE) for mediation, and has been involved with the Authority's office in telephone conferences and filing the statement in reply.

[6] The respondent was required by the Authority to produce the following documents by 3 September 2013:

- (a) A signed copy of the employment agreement;
- (b) Telephone records for August/September 2013;
- (c) Wage and time records; and
- (d) Any other documents.

[7] None of the documents have been filed by the respondent. The respondent had an opportunity to provide statements of evidence in writing from any witnesses it required to attend the investigation meeting and rebut the applicant's claims, but has not done so.

[8] At 7.22 pm on 30 September 2013 the Authority was advised by email from Mr Ross Lindstrom that Mary Lindstrom (Bing Liu) a director of the respondent had had an accident falling off a truck in the evening on 30 September 2013. In fact it seems from the medical certificate the accident occurred at 4.30 pm.

[9] I decided to delay the start of the investigation meeting for the support officer to contact Ms Lindstrom and then waited until 11.00am for Ms Lindstrom to provide documentary proof and details of her accident and visit to the doctor. The support officer confirmed by telephone with Ms Lindstrom that she says she had an accident and was going to the doctor at 10.00am on 1 October. Ms Lindstrom was requested to file any documents to support that the accident had occurred and her visit to the doctor. By 11.30am nothing had been heard from Ms Lindstrom. The medical certificate has since been received.

[10] The applicant at the investigation meeting had doubts about the respondent's genuineness because it was anticipated that the respondent had no intention of turning up anyway. This was supported by the applicant's representative's recollection of a telephone discussion he had earlier with Ms Lindstrom where she said that she would not be attending the hearing.

[11] The applicant's representative's hourly rate is \$250 per hour. The start at 9.00am was delayed until the investigation meeting was abandoned at 11.20 am.

Determination

[12] Mr Stuart has been put to the cost of today's investigation meeting. He needed his representative to attend as the employment relationship problem was properly set down on notice to be heard in full. If the applicant's representative is correct, and I have no reason to doubt his information, that the respondent had no intention to appear, the respondent has left its position open to confusion. Mr Lindstrom contacted the Authority with the explanation that Ms Lindstrom had had an accident and she says that she had made arrangements to get to Palmerston North for the investigation meeting. Thus it is reasonable to conclude that there was some risk that the respondent would turn up, but for the accident. This is supported by a brief explanation given by Ms Lindstrom to the support officer that she had made arrangements to travel from Christchurch to Palmerston North, and that the respondent had had previous engagements with MBIE and the Authority.

[13] It is accepted by the applicant that there may be good cause for the respondent's non-appearance because of any accident. However there is a huge question mark about the intention of the respondent to attend. I say this because the respondent has failed to file any of the documents ordered to be provided by the Authority. Also it has failed to comply with the timetable set by the Authority to produce witness statements for the investigation meeting. In addition, Ms Lindstrom failed to provide any documents providing any evidence of her having an accident and visiting a doctor in the time that she had been given on 1 October 2013. This means that the respondent if it was going to appear would have had to rely on cross examining the applicant and/or to make submissions on the applicant's evidence and/or to seek leave to provide its evidence late. Any request to provide evidence late would not have been unreasonably denied, but does give rise to the possibility of the respondent causing delays. I note that if the respondent does turn up at the next meeting, it is not clear about how the respondent is going to conduct its case efficiently, unless there is some approach to the Authority by the respondent in adequate time before the next meeting about what should be done. Until the email from Mr Lindstrom and the medical certificate was received there has been no attempt from the respondent to be proactive in any problems it may have had with its case management.

[14] The respondent's email at 7.22 pm on 30 September 2013 was too late once it was opened by the support officer on 1 October 2013 to make any changes to the arrangements and save any costs.

[15] The first the applicant and his representative knew anything about the situation was when the Authority informed them at 9.00am. They were by that stage committed to attending the hearing and the expense.

[16] The applicant has reasonably accepted that it is better to abandon the meeting to give the respondent a chance to appear if it wants to than to cause more costs to be incurred if there was to be a need for a rehearing and or challenge to the determination.

[17] I accept that Mr Stuart has incurred costs for his representative's attendance at today's investigation meeting. The costs have been reasonably incurred. The meeting has been delayed and abandoned due to the respondent's failure to appear and/or be represented and then when it failed to provide adequate information about the reasons

being relied upon at the time. Although it appears there may have been good cause for the failure of the respondent to appear there is some doubt about the respondent's genuineness over its intention to actually attend the investigation meeting. Furthermore no other arrangements were made for an appearance and the respondent has not followed the directions for information and not met the Authority's timetable. The abandonment of the investigation meeting is now an indulgence to the respondent given that the delay is the responsibility of the respondent. The applicant is entitled to costs and I accept it is reasonable for M and L Management Limited to pay James Stuart \$625 costs for today's delayed and abandoned investigation meeting.

[18] Also, I have set down another fixture for the investigation meeting to take place on 16 October 2013 at Palmerston North, and a notice of investigation meeting will be issued with the venue and start time.

Orders of the Authority

[19] M and L Management Limited (formerly Direct Freight Management Limited) is to pay James Stuart \$625 costs pursuant to clause 15 (1) of Schedule 2 of the Employment Relations Act 2000. A certificate of determination can be issued for this order and the Authority's order is enforceable immediately.

[20] A fixture has been scheduled for a notice of investigation meeting to take place in Palmerston North on Wednesday 16 October 2013.

P R Stapp
Member of the Employment Relations Authority