Determination Number: AA 48/06
File Number: AEA 439/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Lynda Barlow (Applicant)
AND	Harper Photographics Limited (Respondent)
REPRESENTATIVES	Ken Nicolson, Counsel for Applicant Penny Swarbrick, Counsel for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
COSTS SUBMISSIONS RECEIVED	13 and 16 December 2005
DATE OF DETERMINATION	22 February 2006

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] In its determination dated 16 November 2005 issued under AA 442/05, the Authority held that Harper Photographics Ltd (HPL) should bear no legal responsibility for the employment relationship problem raised by Ms Lynda Barlow in relation to the termination of her employment with HPL.

[2] As no settlement of the reserved costs question has been achieved, it now falls to the Authority to fix costs.

[3] The memoranda supplied to the Authority by counsel Ms Swarbrick and Mr Nicolson has been considered. So too has the recent judgment in *PBO Ltd v Da Cruz* unreported, 9 December 2005, in which the Employment Court expressed its approval of the principles the Authority has been generally applying since its inception when determining costs applications. Many of those principles are listed in the judgment at paragraph [44].

[4] An award of full solicitor-client costs of $6,500 is sought by HPL, whereas for Ms Barlow it is submitted that any award against her should be "nominal" (meaning presumably $50 or thereabouts).

[5] Given the outcome of this case, Mr Nicolson's submission is totally unrealistic. In accordance with principle Ms Barlow should at the very least make a reasonable contribution to actual costs incurred by HPL. I would assess that as $2,200, allowing for the fact that the investigation meeting required more than one day to complete. However I consider that an award of above even the level of reasonable contribution is justified because of the "without prejudice except as to costs" offer made by HPL.

[6] As Mr Nicholson correctly points out, this was not strictly a "Calderbank" offer because HPL

was not just partially but was entirely successful in responding to the grievance. Nevertheless it is an offer that deserves to be given some weight. I consider that Ms Barlow had an underlying wish to finish with HPL and at best she could only have been successful in respect of Mr Harpers conduct or behaviour on 6 November 2004 prompting her to leave then rather than later. In respect of that conduct, if it could have founded a grievance claim of some sort $3,500, the sum offered to settle, was about all that she could have hoped to be awarded. Instead her monetary claims were greatly inflated beyond the total award a best case scenario result for her was ever going to achieve and on this basis I consider she unreasonably failed to accept HPL's realistic offer. That is a relevant factor.

[7] While HPL has sought costs on a total indemnity basis I do not consider this case had present the extremes required before full costs will be awarded, something that rarely if ever has occurred in the Authority jurisdiction. Taking into account equity and good conscience, the need for reasonable consistency to be maintained by the Authority in its costs awards and the tariff detectable among awards generally (a principle referred to at paragraph [44] of *Da Cruz* above), I consider $3,000 is the appropriate level of costs in this case.

[8] Under clause 15 of Schedule 2 of the Employment Relations Act 2000, the Authority orders Ms Barlow to pay HPL costs of $3,000.

A Dumbleton
Member of Employment Relations Authority