

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 303/09  
5164535

BETWEEN                      EMILY BELL-BOOTH  
   Applicant  
  
AND                              WINGATE + FARQUHAR  
   LIMITED  
   Respondent

Member of Authority:        Alastair Dumbleton  
  
Representatives:              Megan Falcon, advocate for Applicant  
   Sarah-Jane Neville, counsel for Respondent  
  
Determination:                26 August 2009

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     Although the investigation meeting notified to proceed on Wednesday 19 August 2009 at 10am did begin, before any evidence was examined the meeting was adjourned by the Authority after discussion with the parties' representatives Ms Falcon and Ms Neville.

[2]     The meeting date had been set some weeks earlier in the usual way, as part of the management of the investigation, during a telephone conference. That was held on Wednesday 1 July 2009. It was confirmed then by me to Ms Falcon and Ms Neville that the investigation meeting would take place on 19 August and that the applicant's witness statement and additional documents were to be filed and served by 5pm, Wednesday 29 July.

[3]     A letter recording the arrangements made during the conference was sent to the representatives on 7 July 2009. The last paragraph of that letter reads:

*The above deadlines are set by the Authority member to allow sufficient time to properly prepare for the investigation meeting. If you find you are unable to meet these deadlines, please contact me urgently.*

[4] The letter was delivered to the applicant's address for service, a Post Office Box number, the following day, 8 July. By then the applicant had 11 days in which to read it and comply with the timetable orally set a week earlier.

[5] The Authority track and trace system shows that the 7 July letter was not collected at the address for service until Monday 3 August at 4.15pm, when "M Falcon" signed for it.

[6] Why that delay occurred between 8 July and 3 August cannot be a matter for any responsibility on the part of Wingate + Farquhar Ltd or its counsel Ms Neville. It is Ms Falcon's choice to use a post office box as her address for service. In doing so she must accept the responsibility for collecting any legal documents that are served there, as the notice was in this case. If the Post Shop slipped up in getting her the mail, that is a matter that Ms Falcon must take up with the Post Shop.

[7] On 30 July 2009 the Authority received a document titled Submissions for the Applicant with a number of attachments, including copies of an employment agreement and some Employment Court judgments. The contents of the document were clearly submissions by Ms Falcon in her role as advocate and not evidence from Ms Bell-Booth the applicant.

[8] On 30 July 2009 Ms Neville sent an email to Ms Falcon pointing out that the Authority's direction had required the filing of a statement of evidence by Ms Bell-Booth the previous day. She also pointed out that while the document that had been served was in the form of submissions it extended to matters that were required to be put forward by a witness, as evidence not submission. Ms Neville asked Ms Falcon to confirm that by the end of 30 July she would provide the applicant's statement of evidence for the meeting on 19 August.

[9] The reply from Ms Falcon, given on 30 July, included:

*I am satisfied my client has provided all necessary evidence at this time that she wants to be addressed by the Authority.*

[10] Also on 30 July the Authority sent by email to Ms Falcon the timetabling as recorded in its letter of 7 July and the Notice of Investigation Meeting that had been sent out the same day. Ms Falcon replied that she had not sighted those documents

because of a family bereavement. She noted that issues had been raised about the content of her submissions by the respondent, and in that regard she said:

*I am satisfied we have filed what we need to and trust the contents of it [Submissions for the Applicant] is adequate for the purposes of the Authority. We have no intention of involving additional witnesses for the hearing.*

[11] The Authority took it from this reply that the applicant Ms Bell-Booth had elected not to offer evidence, either of her own or anyone else.

[12] It is not correct as Ms Falcon has stated in her memorandum received on 20 August that the Authority's timetabling requirements had not been "published" to the applicant by 29 July 2009. They were published on 8 July when they were served at the address given by the applicant's representative, Ms Falcon. Whether the applicant knew of their contents before 29 July is a matter between her and her representative.

[13] Ms Falcon has suggested that somehow the Authority gave approval that the submission document would satisfy the timetabling requirement for a statement of evidence from the applicant. It is surprising that Ms Falcon could have any confusion about that. She participated in the telephone conference in which the requirement was discussed orally and, as a professional employment law representative, she could be taken to have known the probability that the matter of "the real nature of the relationship" between Ms Bell-Booth and Wingate + Farquhar Ltd could only be properly determined by the evidence of the former (and the latter) as well as legal submissions. The timetable struck during the telephone conference clearly anticipated that, and no directions were subsequently given to vary those of 1 July.

[14] Even with an investigative procedure such as the Authority's, a party who is the applicant can reasonably be expected to show some commitment and initiative towards its cause and should not expect that the Authority will drag evidence out of it. Ms Falcon did not seek to provide a written statement of evidence even on or after 3 August when she received the Authority's timetable in writing. The impression given by the submissions that were filed is that she considered them to be sufficient as evidence, documentary at least, for her client to give.

[15] That was the appearance to the Authority from the communications and if Ms Falcon had determined, as it seems, to proceed in that way then her client took the risk that any misunderstanding on her representative's part would lead to the hearing being adjourned.

[16] That is what happened, as it became apparent on 19 August that Ms Bell-Booth did intend to give evidence and to answer questions from the Authority and Ms Neville on it. She also intended providing documentary evidence not previously disclosed in the investigation.

[17] Although ways of avoiding the adjournment were discussed the preferable course to the respondent was to have a brief of evidence and additional documentary provided by Ms Bell-Booth before the investigation meeting proceeded, so as to ensure it went smoothly.

[18] Accordingly, the meeting was adjourned with directions given for Ms Bell-Booth's evidence and any supporting witnesses to be filed and served by 26 August 2009. Any reply from the respondent will be filed and served by 4 September 2009.

### **Costs**

[19] Ms Neville sought an order for costs on behalf of the respondent in the sum of \$1,000 plus GST.

[20] I consider that in the circumstances an order should be made against the applicant because of the unfortunate circumstances arising that have wasted the respondent's time unnecessarily. Its witnesses had to take time away from their work to attend the investigation meeting to give their evidence. Its counsel Ms Neville also spent billable time attending the meeting, for no useful purpose as it turned out.

[21] The applicant is ordered to pay \$425 to the respondent, as a contribution to actual costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act.