IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 308A/10
5164535

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

Member of Authority:	Alastair Dumbleton
Submissions Received	20 July, 25 and 30 August 2010
Determination:	2 September 2010

COSTS DETERMINATION OF THE AUTHORITY

---

[1] An application for costs has been made in relation to the Authority's investigation of a preliminary issue which arose from claims brought by Ms Emily Bell-Booth against Wingate + Farquhar Limited (W+F). The costs application has been brought by W+F in accordance with directions given in the Authority's determination of 30 June 2010 (issued under AA308/10).

[2] The preliminary issue decided by the Authority after an investigation meeting was that the contractual relationship Ms Bell-Booth had been in with W+F was not an employment relationship or contract of service. The Authority held that any claims Ms Bell-Booth wished to make in relation to the performance of that contractual relationship or the termination of it, had therefore to be determined in a jurisdiction other than the Authority.

[3] The claims she had brought were personal grievances and an action to recover arrears of wages. To resolve them Ms Bell-Booth sought monetary remedies in excess of $100,000 in total.

[4] After commencement of the investigation with the lodging of a statement of problem, and after a statement in reply had been received, the Authority directed a hearing of the preliminary question whether or not Ms Bell-Booth had been employed under a contract of service.

[5] The Authority directed this issue be dealt with on 19 August 2009, with evidence and submissions from the parties. In the event, on that date an adjournment was directed by the Authority, as it considered Ms Bell-Booth had been at fault in her preparation and approach to the hearing so as to cause prejudice to W+F if the meeting proceeded as scheduled. Reflecting this consideration was an award of $425 costs made against Ms Bell-Booth. That amount was to compensate W+F for the waste of its time in attending the investigation only to have it adjourned because of Ms Bell-Booth's unpreparedness.

[6] At a new fixture set for 20 October 2009 the parties presented evidence in support of their respective claims about the nature of the contractual relationship between them. This was followed by comprehensive written submissions supplied over the following weeks, in accordance with a timetable set with the parties.

[7] The matter had not been directed to mediation by the Authority, as it considered that until the nature of the parties' relationship had been determined mediation was unlikely to constructively assist them to resolve the claims. It was contemplated by the Authority that the need for mediation would be reviewed by it after the preliminary issue had been determined.

[8] Mediation from the usual source of the Department of Labour was not precluded by any determination that, as turned out to be the case, Ms Bell-Booth was not in an employment relationship. Section 144A of the Employment Relations Act does not confine the Department to providing dispute resolution services only to parties who are in employment relationships.

[9] In costs submissions made on behalf of W+F counsel Ms Neville contended that Ms Bell-Booth's conduct of her claims and the nature of them had caused an increase in the costs to W+F of opposing those claims. Costs incurred were $27,209 plus GST, with disbursements of $484.

[10] Ms Neville submitted that in bringing the claim Ms Bell-Booth had ignored the reality, and her own prior statements or declarations as to the nature her

relationship with W+F, that she had been a contractor at material times. The claim had had a very low chance of success, it was submitted.

[11] W+F seeks a reasonable contribution to actual costs, which it quantifies as an award of $9,000 together with a contribution of $200 for disbursements.

[12] A response to the application for costs was made by counsel on behalf of Ms Bell-Booth, although it was nearly two weeks out of time. Counsel Mr Fulton apologised for the delay, which he has taken responsibility for. In the circumstances the Authority has considered the submissions made and will address the delay simply by noting it, for the possible future purposes of s 181 of the Act should there be a challenge to this costs determination.

[13] Mr Fulton describes W+F's actual costs of $27,000 as "staggering." He notes that the costs have also not been proved. There are no copies of itemised invoices to support the application and no advice has been given as to the charge-out rate or time spent on particular items billed.

[14] Mr Fulton has also criticised the advice given in the application for costs that up to 19 August 2009, the date on which the hearing was expected to proceed, costs incurred were $11,422 plus GST, yet following the adjournment of that fixture further costs of $15,787 plus GST somehow were incurred.

[15] There is no explanation as to why additional costs were incurred to a level where they exceeded costs up to 19 August, assuming the matter had been ready to proceed on that date as intended.

[16] No doubt some of the additional costs were for submissions, and some additional work would have been required to address material only presented for the first time on 19 August. A refresher of the case would also have been necessary before the new date of 20 October 2009.

[17] Mr Fulton submits that the starting point for fixing costs should be a notional $2,000 per day, derived from 8 hours @ $250 hourly charge-out rate. In support of a submissions that no costs should be awarded against Ms Bell-Booth, he gaves the reason that W+F failed or refused to attend mediation and, as an additional reason, that Ms Bell-Booth has had no income since finishing with the firm in May 2009 as she has had no work since then and has been relying on family generosity and support

for economic maintenance. Mr Fulton advises he is instructed by her that Ms Bell-Booth has no funds by which to pay costs or even fees of her own legal advisors. He submits there should be no order for costs.

[18] Although the length of the investigation meeting was one (full) day, this does not reflect the preparation the Authority could reasonably anticipate would be put into this case by both parties.

[19] If a daily tariff approach was to be taken, about two days at least would be the appropriate starting point, to which could be applied a rate of up to $2,500. The determination of the preliminary issue required the Authority to apply what have become reasonably well established legal principles to facts about which there was no great dispute between the parties.

[20] On W+F's side the level of costs incurred is high, and surprisingly so as Mr Fulton has submitted. As pointed out by counsel there is no detailed analysis of the charges as might have been provided in copies of the invoices rendered to W+F.

[21] On Ms Bell-Booth's side, as submitted by Ms Neville there is no satisfactory evidence that Ms Bell-Booth is unable to pay an award of costs as a consequence of impecuniousity.

[22] I agree that there is no basis for making a nil award without evidence detailing in full Ms Bell-Booth's financial situation where, as suggested, she may have an interest in real property, or may be a beneficiary of one or more family trusts. Without that evidence it is merely speculation as to what her true financial state of affairs is.

[23] As to the point made by Mr Fulton about W+F not attending mediation, there was no compulsion by direction of the Authority for it to do so. Mediation remained voluntary. I accept that it was a reasonable approach to wait and see how the preliminary issue was disposed of by the Authority before deciding upon mediation. To take non attendance at mediation into account in fixing costs would be to punish a party, which is not the purpose of costs.

[24] In those circumstances, I consider that an award of $4,500 costs should be made against Ms Bell-Booth, and also $200 as a contribution to W+F's disbursements.

[25] She is ordered to pay those sums pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

A Dumbleton
Member of the Employment Relations Authority