

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Marcel De Witte (Applicant)
AND AGR Matthey (NZ) Limited (Respondent)
REPRESENTATIVES Michael Keall, Counsel for Applicant
Margaret Robins, Counsel for Respondent
MEMBER OF AUTHORITY Vicki Campbell
SUBMISSIONS RECEIVED 16 June 2006 from Respondent
4 July 2006 from Applicant
DATE OF DETERMINATION 14 July 2006

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] Mr De Witte brought a claim of unjustified dismissal to the Authority for determination. The respondent denied Mr De Witte was an employee. Therefore, with the agreement of the parties, I proceeded to hear and determine only the issue of whether Mr De Witte was an employee or an independent contractor.

[2] On 10 May 2006 I issued a determination in favour of the respondent when I found Mr De Witte was not an employee of AGR Matthey (NZ) Limited.

[3] In the statement of problem filed in the Employment Relations Authority, Mr De Witte made no application for costs and neither was the matter dealt with in my determination dated 10 May 2006.

[4] I am advised by Ms Robins on behalf of the respondent that since 10 May 2006, Mr Keall and herself have attempted to agree on the matter of costs. However, those discussions have not led to a resolution. I am now in receipt of submissions from both Ms Robins on behalf of the respondent and Mr Keall on behalf of the applicant.

[5] Ms Robins is claiming a contribution to total costs which amounted to \$15,727.50 although I note that the invoices provided by Ms Robins indicate that some of those costs included some appearances and discussions relating to mediation.

[6] Before the matter proceeded to an investigation meeting, on 7 April 2006, Ms Robins on behalf of the respondent, made a Calderbank offer to Mr De Witte. The Calderbank letter sets out the respondent's response to Mr De Witte's claim that he was an employee, in an effort to persuade him to discontinue the proceeding. The offer to settle the entire matter was a payment of \$15,000 and was expressed to take into account the fact that Mr De Witte may face a greater risk of an award of costs against him if he continued to proceed with the matter. The offer was expressed to be available to Mr De Witte to accept until 5 o'clock on Tuesday, 18 April 2006.

[7] The Authority may pursuant to clause 4 of the Second Schedule of the Employment Relations Act, reopen the investigation in order to deal with the issue of costs. I consider it is reasonable to do so. The power to award costs contained in the Second Schedule of the Act. The following principles are appropriate where the Authority is exercising its discretion in relation to costs (*PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, unreported, AC28/06, 12 May 2006, Colgan CJ, Travis and Shaw JJ):

- There is a discretion as to whether costs should be awarded and what amount;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[8] It was said in *Harwod v Next Homes Limited*, unreported AC70/03, 19 December 2003, Travis J, and *Graham v Airways Corporation of New Zealand Ltd*, unreported, AA39/04, 28 January 2004, Member Dumbleton, that average awards of costs fall between \$1,000 and \$1,500 for a one-day investigation meeting by the Authority. There was also agreement in those decisions of a recent trend towards a higher figure of between \$2,000 and \$3,000.

[9] In determining a reasonable amount of an award for costs, I have had regard to the Calderbank offer made by AGR to resolve the matter. The offer was based on a realistic assessment of Mr De Witte's likelihood of success and the minimal costs that could have been expected to have been incurred at that point. I have also had regard to the general principles and the submissions I have received from the parties.

[10] Taking all of these circumstances into account, Mr De Witte is ordered to pay AGR Matthey Limited \$1,000 towards its legal costs.

Vicki Campbell
Member of Employment Relations Authority