Determination Number: AA 1A/06
File Number: AEA 587/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Tania Faithfull (Applicant)
AND	Morris and Morris Limited (Respondent)
REPRESENTATIVES	Ken Nicolson, Counsel for Applicant Andrew Clemow, Counsel for Respondent
MEMBER OF AUTHORITY	R A Monaghan
MEMORANDA RECEIVED	1 and 3 February 2006
DATE OF DETERMINATION	9 February 2006

DETERMINATION OF THE AUTHORITY ON COSTS

[1] In a determination in the above matter, dated 5 January 2006, I found Ms Faithfull was unjustifiably dismissed prior to the termination of her fixed term employment agreement. She was awarded remedies in that respect.

[2] Costs were reserved and counsel have submitted memoranda on the matter.

[3] Counsel for Ms Faithfull seeks a contribution of $5,000 to actual costs of $7,200.

[4] Counsel for Morris & Morris seeks a contribution of $2,000 to actual costs in excess of $17,000. He relied in particular on a written offer dated 18 November 2005 and marked 'without prejudice save as to costs'. The offer was for a payment of $2,500 under s 123 of the Employment Relations Act 2000, and provided that costs should lie where they fell.

[5] The offer could have been made very much earlier than it was. Instead it was sent by facsimile on a Friday afternoon, when the investigation meeting was to commence the following Monday morning. Briefs of evidence had been filed and counsel himself was already on his way to Whangarei. Had the offer been made earlier I would have given it weight, but as matters stand it was not made in circumstances where its acceptance could reasonably be considered likely. For that reason it does not assist.

[6] Even so, this was very much a matter that should have been settled early and for a relatively modest sum.

[7] Since I do not know what the parties' negotiating positions were, I can say only with reference to the way the matter was advanced in the Authority that Ms Faithfull should have recognised the weakness of any claim for the reimbursement of earnings lost after the end of her fixed term agreement, and of the claim for reimbursement of her moving expenses. It was not appropriate to ignore the primarily commercial basis of her association with Morris & Morris and

the attempt to cast it in a different light was particularly unconvincing. Ms Faithfull's strongest claim was for compensation in respect of the early termination of her employment agreement. That was where her focus should have been, and her settlement expectations should have been shaped accordingly.

[8] Similarly, Morris & Morris should have recognised at an early stage that it was not enough just to pay Ms Faithfull for the unexpired period of her employment agreement. The company was always going to be exposed to a claim for further remedy, not least because the agreement was terminated so peremptorily only days after it had been extended. Morris & Morris should not have let any unhappiness about the relationship blind it to the serious flaws in the way it attempted to deal with its termination. Finally, the company should have recognised the weakness of the argument that the parties were not in an employment relationship at all.

[9] I have said all of this to emphasise the importance of taking a realistic approach in any settlement negotiations to the strengths of various arguments, and to the likely level of liability or remedies available as a result. More directly as far as costs are concerned now, the comments indicate where both parties have had a degree of success (or lack of it) in the substantive determination.

[10] The end result was a net award in Ms Faithfull's favour of $2,866.36. For the reasons I have discussed there never a realistic prospect of a high award by way of remedy. Ms Faithfull now faces the possibility that, despite the degree of success she has achieved, it has cost her a disproportionate sum to achieve it and she may suffer a net loss.

[11] That could be remedied by making a higher award of costs than I would otherwise have made. However this is simply not a case where a high award of costs is called for. At the same time Ms Faithfull enjoyed some degree of success and the lateness of the settlement offer means I do not accept this is a case where a contribution to the respondent's costs is called for.

[12] Accordingly, bearing mind the nature of the case, the mixed success achieved by the parties, and that the investigation meeting took less than a full day, Morris & Morris is ordered to contribute to Ms Faithfull's costs in the sum of $2,500.

R A Monaghan
Member, Employment Relations Authority