

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 88A/07
File Number: 5034828

BETWEEN John Christopher Johns (Applicant)

AND Shell New Zealand Limited
 (Respondent)

Member of Authority: P R Stapp

Investigation Meeting: Wellington 29 May 2007

Submissions received: 22 May 2007 (from the Applicant's representative Seah Balan
 Ravi & Co in Malaysia)
 24 May 2007 (from the Respondent's representative Minter
 Ellison Rudd Watts)
 28 & 29 May 2007 (Mr Johns)

Determination: 31 July 2007

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter arises from a determination I issued on 30 May 2007 in respect to Mr Johns' request for an adjournment that was unsuccessful. No good cause was shown for his failure to attend or be represented at the Authority's investigation meeting. Further I proceeded to fully act in Mr Johns' absence as if he was present and/or represented. The respondent has applied for costs. An opportunity was provided to Mr Johns to reply.

[2] Mr Johns requested that the respondent pay his costs. Without good cause he has put the Respondent to unnecessary cost in failing to get an adjournment given the notice he was on in regard to the proceedings. In the circumstances he can hardly expect any costs in his favour when he made no attempt to be present or be represented at the Authority's investigation meeting.

[3] The respondent was able in advance to at least make alternative arrangements to avoid the cost of Shell New Zealand's witnesses appearing, and produced its witness statements in affidavit form. A further affidavit sworn in the Authority from Mr McGuire was necessary to respond to Mr

Johns' latest allegations and a late submission for an adjournment. The matter of the adjournment could not have realistically been considered until the first day of the investigation meeting. Mr Johns must take responsibility for the situation because he left the matter so late.

[4] It was expected that if the adjournment was not granted Mr Johns would not be present. Mr Johns has put the respondent to unnecessary cost because of his lateness and deliberate attempt to further pursue an adjournment and delay the matter.

[5] I conclude an adjournment has been his aim all along, at least since it was initially declined by me and at which time the respondent could have expected him to be involved in the investigation. He did not produce a written statement of evidence in reply as requested. His correspondence on the application to adjourn was considered by me. He has to pay a portion of the respondent's costs upon being unsuccessful and putting the respondent to the expense and cost of the proceedings. Indeed even if I had granted the adjournment he most likely would have had to pay for the indulgence.

[4] The respondent was represented, which was entirely reasonable considering the nature and type of allegations made by Mr Johns. The respondent followed in good faith the directions of the Authority, reasonably understanding that the investigation meeting would take place at least until Mr Johns raised his adjournment request again; being a few days before the scheduled investigation meeting.

[5] This is a meritorious situation for more than just the usual range of costs that would be applied by the Authority for a short meeting. Reasonably the respondent could have expected at least a full day investigation meeting on the issues in the statement of problem and to have to make submissions. Thus it was not unreasonable to plan for such an eventuality upon late notice of an adjournment even although there was time to mitigate and save costs because of the likelihood that Mr Johns would not turn up or be represented.

[6] Costs are determined as a matter of principle. They are not to punish any party but to reimburse the successful party for any cost it has been unreasonably put to by the other party.

[6] The respondent asked for direct solicitor client costs. It has/not supported this with the actual details including invoices and receipts. It accepted that direct costs would be rare and exceptional. I mentioned earlier that I am of the opinion that Mr Johns holds a genuine point of view about

certain things that would ordinarily be tested if he was in New Zealand. I am also of the opinion that his unavailability is not necessarily the fault of the respondent, or attributable to any of the respondent's actions in conducting itself in these proceedings, and that Mr Johns is responsible for how he has conducted his affairs.

[7] Therefore it is my decision that costs will follow the event in favour of the respondent. A sum of reasonable costs includes the time the respondent's counsel needed to prepare (including producing statements, documents, affidavits and submissions) and their attendances. The last minute application for an adjournment from Mr Johns was wholly unsatisfactory when an earlier application for different reasons and on lighter/lesser grounds had been declined by me. The respondent moved to mitigate any further losses by arranging affidavits instead of witnesses attending. That was entirely proper.

[8] Any costs should relate to the cost of a full investigation meeting as if it had taken place over at least a day. Deciding costs has to fall short of full costs. The Act does envisage there will be times when adjournments and non appearances will occur. Mr Johns at least had an employment relationship problem worthy of investigation that the respondent had to defend. In those circumstances the threshold for full costs has not been met. However my finding that Mr Johns left me with the impression that he was deliberately delaying the investigation and without good cause not appearing has an impact on my consideration of this issue. Therefore the amount of reasonable costs must take into account the employer's engagement of Counsel, their preparation and attendances on the basis of planning for a full day. I fix reasonable costs at \$3,680.

[9] My assessment of the contribution amounts to 90% of the reasonable costs. My reasons are: Mr Johns' unsuccessful late application for an adjournment, his misleading information on engaging a lawyer in Wellington, and having no good cause for failing to attend, are all contributing factors.

[10] Therefore I order Mr Johns to pay a contribution of \$3,312 to Shell New Zealand Limited.