

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 266
5457842

BETWEEN GRAHAM KEMP
 Applicant

A N D POST HASTE LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Max Whitehead, Advocate for the Applicant
 Jim Roberts, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions: 19 June 2014 from Applicant
 16 June 2014 from Respondent

Date of Determination: 26 June 2014

COSTS DETERMINATION OF THE AUTHORITY

A. The applicant, Mr Graham Kemp is ordered to contribute \$500.00 towards the respondent, Post Haste Limited’s costs.

[1] On 28 April 2014 the applicant, Mr Graham Kemp, filed a statement of problem in the Authority requesting that the Authority investigate a settlement (the settlement) reached with the respondent, Post Haste Limited (Post Haste) and signed by a mediator which had allegedly arisen out of his employment by Post Haste. Mr Kemp alleged the settlement was without “*accord and satisfaction between the parties.*”

[2] On 13 May 2014, through its counsel, Post Haste applied to the Authority for determination of a preliminary issue, namely, “*...whether the agreement for settlement dated 2 September 2013 executed by the parties (and signed by a mediator from the Ministry of Business, Innovation and Employment in accordance with the procedure*

outlined in s.149 of the Employment Relations Act 2000) operates to prevent the applicant from pursuing any personal grievances against the respondent, including that for unjustifiable dismissal as outlined in the statement of problem.”

[3] On 13 May 2014, Post Haste through its counsel filed a statement in reply in the Authority.

[4] On 26 May 2014, the Authority convened a telephone conference with the representatives for Mr Kemp and Post Haste. The purpose of the telephone conference was to schedule appropriate times for the hearing and determination of the preliminary matter raised by Post Haste and the substantive matter raised by Mr Kemp.

[5] During the course of the telephone conference, Mr Whitehead requested the opportunity to speak to Mr Kemp regarding his claim and whether or not the settlement entered into under the Employment Relations Act 2000 (the Act) was final and binding on the parties. Mr Kemp subsequently withdrew his claim.

[6] Counsel for Post Haste seeks costs in relation to defending what it considers to be an “*unmeritorious try-on*” by Mr Kemp.

[7] Post Haste has incurred actual legal costs of \$7,231.00 plus GST for defending the claim to date. Attendances include correspondence between the representatives following the raising by Mr Kemp of his personal grievance claim, preparation of and filing a statement in reply to Mr Kemp’s statement of problem, the preparation of the application for a preliminary matter to be determined by the Authority and attendance at the telephone conference. The investigation meeting did not proceed because Mr Kemp withdrew his claim before it was investigated by the Authority.

[8] Counsel for Post Haste submits that Post Haste has had to incur wholly unnecessary costs as a result of Mr Kemp proceeding with his unmeritorious claim. Counsel for Post Haste seeks an order for a contribution of \$5,704.50 plus GST towards actual costs incurred by Post Haste.

[9] Mr Kemp requests the Authority let costs lie where they fall because he was led to believe he had a claim and has himself incurred costs of some \$1,650 in bringing the claim.

[10] It appears that Mr Kemp withdrew his claim because it became apparent that it was unmeritorious. Mr Kemp had already raised a grievance which had been settled at mediation and signed off in an agreement for settlement by the mediator under s.149 of the Act. The fact that Mr Kemp has incurred costs for pursuing a claim that he subsequently decided not to pursue because it was unmeritorious is unfortunate. However, Post Haste has incurred costs up to the point that Mr Kemp made his decision to withdraw his claim. A contribution by Mr Kemp to Post Haste's costs in such circumstances is justified, in my view.

[11] The Authority's power to award costs arises from Schedule 2, clause 15 of the Act. This confers a wide discretion on the Authority to award costs, on a principled basis.

[12] The principles guiding the Authority's approach to costs is set out by the full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. Those principles are so well recognised I do not need to restate them.

[13] The general principle is that costs follow the event, and I see no reason to depart from that in this case. Mr Kemp brought a claim, following correspondence with counsel for Post Haste and following a telephone conference with the Authority decided to withdraw and not progress the claim further. Post Haste incurred reasonably significant costs in defending the claim brought by Mr Kemp.

[14] Normally costs in the Authority are awarded on a notional daily tariff approach. The normal starting point for costs in the Authority is \$3,500 per day, *Fifita (aka Bloomfield) v. Dunedin Casinos Limited*¹. Even though this matter did not proceed to an investigation meeting in the Authority, a statement of problem was filed requiring a response by Post Haste, a preliminary application was filed by Post Haste requesting the Authority to determine a preliminary matter concerning the status of the settlement and whether it operated to prevent the Authority from investigating the matter, and there was an attendance at a telephone conference to timetable the matters to an investigation meeting. There was no investigation meeting.

[15] In the circumstances, I am prepared to award costs in favour of Post Haste but not at the level being sought by it.

¹ [2012] NZERA Christchurch 219

[16] A contribution is appropriate and in the circumstances, I order Mr Kemp to pay \$500 towards the costs of Post Haste. Mr Kemp is to pay Post Haste the sum of \$500 costs within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority