

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Diana Margaret McLeman (Applicant)
AND New Zealand Commercial Care Limited (Respondent)
REPRESENTATIVES Denis Standing, Counsel for applicant
No appearance for respondent
MEMBER OF AUTHORITY Philip Cheyne
SUBMISSIONS RECEIVED 20 July 2005 from Applicant
No submissions from respondent
DATE OF DETERMINATION 18 August 2005

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 1 July 2005, I rejected Ms McLeman's personal grievance claims but upheld part of a claim by her for arrears of wages and holiday pay. Costs were reserved.

[2] Counsel for Ms McLeman lodged a memorandum regarding costs on 20 July 2005. I am satisfied from the file that the memorandum was sent to the respondent company at its registered office at 264 Gloucester Street on 21 July 2005. I allowed the respondent 14 days to provide any response to the applicant's cost memorandum but nothing has been received. Given the respondent's earlier failure to lodge a statement in reply, to participate in a phone conference or to attend the investigation meeting, it seems likely that there will be no response however long is given. It might also be that any cost order now made by the Authority will be fruitless as the indications are that the respondent no longer trades. However, that is not relevant to the present task.

[3] Counsel helpfully provided an itemised breakdown of the bill of costs. The legal fees inclusive of the lodgement fee are \$4,421.50. Counsel makes two points about costs which I accept. First, that as a wage arrears action, Ms McLeman bore no culpability in the situation. Secondly, counsel pointed out that Ms McLeman's personal circumstances are such that she is unable to meet her own legal fees. It also seems likely that she will not be able to collect the more than \$6,000.00 wage arrears plus interest that the respondent has already been ordered to pay. I accept that Ms McLeman has ended up in a difficult situation not of her own making.

[4] The usual approach of the Authority is to order an unsuccessful party to pay a reasonable contribution to the costs reasonably incurred by the successful party in preparing for and participating in the investigation process. I see no reason to depart from that approach in the present case.

[5] The present situation is complicated by my rejection of the personal grievance claims and the inference I draw that a significant part of Ms McLeman's legal costs relate to those aspects of her claim. Ms McLeman is not entitled to any contribution to that part of her costs. I am left then to assess what time might have been required to pursue the arrears claim. If one allows 1 hour for initial instruction, 1 hour for preparing and lodging a statement of problem, ½ an hour for the directions conference, 1 hour for preparing and lodging the statement of evidence, 1 hour for attendance at the investigation meeting and ½ an hour for incidental attendances, that would be 5 hours in total. Correspondence from solicitors originally instructed by the respondent advanced the view that Ms McLeman was not an employee but was an independent contractor. As indicated in the determination, there was barely any evidence to support that view but it no doubt required some further work on the part of Ms McLeman's solicitor to counter it. A further hour can be allowed, bringing the total to 6 hours work giving a total cost of \$1190.70 at counsel's hourly rate for assessed reasonable costs. In addition, Ms McLeman incurred the lodgement fee of \$70.00.

[6] Ms McLeman succeeded in recovery of arrears of holiday pay, statutory holiday entitlements and some wages. They were all payments that should have been made by the respondent while it was trading. In that circumstance I consider that the respondent should pay Ms McLeman \$1,000.00 towards her costs and expenses in pursuing her claim.

Conclusion

[7] The respondent is to pay the applicant \$1,000.00 as a contribution to her costs and expenses.

Philip Cheyne
Member of Employment Relations Authority