

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Kerry William McVicar (Applicant)
AND Donald McKenzie Harcourt (Respondent)
REPRESENTATIVES David Beck, Counsel for Applicant
Donald McKenzie Harcourt, Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 19 July 2005
DATE OF DETERMINATION 24 August 2005

DETERMINATION OF THE AUTHORITY

[1] In a determination dated 5 August 2005, I upheld a claim by Mr McVicar for arrears of wages and holiday pay. Costs were reserved to allow the respondent to reply to submissions on costs received from the applicant after the investigation meeting but before the determination was issued. I have now received a written reply from the respondent. This determination resolves the disputed question of costs.

[2] Part of the claim for arrears of wages and holiday pay was resolved in favour of the respondent by a finding that there had been no agreement about backpay for the initial period of the employment, part of the claim was conceded by the respondent prior to the investigation meeting and another part was resolved by applying the law about payment for statutory holidays. I should also note that while the respondent conceded part of the claim, he did not actually pay any money to the applicant prior to the date of the investigation meeting. I am not aware of what has happened since. Assessing the overall outcome, it is fair to say that the applicant enjoyed a measure of success and is entitled to a reasonable contribution to legal costs reasonably incurred.

[3] That said, the respondent makes a number of valid points about the claim for costs. He questions why the applicant instructed a lawyer at all, but parties are entitled to representation if they wish. The fact that the respondent apparently did not know of that right is irrelevant. However, the respondent asks why Christchurch counsel was instructed for a matter that was dealt with in Greymouth. That increased the legal costs. For example, the applicant's itemised costs show \$720.00 as *Travel*. I see no reason why the respondent should contribute to such costs.

[4] The second valid point made by the respondent is about time spent on unmeritorious issues. Shortly before the investigation meeting, the applicant sought to expand the problem to include a constructive dismissal claim. I was not prepared to do that so soon before the investigation meeting because of the likely prejudicial effect on the respondent. At the investigation meeting, the applicant sought to extend the problem to include a claim for penalties and to cover an ACC issue without any proper notice about those matters. The applicant also spent time on additional

submissions sent to the Authority after the investigation meeting on the application of section 132 of the Employment Relations Act 2000. I accept that the respondent did not comply with his obligation to keep and produce time and wage records, but that breach had nothing to do with the essence of the problem. Again, I see no reason why the respondent should contribute to the cost of these matters.

[5] I am left to assess reasonable costs and an appropriate contribution. The investigation meeting lasted about 2½ hours. The claims were well defined by the original statement of problem and the reply. Counsel was not instructed until after the proceedings were commenced. There was only one relevant point of dispute between the parties and only the applicant and the respondent gave evidence. In those circumstances, I will adopt a multiple of 2 to assess reasonable time at about 5 hours. At counsel's hourly rate, that gives assessed reasonable costs of about \$1,000.00. I order the respondent to pay \$600.00 as a contribution to the applicant's costs plus a further \$70.00 to reimburse him for the lodgement fee.

Philip Cheyne
Member of Employment Relations Authority