

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Katsunao Nagai (Applicant)
AND Carlton Hotel (Auckland) Limited (Respondent)
REPRESENTATIVES Tae Wok Kwon, Counsel for Applicant
Katherine Burson, Counsel for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 30 August 2004
31 August 2004
DATE OF DETERMINATION 4 February 2005

COSTS DETERMINATION OF THE AUTHORITY

The applicant brought a personal grievance claim alleging constructive dismissal. The applicant was unsuccessful in that claim.

The respondent submits it has incurred significant costs in defending this matter (\$17,083.80) and seeks an award of costs in the sum of 11,275.31 being 66% of that sum.

The power to award costs is contained in the Second Schedule of the Employment Relations Act 2000. The general principles to be applied in cost applications are set out, in case law including *NZALPA v Registrar of Unions* (1989) NZILR,550, *Okeby v Computer Associates (NZ) Limited* [1994] 1 ERNZ 613 and *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38. The criteria to be taken into account include the importance of the case to the parties, the way the case was conducted, the conduct of the parties at the hearing, the amount of time required for effective preparation over and above that which would ordinarily be inferred, whether arguments lacking in substance were advanced or whether unduly legalistic and technical points were taken and the actual costs incurred.

Determination

I have read and considered the submissions of the parties in this matter.

The respondent is not estopped from claiming costs as argued by counsel for the applicant. The question of challenge is a separate matter from that of costs and should be considered by an applicant on its merits and chances of success separately from any costs issues arising from bringing the substantive case.

Taking this case overall it must be said the applicant has gone out on a limb and made a poor assessment of risk. I note in particular his decision to decline a properly constructed, timely and reasonable Calderbank offer of settlement.

Now all that remains is for me to set costs in the matter.

In all the circumstances of this case I direct the applicant to pay to the respondent the sum of \$8,500 to compensate it for the cost it has incurred in defending the applicant's claim.

Janet Scott
Member of Employment Relations Authority