

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Shannon Dayle Taylor (Applicant)
AND Esquires New Zealand Limited (Respondent)
REPRESENTATIVES Shannon Dayle Taylor In person
Michael Smyth, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
MEMORANDUM RECEIVED 28 April and 9 May 2005
DATE OF DETERMINATION 16 May 2005

DETERMINATION OF THE AUTHORITY ON COSTS

[1] The parties' employment relationship problem was set down for an investigation meeting on 22 April 2005. The meeting was to address the preliminary issue of whether the parties were in an employment relationship or whether Ms Taylor contracted her services to Esquires New Zealand Limited ("Esquires"). The parties were to have filed and served statements of evidence by 15 April, and the Authority received Esquires' material on 18 April 2005.

[2] Also on 18 April Ms Taylor contacted the Authority indicating she sought to withdraw her claim. When asked to confirm her intentions in writing, by letter of the same date she said she was unable to attend the meeting and asked that it be cancelled. It seems she wanted her application to remain 'in abeyance', although she also mentioned an intention to approach the Disputes Tribunal. When asked to clarify her intention in a conference call on 21 April, Ms Taylor confirmed that she wished to withdraw her employment relationship problem. The investigation meeting did not go ahead.

[3] Counsel for Esquires has applied for costs. He pointed to a letter to Ms Taylor dated 22 February 2005 in which he: set out reasons why his client believed the parties were in a relationship of principal and contractor; expressed the view that Ms Taylor's claim was spurious, frivolous and vexatious; and offered her the opportunity to withdraw the claim with no claim for costs being made against her. The letter required a reply by the close of business on 4 March 2005.

[4] It appears no agreement in the above terms was reached. Accordingly counsel seeks a contribution to \$1,980 being costs incurred prior to 4 March 2005, plus full reimbursement of costs of \$2,280 incurred after 4 March.

[5] The material filed indicates Ms Taylor was engaged as a commission-only seller of franchises for Esquires outlets, and provided her services through a GST-registered company Interweave Enterprises Limited which invoices Esquires for those services. The business structure Ms Taylor used was indicative of her being a contractor, and some email exchanges filed indicated

that was both parties' intention. A full investigation of the method of carrying out work might have led to a finding that Ms Taylor was an employee of Esquires', but otherwise the material I have tends to indicate merely that Ms Taylor's general work-related activities were typical of a commission-only salesperson.

[6] Overall I would not say that Ms Taylor's claim was as clearly unmeritorious as counsel would have it. In particular I would not say that the present circumstances are comparable with those in **Reid v NZ Fire Service Commission** [1995] ERNZ 38, where Chief Judge Goddard commented on the implications of proceeding with an unmeritorious case in the face of warnings about costs. The circumstances here are even less comparable with those in a later costs award involving the same parties, in **Reid v NZ Fire Service Commission** [1998] 3 ERNZ 1237, 1260.

[7] Counsel was, nevertheless, entitled to warn Ms Taylor of her likely exposure to costs if she was unsuccessful. Her claim that she was an employee was weak but she chose to proceed, and in doing so caused Esquires to incur costs. Her late withdrawal of the application meant the costs - and in particular those associated with preparing for the investigation meeting - were incurred needlessly. On that ground, Esquires is entitled to consideration of a contribution to its costs.

[8] For her part Ms Taylor says she has had no income for the last 6 months and is presently experiencing financial hardship.

[9] In addition, with the exception of cases like the **Reid** cases, awards of costs when a matter has been withdrawn have not been high. In this case I consider a contribution of \$100 to be appropriate and Ms Taylor is ordered to pay that sum to Esquires.

R A Monaghan
Member, Employment Relations Authority