

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Augustinus van der Kleij (Applicant)  
**AND** Zespri International Ltd (Respondent)  
**REPRESENTATIVES** Richard Harrison, Counsel for Applicant  
Ian Davidson, Advocate for Respondent  
**MEMBER OF AUTHORITY** Vicki Campbell  
**SUBMISSIONS RECEIVED** Respondent 16 March 2005  
Applicant 27 June 2005  
**DATE OF DETERMINATION** 11 July 2005

DETERMINATION OF THE AUTHORITY

- [1] On 27 August 2004 Mr Augustinus van der Kleij filed a statement of problem with the Employment Relations Authority relating to work he had undertaken in Belgium for Zespri International Limited.
- [2] A statement in reply was received from the Respondent on 22 September 2004. While the respondent accepted, in the interests of the parties, that the Employment Relations Authority was the "*forum conveniens*" at the same time it applied for a declaration that the appropriate law was Belgium employment law.
- [3] Because the matter had not been to mediation, as a first step towards attempting resolution of the problem, the Authority Support Officer emailed Mr Davidson and asked if the Respondent was willing to meet in mediation. On 5 October 2004 Mr Davidson advised that Zespri International Limited was willing to attend mediation.
- [4] The Authority was advised on 7 December 2004 that the matter had not been resolved in mediation. The Authority attempted to set up a directions conference with the parties to discuss timetabling an investigation meeting. However, this did not occur as on 15 December 2004 the applicant, through his then representative advised the Authority not to convene a conference call at that stage as Mr van der Kleij was considering his options regarding jurisdiction.

- [5] Mr van der Kleij notified Mr Davidson of his intention to withdraw the matter. In response, on 28 January 2005, Mr Davidson objected to the withdrawal of the claim and advised that Zespri International Limited would seek costs from the applicant.
- [6] Formal notice of withdrawal was received from the Applicant on 14 February 2005. On 17 February 2005, Mr Davidson wrote to the Authority and restated his objections to the withdrawal and the intention to seek costs. The parties were invited to make submissions on the issue of costs.
- [7] Mr Davidson submitted for the Respondent that the case lacked merit and that it should have been apparent to the applicant that the relevant jurisdiction for his claim was in Belgium and not New Zealand.
- [8] I can not say whether the substantive issues that lie behind the original application are unmeritorious, because no investigation was ever commenced by the Authority. Those substantive matters have now become a matter for another judicial forum to determine.
- [9] Mr Davidson submitted that full costs including those costs incurred through the attendance at mediation should be awarded given the complexity of the case. Mr Davidson makes his submission relating to the costs of attending mediation on the basis that the parties were directed to attend mediation.
- [10] According to the file, the parties were not directed to mediation by the Authority. In discussion with the support officer managing the file the parties mutually agreed to attend mediation and did so.
- [11] In support of his submissions that costs associated with mediation are recoverable, Mr Davidson referred me to a decision of the Employment Court in *Eniata v AMCOR Packaging (NZ) Ltd* (unreported) AC 19A/02, 24 May 2002, where Colgan J (as he was then), stated:
- Unlike the Employment Contracts Act 1991, the mediation process is not a part of, nor even dependent upon, proceedings having been issued. Rather, mediation is usually attempted prior to any proceedings being lodged with the Authority although in some cases the Authority will direct mediation where it is not satisfied this alternate dispute resolution mechanism has been employed but should be. I have reservations as to whether even the Employment Relations Authority can order costs of participation in mediation but leave the question open for determination in another case if it arises.*
- [12] In a more recent decision of *Waugh v Commissioner of Police* (unreported), WC 8/04, 23 June 2004, the then Chief Judge of the Employment Court also commented on the ability for the Employment Court to award costs associated with mediation. Goddard CJ, stated that the Employment Court Regulations 2000 do not go so far as to preclude the Court from awarding costs of mediation. The Chief Judge commented that mediation is either required by the Authority

or by the Court or both or is undertaken by the parties in anticipation of the certainty that it will be so required if not undertaken voluntarily.

- [13] The Authority can only commence an investigation when a matter is properly before it. A matter is properly before the Authority when the required statement has been filed and the fee paid. The Act provides for proceedings before the Authority to be suspended when parties are directed to attend mediation (s.159(2)). Once suspended, the Authority is unable to commence its investigation until after mediation has been completed.
- [14] In this case the parties attended mediation voluntarily, after this matter was filed in the Employment Relations Authority. Once the parties indicated their willingness to attend mediation they were advised that in the meantime the proceedings in the Authority would be suspended. Also, the parties were advised that it was up to the applicant to advise the Authority whether or not he wished to progress the matter to an investigation meeting in the Authority.
- [15] Mediations are held in a confidential forum and the Authority is prohibited from making any enquiries into the mediation (s.148). On that basis it is not possible for the Authority to enquire as to the appropriateness or otherwise of the costs associated with mediation services.
- [16] I am not persuaded that costs associated with mediation are available to be included in the calculation for contribution of costs.
- [17] Costs may, however, follow the withdrawal of proceedings, but first the respondent must show that costs have been incurred in defending the proceedings up to that point. Here the withdrawal was precipitated by the filing of the statement in reply. The withdrawal came soon after mediation had occurred. The investigation did not even begin, there was no preliminary conference, no timetabling, no commencement of preparation for a meeting, of witness briefs, or of documentation.
- [18] All that can possibly be considered in relation to costs in this matter is whether the respondent should be reimbursed for the expense of having a statement in reply drafted. Nothing else had happened in relation to these proceedings.
- [19] The total legal fees sought and incurred through invoices from Teesdale Associates equate to \$17,952 plus GST. Of that amount \$14,493 relates to work undertaken in July, which is prior to the Statement of Problem being filed in the Authority, attendance at and preparation for the mediation hearing, and other negotiations.
- [20] The legal fee for which contribution is to be calculated is therefore \$3,459.00 which is the amount directly attributable to the preparation, drafting and finalising of the statement in reply.

- [21] Mr Harrison submitted that costs lie where they fall. He referred me to the decision of Goddard CJ in *Sheiling Laboratories v Smith* (unreported) AEC 48/95 where his Honour remarked that the contribution of costs awarded in a case which has been fully prepared but has not been heard is unlikely to attract anywhere near as much as a case which had gone on to a full hearing.
- [22] In this case, Mr van der Kleij withdrew his application before any timetabling or hearing dates had been discussed or set. There was no preparation required to be undertaken.
- [23] I am satisfied that the discretion under clause 15 of Schedule 2 of the Act ought to be exercised in favour of Zespri International Limited, however, I have had regard for the fact that Mr van der Kleij did advise the Respondent soon after mediation that withdrawing his application was an option he was considering. I have also taken into consideration the fact that Mr van der Kleij has filed an application in Belgium and therefore, a large amount of the work undertaken by Zespri International Limited in preparation of its statement in reply, would have been useful in defence of the matter filed in Belgium.

**Mr van der Kleij is ordered to pay to Zespri International Limited the sum of \$1000.00 as a contribution to costs.**

Vicki Campbell  
Member of Employment Relations Authority