

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kendrick Family Trust (Applicant)
AND Nicholas Howard Barnes (Respondent)
REPRESENTATIVES Michael Smyth, for Applicant
Nicholas Howard Barnes In person
MEMBER OF AUTHORITY Janet Scott
SUBMISSIONS DATED 23 September and 5 October 2005
DATE OF DETERMINATION 19 October 2005

COSTS DETERMINATION OF THE AUTHORITY

The applicant filed a claim seeking a determination on the status of Mr Barnes i.e. whether he was an independent contractor responsible for paying his own tax or whether he was an employee in respect of whom the employer was responsible for deducting and paying PAYE to IRD.

It was the applicant's position that Mr Barnes was an independent contractor responsible for paying his own tax. IRD had taken a different view and had held the applicant responsible for payment of PAYE. It advised the applicant to recover the sum involved from Mr Barnes. The applicant had sought recovery from Mr Barnes who did not comply with the request that he reimburse the applicant for the sum involved. The applicant of necessity, therefore, needed a determination on the employment status of Mr Barnes in order to seek recovery of the money required to be paid by it to IRD. The situation called for clarity because recovery action must be taken in the appropriate jurisdiction depending on whether Mr Barnes was to be categorised as an employee or an independent contractor.

The applicant's position was that Mr Barnes was an independent contractor and the Authority confirmed that the parties were involved in a relationship in the nature of a partnership supported by a contract for services i.e. that Mr Barnes was an independent contractor.

The applicant submits it has incurred significant costs in having the position determined and seeks an award of costs close to actual costs. Total costs (including costs associated with preparing costs submissions) are \$5,160.

The respondent submits that IRD have accepted his position in the matter, that he did not bring this claim and therefore has not been responsible for the applicant incurring costs. He also submits he is of limited means.

Discussion

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.

It would have been desirable for the parties to have resolved the issue of who should bear the cost of the sum required by IRD to be paid without resort to litigation. However that was not possible and it was necessary for the applicant to have a determination on the status of Mr Barnes to enable it to file for recovery in the appropriate jurisdiction. As a result of the Authority's determination that issue can only be aired in the Disputes Tribunal or District Court.

The Authority's Determination was an essential step in determining whether or not the applicant is entitled to recover the sum involved from the respondent. The applicant's position that Mr Barnes was an independent contractor was upheld by the Authority and a fundamental principle guiding the award of costs is that costs will follow the event.

On the other hand the matter took only half a day.

I have also had regard to the submissions of the parties.

Determination

Costs are set on the a reasonable contribution basis taking account of the fact that it was not a particularly complex matter and that it occupied barely half a day in the Authority.

In all the circumstances of this case I direct that the respondent pay to the applicant the sum of \$750 as contribution towards the costs incurred by it in having the matter determined.

Janet Scott
Member of Employment Relations Authority