

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Huia Smith (applicant)

**AND** Nga Kairauhii Trust (respondent)

**REPRESENTATIVES** Trent Petherick for the applicant  
Elizabeth Brown for the respondent

**MEMBER OF AUTHORITY** Denis Asher

**SUBMISSIONS RECEIVED** by 16 February 2007

**DATE OF DETERMINATION** 20 February 2007

**COSTS DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. In my substantive determination dated 11 September 2006 (WA 121/06) I found against Ms Smith's claims that exceptional circumstances applied that occasioned the delay in her filing a personal grievance and that it was not just to grant leave for the claim to be brought out of time. A challenge has since been filed in the Employment Court along with an application for leave to file out of time.
2. Ms Smith was in receipt of legal aid.
3. Costs were reserved. The parties have been unable to reach agreement on costs.

## Respondent's Position

4. In its 17 October 2006 submission the Trust points out that the recovery of costs against a legally aided party is governed by ss. 40 & 41 of the Legal Services Act 2000 (LSA).
5. The position under these sections is as follows:
  - a. An award against a legally aided person must be reasonable having regard to all the circumstances including the parties' means and their conduct in connection with the dispute (s. 40(1)).
  - b. Unless there are exceptional circumstances the award cannot exceed the amount of the contribution that the aided person is required to pay (s. 40 (2)).
  - c. An order for costs may specify the amount that the aided person would have been ordered to pay if s. 40 had not affected their liability (s. 40 (3)).
  - d. Where an order is made under s. 40 (3) or s. 40 (4) a prejudiced party may apply to the secretary of the District Legal Services Committee for payment by the Legal Services Board of the difference between the costs actually ordered and the costs that would have been ordered but for the operation of s. 40 (s. 41 (1)).
6. Amongst other things, the Trust says it was entirely successful and that Ms Smith's case had no merit. It also made a reasonable offer without prejudice except as to costs to settle the matter on 6 June 2006, before preparations for the investigation or preliminary matters had substantively commenced. The offer was open until 16 June 2006. (The substantive matter was determined on the papers. Submissions were received in August 2006). Ms Smith refused the offer.
7. The Trust has incurred significant unnecessary costs. The effect of this has been that funds normally channelled towards advancing local Maori health have gone into defending the claim.
8. On the basis that the amount of any costs award against Ms Smith may be limited due to her financial means, the Trust asks the Authority to specify the amount the applicant would have been ordered to pay if s. 40 of the LSA had not affected her liability.

9. Actual costs incurred by the Trust total \$6,302.50 plus GST (a detailed breakdown was provided). This amount reflects a heavy discounting because of the nature of the Trust. Given the nature of the case and the Authority's discretion, a reasonable contribution to costs would be \$3,500 (plus GST).
10. The Trust therefore seeks a declaration of the amount Ms Smith would have been ordered to pay but for her being legally aided and some contribution to its costs by the applicant.
11. In a communication dated 30 November, through its counsel, the Trust advised it was opposed to the stay sought by the applicant (see below). Various arguments are advanced in support of its position including the claim that there would be no prejudice to Ms Smith if an order for costs was made as she (remains) legally aided, whereas a stay would prejudice the Trust – the successful party – from pursuing its application to the Legal Services Board, as well as its ongoing charitable activities in the community.

#### Applicant's Position

12. Through her counsel, and by referral to the challenge, Ms Smith asks that the issue of cost be stayed pending the outcome of the application for leave to appeal.
13. In a further communication (received by email on 16 February 2007) the applicant points out that if leave is granted the Court would then resolve all matters. In the alternative, the applicant is a beneficiary and remains in receipt of legal aid. The statutory restrictions relating to costs are therefore applicable. Her contribution is \$50. No details as to income, outgoings, security given so as to obtain legal aid or ability – over time – to make some payments has been provided.

#### Costs Decision

14. I see no reason in this case to depart from the well-established principle that costs should follow the event: *Harwood v Next Homes Ltd*, unreported, 19 December 2003, Travis J, AC 70/03. I also see no reason to not award costs on the ground that a challenge has been lodged or because Ms Smith is a beneficiary and continues to receive legal aid.
15. I reach these conclusions having regard to *Harwood* (above) and also to the principles set out in *PBO Limited (formerly Rush Security Limited) v Eneida Leonor Christo Da Cruz*, [2005] 1 ERNZ 808.

16. While the substantive determination was arrived 'on the papers', both parties invested considerable effort in presenting those papers (being comprehensive witness statements and submissions), in respect of both the out of time issue and the originating employment relationship problem.
17. The Trust was entirely successful. As they are well within established principles (*Harwood, PBO*, above), they are entirely fair and reasonable. Given the nature of this case, its "reasonable" (above), but unspecified, offer to the applicant, and the scope of the Authority's jurisdiction, I am satisfied that a reasonable contribution to the respondent's case if the applicant was not legally aided would be the sum claimed, i.e. \$3,500.
18. It is also appropriate that Ms Smith pay to the Trust the amount of her contribution, i.e. \$50.

**Decision**

19. I am satisfied that Ms Smith, but for being legally aided, would have been ordered to pay to the Trust the sum of \$3,500 (three thousand and five hundred dollars).
20. I also direct Ms Smith to pay to the Trust the sum of \$50 (fifty dollars).

**Denis Asher**

**Member of Employment Relations Authority**