

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Pero Tamarua (applicant)

**AND** Toll NZ Consolidated Limited (respondent)

**REPRESENTATIVES** David McLeod for the applicant  
Shannon Kelly for the respondent

**MEMBER OF AUTHORITY** Denis Asher

**SUBMISSIONS RECEIVED** 4, 13 & 25 January 2006

**DATE OF DETERMINATION** 30 January 2006

**COSTS DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. In my substantive determination dated 1 November 2005 (WA 171/05) I found against Pero Tamarua's, claim that Toll NZ Consolidated Limited, had unjustifiably dismissed him.
2. Costs were reserved.

### **Respondent's Position**

3. In its submission received on 4 January, the Company's counsel, Ms Shannon Kelly, in commendably brief and to the point submissions, says her client has been unable to reach agreement with Mr Tamarua on the matter of costs and that it seeks costs on the basis of the checklist of criteria set out in *Okeby v Computer Associates (NZ) Limited* [1994] 1 ERNZ 613.
4. The general amount recovered by a successful party for a full day's investigation is in the region of \$1,500 to \$2,000. In the current case the respondent incurred \$18,557 of actual costs (GST exclusive) including travel costs for its counsel and in flying witnesses to the investigation. Costs of \$2,500 are sought.
5. The Company points out the Authority has no evidence of the applicant's claimed hardship, that he is in employment and earns \$430 nett per week and therefore opposes the application for an order staying any financial penalty.

### **Applicant's Position**

6. Mr David McLeod, on behalf of the applicant, in similarly brief submissions received on 13 January, advises that his client has applied to the Employment Court for a hearing de novo regarding the Authority's determination. It is intended the challenge will be pursued without unreasonable delay. A result is expected shortly. It is submitted that a costs order against Mr Tamarua would create considerable hardship for him. The applicant therefore requests that the Authority decline an application for costs and "... order a stay in respect of any financial penalty ..." on him.

### **Costs Decision**

7. 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 of the claim of hardship. The Company is therefore entitled to recover a contribution to its reasonable costs.

8. 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*, unreported, Colgan CJ, Travis, Shaw JJ, 9 December 2005, AC 2A/05.
9. I have also noted the absence of evidence before the Authority of any financial hardship Mr Tamarua would face in the event of an adverse costs decision. The Authority is aware that Mr Tamarua has modest paid employment. The risks and the financial implications of an adverse decision were discussed openly with the parties during the investigation. Costs are not applied so as to punish an unsuccessful party but to contribute reasonably to the costs incurred by a successful party.
10. The Company's costs have largely not been particularised. Given the availability of experienced local counsel, Ms Kelly's travel costs to and from the investigation are disallowed.
11. Consistent with well-established case law, I see no reason to depart from the indication I gave to the parties during the investigation as to their costs risk. Having regard to the above and the duration of the investigation, I am satisfied that the applicant should pay to the respondent, as a contribution to its costs, the figure of \$1,500.

## **Decision**

12. As is made clear above, I am satisfied that the applicant, Pero Tamarua, should pay to the respondent, Toll NZ Consolidated Limited, as a contribution to its fair and reasonable costs, the sum of \$1,500.00 (one thousand five hundred dollars). I would expect the respondent to be open to any fair and reasonable proposal by the applicant to pay this sum over a period of time.

**Denis Asher**

**Member of Employment Relations Authority**