

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 226/08
5105328

BETWEEN WENDY FAITH
 Applicant

AND TAONGA IMPORTS
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: John Schlooz, for Applicant
 Bruce Stainton, for Respondent

Submissions, further
information received: 19, 30 June 2008, from Applicant
 23 May and 26 June 2008, from Respondent

Determination: 2 July 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] In determinations dated 28 August and 19 December 2007 (AA 261/07 and AA 402/07), I upheld Ms Faith's claim that she was an employee, concluded she had not raised a personal grievance within the 90-day statutory time-frame and that that delay was not occasioned by exceptional circumstances. Costs were reserved and I have received memoranda.

Respondent's submissions

[2] By way of memorandum Mr Stainton advises that Ms Faith has a grant of legal aid for her applications to the Authority, and subject to the outcome of a review of that grant, seeks the following possible awards:

- (a) an award of costs equal to the amount of Ms Faith's contribution to legal services under s 40(1) and (2) of the Legal Services Act 2000; or

- (b) a finding of the existence of exceptional circumstances in terms of s 40(2) of the Legal Services Act, so that Ms Faith should be ordered to pay costs either on a full indemnity basis or such other award as the Authority determines; or
- (c) certification from the Authority as to the costs that would have been awarded but for Ms Faith's being in receipt of legal aid, under s 40(5) of the Legal Services Act.

[3] With reference to s 40 of the Legal Services Act Mr Stainton submitted that there were exceptional circumstances warranting a departure from the usual rule that costs against a legally aided person are limited to the amount of that person's contribution to a grant of legal aid. The exceptional circumstances were said to include:

- (i) the unmeritorious nature of the applicant's preliminary claims - the notice of grievance was found not to amount to raising a personal grievance as was her application for leave to raise a personal grievance out of time;
- (ii) the unmeritorious nature of the applicant's substantive claim – this could not be an unjustifiable constructive dismissal given the applicant provided another employee with a reference which stated she had resigned;
- (iii) the applicant did not progress her claim in a timely manner – the personal grievance was raised two days before the expiry of the 90-day period, the application was lodged in the Authority just prior to the 12 month limit, the applicant did not attend pre-arranged mediation;
- (iii) the applicant did not advise the Authority or the respondent that she had a grant of legal aid for the second preliminary matter.

Applicant's submissions

[4] Mr Schlooz for the applicant denied these amounted to exceptional circumstances. He submitted no order for costs should be made pursuant to section 40 of the Act because:

- (i) the parties' means are significantly different and the applicant's sufficiently meagre to be eligible for legal aid;

- (ii) there is nothing exceptional about raising a grievance or lodging in the Authority just prior to the expiry of statutory timeframes;
- (iii) the preliminary issues to be determined by the Authority included the respondent's failed challenge to the Authority's jurisdiction on the grounds the relationship between the parties' was a partnership;
- (iv) the failure to attend the pre-arranged mediation was the fault of the applicant's then representative;
- (v) there is nothing unusual about status being argued as a preliminary issue and then seeking leave to raise a personal grievance outside the 90-day time limit.

Do exceptional circumstances exist?

[5] Exceptional circumstances, for the purposes of a costs award exceeding an applicant's contribution to a grant of legal aid, are usually determined on the particular facts of the case and would require something out of the ordinary¹. An unmeritorious or grossly exaggerated claim may be a factor in assessing whether exceptional circumstances exist, as may attempts to resolve the dispute and the common sense of a claim, particularly in light of the parties' respective financial positions². The threshold is high³.

[6] Ms Faith's preliminary claims were arguable. She was entitled to an assessment of their merits by the Authority. I make no comment on the merits of the substantive claim, the investigation of which may have disclosed aspects not evident from the papers.

[7] The progress of the claim was slow. However, proximity to the expiry of statutory timeframes does not amount to an exceptional circumstance and there is nothing to suggest the applicant deliberately delayed the progress of her claim for some unreasonable or improper purpose.

[8] The failure to advise of an extension to the grant of legal aid for the leave

¹ Hammond J, *Awa v Independent News Auckland Limited* [1996] 2 NZLR 184

² *Barrett v Te Runanga O Ngati Pu Incorporated* (unreported, Hamilton Registry, Chambers J, 16 April 2002, CP 52/00)

³ *Mullay And Southern Institute of Technology* 31/1/06, H Doyle (member), CA15/06

application does not amount to an exceptional circumstance⁴.

[9] Exceptional circumstances do not exist in this case. No order for costs exceeding the amount of Ms Faith's contribution to her grant of legal aid will be made.

Section 40(5) Legal Services Act 2000 - but for the grant of legal aid

[10] The respondent's assertion that the relationship was a partnership failed as did the applicant's claim that her grievance was raised within the statutory 90-day time limit and her alternative claim that leave ought to be granted to raise the grievance out of time. These were threshold issues. The consequence of these determinations was to statute bar the applicant's substantive claim.

[11] The first two threshold issues (nature of the relationship and statutory timeframe) were investigated concurrently. The parties both achieved a degree of success. This is an appropriate case for costs to lie where they fall.

[12] The third threshold issue (leave to raise a personal grievance out of time) was able to be determined by way of written submissions. No investigation meeting was convened. Evidence received by the Authority during the first investigation was referenced. The modest process was entirely appropriate. Relevant findings in the first determination gave this application a modest chance of success.

[13] Mr Stainton advised the respondent's actual costs in relation to both applications total \$25,334.68. The break down of actual costs incurred in relation to the leave application has not been provided. Given there was no investigation meeting or evidence filed in relation to the leave application I believe I am safe to conclude most of those costs were incurred in relation to the first two threshold issues.

[14] I accept the respondent was required to undertake additional preparation to respond to the leave application and has incurred costs as a consequence. Balancing Ms Faith's financial position against that I am of the view that a fair contribution towards costs reasonably incurred would be, but for the grant of legal aid, \$500.

⁴ *Hunter And Sorenson Group Ltd* 12/1/04, K Anderson (member), AA7/04

Determination

[15] I have not found that there were exceptional circumstances that would justify an award against Ms Faith personally that exceed her legal aid contribution.

[16] If Ms Faith had not been legally aided then an award of costs would have been made in favour of the respondent, only in relation to the leave application, in the sum of \$500 and an order that costs were to lie where they fell would have been made in relation to the 90-day and status issues.

[17] Ms Faith has made no contribution to the amount of legal aid. No order can be made on that ground.

Marija Urlich

Member of the Employment Relations Authority