

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Adrienne Scott (applicant)

**AND** The Chief Executive, Department of Corrections  
(respondent)

**REPRESENTATIVES** Megan Williams for the applicant.  
Phillip Cornegé for the respondent.

**MEMBER OF AUTHORITY** Denis Asher

**SUBMISSIONS RECEIVED** 29 June and 2 August 2006

**DATE OF DETERMINATION** 4 September 2006

**COSTS DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. In my substantive determination dated 13 March 2006 (WA 29A/06) I found against the applicant's claim that Corrections unjustifiably disadvantaged her. I note here that my substantive determination erroneously records the date of the investigation as 7 February 2006 when in fact it was 7 March 2006.
2. Costs were reserved. The parties subsequently advised they were unable to reach agreement on this matter and request a determination by the Authority.

### **Respondent's Position**

3. In a submission received on 29 June, Correction's counsel, Mr Phillip Cornegé, advised his client's total costs between 1 January and 7 March 2006 totalled \$22,171.86. It relies on a Calderbank offer put to the applicant on 22 February, namely that if Ms Scott withdrew her claim Corrections would not seek costs. Ms Scott was advised that if she declined its offer she may be liable for all of Corrections' costs from that point (22 February) on: the applicant refused its offer. Corrections' costs between 22 February and the date of the investigation itself, 7 March, totalled \$13,228.18: that entire amount is sought. A reasonable contribution is also sought in respect of the balance.
4. At the investigation meeting on 7 March Corrections again offered not to seek costs if the applicant withdrew her claim: Ms Scott again rejected this offer.
5. On the basis of its Calderbank offer, and from the date it was first put, Corrections requests full solicitor-client costs. It also seeks a reasonable contribution to its costs incurred prior to 22 February 2006 (which total \$8,943.68). A substantial contribution is reasonable in light of Ms Scott's delays in filing her evidence which resulted in unnecessary cost to the respondent.
6. The respondent's counsel's charge-out rate of \$210.00 per hour is not excessive.

### **Applicant's Position**

7. Costs submission filed by Ms Scott's advocate, Ms Megan Williams, and received on 2 August, run to 6 brief paragraphs: they largely amount to a relitigation of her client's substantive claim (pars 1-4 inclusive). Accordingly I do not intend to have regard to them as their concerns have already been determined.
8. Ms Williams remaining paragraphs address to matters: first, they describe the respondent's claim for costs "*in this instance (as) far and beyond what a reasonable advocate would charge a client*" (par 5). However, no argument or case law is provided in support of that claim.

9. Ms Williams' second and final submission (par 6) is plainly put: that Ms Scott also incurred costs and therefore costs should lie where they fall. No additional argument is provided.

### **Costs Decision**

10. For the following reasons, and based on 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 find in favour of the respondent's claim for costs. No evidence is provided in support of Ms Scott's claim that costs should lie where there fall. In particular no evidence is provided in respect of her present circumstances and ability to pay. The originating statement of problem was broadly but vaguely cast, necessitating – I find – significant additional work by Corrections to address all of the applicant's claims. Those claims included a number of matters that – from the time of the parties' preliminary conference call with the Authority – were identified as highly unlikely to succeed, because of the applicant's apparent failure to meet the statutory 90-day notice requirement. That proved to be the case. The risks and the financial implications of pursuing these matters and an adverse decision were also discussed openly and extensively with the parties during the investigation: as is made clear above, Ms Scott enjoyed several opportunities to withdraw her claim in the knowledge Corrections would not pursue costs. Ms Scott elected to reject those opportunities, and to take her chances by proceeding. Costs are not applied so as to punish an unsuccessful party but instead to contribute reasonably to the costs incurred by a successful party. Because those costs were greater as a result of the broad but vague reach of Ms Scott's claims, and because they were both out of time and lacking in substantive merit, Corrections is therefore entitled to a greater contribution to its fair and reasonable costs.
11. I reach these conclusions having regard to *Harwood* (above) and also to the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808. In particular, I note the Court's observation at par 47 that, "*representatives of parties (are urged) to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approach economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being*

*incurred are reasonable in light of the amount that is likely to be recovered as remedies and costs from the Authority.”*

12. Is Corrections entitled to all of its costs from 22 February 2006 as a result of its Calderbank offer? I do not think so. This is because the respondent's account is not particularised and the investigation was easily disposed off in a day, notwithstanding the broad but vague reach of Ms Scott's claims.
13. Having regard to the above I am satisfied that Ms Scott should pay to Corrections, as a contribution to all of its costs the sum of \$5, 000.

### **Decision**

14. As is made clear above, I am satisfied that the applicant, Adrienne Scott, should pay to the respondent, the Chief Executive of the Department of Corrections, as a contribution to its fair and reasonable costs, the sum of \$5,000.00 (five thousand dollars).
15. The parties may wish to attempt to reach agreement on a repayment schedule properly taking into account Ms Scott's ability to pay this sum.

**Denis Asher**

**Member of Employment Relations Authority**