

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2023] NZEmpC 79
EMPC 94/2022**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	NEW ZEALAND QUALIFICATIONS AUTHORITY Plaintiff
AND	TIMOTHY PATRICK HICKEY Defendant

Hearing:	9 November 2022 (Heard at Christchurch via Audio Visual Link)
Appearances:	P McBride, counsel for plaintiff P McKenzie-Bridle, counsel for defendant
Judgment:	30 May 2023

COSTS JUDGMENT OF JUDGE K G SMITH

[1] My 10 May 2022 judgment set aside the Employment Relations Authority determination reinstating Timothy Hickey to his employment with New Zealand Qualifications Authority (NZQA).¹ Costs were reserved.

[2] Agreement about costs was not reached and the Court subsequently received three memoranda about them. The first memorandum contained advice that

¹ *New Zealand Qualifications Authority v Hickey* [2022] NZEmpC 76.

Mr Hickey was in receipt of legal aid under the Legal Services Act 2011 (the Act) and, as a result, he was protected from a costs order by s 45(2).

[3] The second memorandum was NZQA's response. It contained an application for costs claiming that Mr Hickey had not established his entitlement to legal aid relating to this proceeding and therefore did not have the protection from costs afforded by s 45(2).

[4] The third memorandum was on Mr Hickey's behalf reiterating that he had received a grant of "full" legal aid.

[5] Against that background a further hearing was required.

The issues

[6] The first issue is whether Mr Hickey was in receipt of legal aid so that he has the benefit of s 45(2), under which an order for costs is not to be made against an aided person unless exceptional circumstances exist. NZQA did not seek to establish that exceptional circumstances apply.

[7] The second issue arises if Mr Hickey was not in receipt of legal aid, it is whether to order him to pay costs and, if so, in what amount.

The substantive proceeding

[8] Mr Hickey was employed by NZQA as a senior business analyst. He was employed on a fixed term basis until the completion of a workstream it was undertaking called PACER Plus.²

[9] Relying on the employment agreement being fixed term, NZQA informed Mr Hickey on 2 December 2021 that his employment would end later that month.

² At [1].

Mr Hickey did not agree, considering himself to be a permanent employee, or at least, that his fixed term employment ran until the PACER programme ended.³

[10] Mr Hickey lodged a claim in the Employment Relations Authority in which he sought a declaration that he was permanently employed by NZQA. He sought to be reinstated to his employment on an interim basis.⁴ The Authority granted Mr Hickey's application on 25 March 2022.⁵ NZQA was ordered to reinstate Mr Hickey to its payroll from that date and to his former position within 21 days pending further orders being made.

[11] On 28 March 2022, NZQA challenged that determination and was successful.

Plaintiff's submissions

[12] As the successful party in this proceeding NZQA would usually be entitled to an award of costs. It sought costs of \$25,121.16 calculated on a category 2B basis in accordance with the Guideline Scale.⁶ There is no dispute about the accuracy of that calculation.

[13] NZQA's entitlement turns on an analysis of Mr Hickey's successful application for a grant of legal aid and a contention that while it applied to the Authority proceeding, the grant did not extend to the challenge in this Court.

[14] Mr McBride's submissions can be summarised in the following way:

- (a) Section 45 is a shield against a costs order.
- (b) To use the shield Mr Hickey must establish that he had successfully applied for legal aid specifically for the Court proceeding.

³ At [3].

⁴ At [4].

⁵ At [5].

⁶ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.

- (c) Mr Hickey has not established that he successfully applied for a grant for the Court proceeding.

[15] The essence of Mr McBride's submissions was that the scope of a grant was specific to a proceeding in a particular court or judicial body. From February onwards, NZQA knew Mr Hickey had received a grant of legal aid, but it was confined to the Authority.

[16] Mr McBride's starting point was that the Act required Mr Hickey to make a successful application for legal aid for the Court proceeding before s 45 applied. The submission was that s 7 of the Act provides for grants of civil legal aid and s 7(1)(e) differentiates between grants in the Court and Authority. That separation was said to show that the Act contemplates separate grants in each jurisdiction. The Act did not, for example, contemplate a grant that was sufficiently broad that it applied until resolution of the employment relationship problem.

[17] Section 10(4) was relied on to reinforce the need for separate grants. The section provides for the circumstances in which a grant may be refused, differentiating between original proceedings in s 10(4)(d) and appeals in s 10(4)(e). In this case appeals were equated with challenges to Authority determinations.

[18] A policy reason was said to underlie the necessity for a separate grant in each jurisdiction; in the context of an appeal it allowed the Commissioner to review whether legal aid should continue.

[19] To support these submissions the available information about what Mr Hickey had applied for and been granted was reviewed. Mr Hickey's proceeding was lodged in the Authority in December 2021. Mediation occurred in January 2022. On 2 February 2022, notice was given to the Authority and NZQA that Mr Hickey had been granted aid "for these proceedings". Later that day Mr McBride asked for specific advice about the scope of the grant. He was informed that it was a full grant. That statement was queried by asking whether it was for mediation, the application for interim reinstatement, or something else. Matters appear to have rested there because no further correspondence between counsel was provided.

[20] Copies of several emails between Mr McKenzie-Bridle's office and the Legal Services Commissioner's office in March 2022 and April 2022 were provided along with letters dated 6 May 2022, 12 May 2022, 30 May 2022 and 14 June 2022. The Commissioner's letters of 12 May and 14 June 2022 were accompanied by schedules of services to be undertaken on Mr Hickey's behalf.

[21] Mr McBride highlighted the fact that emails from the Commissioner's office consistently referred to the same grant number allocated to Mr Hickey for the Authority investigation while the letters referred to the subject matter of the grant with the simple statement "Employment Relations Authority". The contents of the schedules of services were described as overwhelmingly referring to steps associated with the Authority's investigation.

[22] Mr McBride acknowledged that the letter from the Commissioner's office dated 6 May 2022 reassessed Mr Hickey's ongoing eligibility for legal aid and confirmed it. He pointed out however that the letter continued to describe the subject matter by referring to the Authority, with the same legal aid grant number allocated for that jurisdiction and does not mention the Court at all.

[23] Mr McBride accepted that the Commissioner's correspondence from 12 May 2022 onwards refers under a heading "Other Activities" to an approved number of hours of work for preparation for the challenge and an appearance before the Court. The submission was that those schedules were too late to be effective. Under s 14 of the Act an application for a grant must be made before the final disposition of the matter in relation to which it is intended.⁷ When the judgment was issued on 10 May 2022 the proceeding was disposed of within the meaning of that expression in the Act.⁸ In turn that meant any approval by the Commissioner after 10 May 2022 could not assist Mr Hickey.

[24] If this analysis is accepted, s 45(2) does not apply and Mr Hickey is exposed to a costs order.

⁷ Legal Services Act 2011, s 14(1).

⁸ Section 14(3).

Defendant's submissions

[25] Mr McKenzie-Bridle took a different starting point, concentrating on s 45(2) and the protection it provides to an aided person in a civil proceeding unless exceptional circumstances apply.

[26] In summary Mr McKenzie-Bridle submitted that:

- (a) an aided person is defined in s 4(1) as someone who has been granted legal aid under the Act;
- (b) a grant means one made under the Act and includes “any amendments to that grant”;
- (c) a grant of legal aid may only be made on an interim or full basis;⁹
- (d) multiple applications are not required by the Act, but the schedule of services may be altered;
- (e) where a grant of legal aid has been made it continues to apply, including any amendment to it, unless withdrawn under s 30;
- (f) under s 16 the Commissioner makes a decision on an application for legal aid and that may be in respect of the whole or any part of the proceedings or appeal;
- (g) Mr Hickey was granted legal aid on an interim basis in January 2022 and a grant number was allocated to him; that number can be traced through all subsequent correspondence including where references were made to the Court;
- (h) the interim grant was replaced with a full grant;

⁹ Relying on s 16(1)(a) and (b).

- (i) the advice of the existence of the grant was provided to NZQA as required in s 24 of the Act; and
- (j) the schedule of services was extended to cover attendances in the Court and counsel had been paid for them.

[27] Mr McKenzie-Bridle made the point that when the Commissioner grants legal aid the grant is to the aided person. A separate schedule of approved services is supplied to the legal aid provider who will undertake the required work. It is the schedule that confirms the scope of the work to be undertaken by the service provider in fulfilling the grant.

[28] In this case, the submission was that Mr Hickey obtained a grant when his proceeding was before the Authority and it was not withdrawn. The grant was confirmed on 6 May 2022, after the hearing of the challenge but before judgment. He therefore had a grant that applied to this proceeding. The schedule of services was extended to cover the challenge and, later, this costs dispute. On this analysis, it was submitted that Mr Hickey has the benefit of s 45(2).

Analysis

[29] At the heart of Mr McBride's submissions was that the structure of the Act meant the Commissioner must approve a grant of legal aid for each discrete phase of the litigation as it moves from the original proceeding through the appeal process. On his analysis Mr Hickey had to establish he had applied for, and been granted, aid for the challenge but there was no proof he had done so.

[30] I prefer Mr McKenzie-Bridle's analysis. The difficulty with Mr McBride's approach is it comes at the expense of not adequately considering the Commissioner's action.

[31] There was a grant of legal aid to Mr Hickey from the outset and NZQA was on notice of that fact. After the Authority granted interim reinstatement a further financial disclosure was made to the Commissioner. That disclosure was necessary because the

temporary reinstatement of Mr Hickey's salary may have affected his eligibility for legal aid. It may have been withdrawn under s 30.

[32] The updated financial disclosure was made by Mr Hickey on 12 April 2022. An accompanying email asking for advice about whether aid would continue or be withdrawn referred to the necessity to advise the Court. Aid was confirmed on 6 May 2022 and in doing so the Commissioner did not require Mr Hickey to make a fresh application before deciding that he remained eligible for a grant of aid.

[33] The correspondence shows that the Commissioner considered Mr Hickey to have been in receipt of a grant of legal aid throughout. At the time of the Commissioner's letter on 6 May 2022 the litigation encompassed NZQA's challenge which had been heard a few days beforehand.

[34] I am not attracted to the submissions that require reading the schedule of services provided in May 2022 and June 2022 in a way which concentrates disproportionately on references to the Authority. That would downplay, or set aside, the references in them to the preparation for the challenge and an appearance in Court.

[35] In *Gill v Lethlean*, the High Court held that the question was to which costs a grant of legal aid attached rather than the timing of the grant.¹⁰ In that case the application was made during the course of the proceeding but nevertheless extended the benefit of the Act to the aided party. That situation is similar to this case. I accept Mr McKenzie-Bridle's submission that the schedules show that grant of legal aid attached to preparations for the challenge in the Court to the Authority's interim reinstatement and the subsequent appearance when that matter was argued.

[36] Finally, I do not accept that s 14 assists NZQA. At the very latest Mr Hickey had his eligibility confirmed on 6 May 2022, at which time the proceeding before the Court had not been resolved.

¹⁰ *Gill v Lethlean* [2021] NZHC 296, (2021) 25 PRNZ 718 at [26]; citing *AA v LA* [2017] NZHC 646 at [17].

[37] It follows that Mr Hickey has the benefit of protection from a costs order pursuant to s 45(2).

Conclusion

[38] NZQA's application for costs is unsuccessful and it is dismissed.

[39] If there is any further costs-related issue arising from this application memoranda may be filed.

K G Smith
Judge

Judgment signed at 12 pm on 30 May 2023