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Briskie v McHannigan and anor [2011] NZERA 30; [2011] NZERA Auckland 37 (25 January 2011)

Last Updated: 10 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 37 5104257

BETWEEN CATHERINE BRISKIE

Applicant

AND MICHAEL McHANNIGAN

AND KATHLEEN PARKER Respondent

Member of Authority: Eleanor Robinson

Costs Submissions 20 December 2010 and 19 January 2011

Determination: 25 January 2011

[1] By determination AA 474/10 the Authority found that Mrs Catherine Briskie did not have a personal grievance against the Respondents, Mr Michael McHannigan and Ms Kathleen Parker, on the basis that there was no employment relationship between the parties. In that determination costs were reserved and the Respondent was allowed 28 days for filing and serving submissions should the Respondent wish to seek recovery of a contribution to its costs.

[2] The parties have filed submissions in respect of costs. In the determination it was noted that the Applicant was legally aided. In these circumstances it is normally the case that a recovery of a contribution to costs is unavailable

[3] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the [Employment Relations Act 2000](#) which states:

15 Power to award costs

COSTS DETERMINATION OF THE AUTHORITY

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[4] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[5] Further, the then Chief Judge Goddard noted in *Registrar of Trade Unions v NZALPA*^[1] that costs normally follow the event and are independent of any appeal, and the Court of Appeal in *Victoria University of Wellington v Alton-Lee*^[2] observed at para [48] "As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[6] Section 40 of the [Legal Services Act 2000](#) is relevant to the determination of costs where a party to proceedings is legally aided. Section 40(2) provides that no order for costs may be made against a legally aided person in civil proceedings unless the Authority is satisfied that there are exceptional circumstances.

Respondent's Submissions [7] With reference to s 40(2), Mr Gardiner 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 Mr Gardiner cited in his submissions included:

(i) The unmeritorious and spurious nature of the Applicant's claim - this could not be an unjustifiable dismissal given that the Applicant was found to have no employment relationship with the Respondents;

1 [\[1996\] 2 ERNZ 622](#)

(ii) That the evidence relied upon by the Applicant in support of her claim, namely the receipts and documentation from Work and Income, failed significantly to do so and were spurious;

(iii) That the Applicant's claim was progressed over a significant period of time but despite the opportunity afforded by such a lengthy period to identify and produce witnesses in support of her claim, the Applicant failed to do so, with the exception of a Mr McGrath. In the case of Mr McGrath, Mr Gardiner submitted that his evidence "did little to assist the Applicant in substantiating her claim".

Applicant's submissions [8] Mr Hope submitted that an exceptional circumstance must be something that is exceptional but also something that adds unnecessarily to the successful party's costs. Mr Hope on this basis submitted that there was nothing in the conduct of the Applicant's case that would amount to an exceptional circumstance. Mr Hope cited the following as the basis of the submission:

(i) The fact that a party to proceedings is not successful does not make for an exceptional circumstance.

(ii) That the delay in pursuing the claim was not causative of any increase in the Respondent's costs, the claim having being pursued within statutory time limits.

(iii) That the Respondent's refusal to engage with the Applicant in the mediation process contributed to the delay.

Do exceptional circumstances exist? [9] In *Wadley v Salon D'Orsay Ltd*[\[3\]](#) Judge Travis, citing *Awa v Independent News Auckland Ltd*[\[4\]](#) construed 'exceptional circumstances' as being something "quite out of the ordinary". In *Awa v Independent News Auckland Ltd* the High Court decided that a 'fact specific' approach was required. 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 positions.[\[5\]](#) I note that the threshold is high.

[10] I accept Mr Hope's submission that it is not unusual for proceedings in the Authority to be argued between an applicant and a respondent with little in the nature of supporting documentary evidence. The one witness that Mrs Briskie identified and was subsequently interviewed via a telephone conference, Mr McGrath, provided evidence which was of assistance to the Authority in reaching the decision which was in favour of the Respondent.

[11] The delay cited by Mr Gardiner in submissions was nonetheless within the statutory guidelines and does not of itself point to exceptional circumstances.

[12] I do not find exceptional circumstances to exist in this case.

Section 40 (5) Legal services Act 2000 - but for the grant of legal aid [13] The Respondent was wholly successful in the substantive matter. Mr Gardiner advised that the Respondent's actual costs were \$12,125.00 and has produced detailed breakdowns in support of the claim.

[14] I accept that given the late production of Mr McGrath as a witness and the necessity of time spent on the telephone conference subsequent to the Investigation Meeting, additional costs were incurred by the Respondent.

Determination

[15] I have not found exceptional circumstances that would justify an award against Mrs Briskie personally.

[16] If Mrs Briskie had not been legally aided then, applying a tariff of \$2,500.00 per day as a reasonable costs award, an award of costs would have been made in favour of the Respondent in the sum of \$4,500.00.

Eleanor Robinson

Member of the Employment Relations Authority

[\[1\]](#) (1989) ERNZ Sel Cas 304

[\[2\]](#) [\[2001\] NZCA 313](#); [\[2001\] ERNZ 305](#)

[\[3\]](#) Unreported, AEC 138/97

[\[4\]](#) [\[1996\] NZHC 2245](#); [\[1996\] 2 NZLR 184](#)

