

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 44  
5274345

BETWEEN                      ZACHARY PETER COSTLEY  
   Applicant  
  
AND                                WAIMEA NURSERIES  
   LIMITED  
   Respondent

Member of Authority:        Philip Cheyne  
  
Representatives:              Ian Miller, Counsel for Applicant  
   Nicole Ironside, Counsel for Respondent  
  
Submissions received:        From both Parties  
  
Determination:                23 March 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In a determination dated 10 January 2011 I found that Mr Costley had a personal grievance of unjustified dismissal but declined to award him any remedies because of his contribution to the circumstances giving rise to the grievance. Costs were reserved for the parties to lodge and serve memoranda. These memoranda were received but I am not able to access the Authority's physical file including my hearing notes because of the situation in Christchurch. It is unclear when or if access can be achieved. Helpfully the parties provided further copies of their submissions and I have also obtained a copy of the original determination. These materials are sufficient to deal with the question of costs.

[2]     Mr Costley was legally aided. Nonetheless the respondent seeks costs against him because he rejected a *Calderbank* offer in August 2010. I am referred to s.40 and s.41 of the Legal Services Act 2000. Because Mr Costley received no compensation from the litigation he has failed to do better than the *Calderbank* offer and would normally be exposed to an adverse costs award despite establishing a personal

grievance: see for example *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 601 (CA) and more recently *Bluestar Print Group (NZ) Limited v Mitchell* [2010] NZCA 385. This is not a case where Mr Costley needed to proceed for reputational issues so as to avoid the principles expressed in these cases. The issue for consideration here is whether these principles still apply in light of the provisions of the Legal Services Act 2000.

[3] S.40(2) of the Legal Services Act 2000 provides that *No order for costs may be made against an aided person in a civil proceedings unless the court is satisfied that there are exceptional circumstances.*

[4] In *Wadley v Salon D'orsay Ltd* [1998] 1 ERNZ 369 the Employment Court construed the expression as meaning *quite out of the ordinary*. There the Court was dealing with the predecessor to the current Legal Services Act but the decision remains relevant.

[5] Here, Mr Costley rejected the *Calderbank* offer and later counter-offered at a higher level. There was no agreement but the parties both attempted to resolve the problem. The matter went on to an investigation meeting with the result as indicated above. There is nothing *quite out of the ordinary* for opposing parties to have a different view about either the substantive merits or the economic value of a personal grievance claim, as happened here. Nor does the additional factor of legal aid make a difference to that assessment. I find that there are no exceptional circumstances in the present case so no order for costs can be made.

[6] The alternative submission for the respondent is that I should specify the order that would have been made but for the operation of s.40(2) of the Act. It is proper to recognise the effect of the *Calderbank* offer by doing so.

[7] The Authority's usual approach to costs is to apply the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. There the Court approved a daily tariff approach subject to the circumstances of the particular case which might give reason to increase, decrease or depart from that approach.

[8] The meeting took somewhat less than a day but I recognise that the respondent had the greater preparation burden because it needed to present more evidence from more witnesses than did the applicant. That differential would be fairly recognised by treating the matter as if it occupied one day. There was some factual but no great legal complexity to the matter. Both parties assisted with presenting the respective issues clearly and succinctly. In those circumstances I assess an appropriate daily tariff as \$3,000.00.

[9] The respondent submits that it should have an order for either all or two-thirds its costs following the *Calderbank* offer. The effect of the *Calderbank* offer has been to reverse the usual liability for costs. I do not accept that I should give it the double effect of increasing the quantum that would otherwise be set.

[10] I confirm that, but for s.40(2) of the Legal Service Act 2000 I would have ordered Mr Costley to pay costs of \$3,000.00 to Waimea Nurseries Limited.

Philip Cheyne  
Member of the Employment Relations Authority