**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2011] NZERA Christchurch 138
5298712

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| | BETWEEN | BRIDGET ISHERWOOD<br>Applicant |
| | A N D | INSYN LIMITED<br>Respondent |

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| Member of Authority: | Helen Doyle |
| Representatives: | Simon Graham, Counsel for Applicant<br>Angela Boniface, Counsel for Respondent |
| Submissions Received: | 1 August 2011 from Applicants<br>4 August 2011 from Respondent |
| Date of Determination: | 16 September 2001 |

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In my determination dated 28 July 2011, I found in favour of the applicant that she had made out her complaint of disadvantage under the Parental Leave and Employment Protection Act 1987. I awarded her compensation in the amount of $4,000 and reserved the issue of costs. Submissions have now been received from Mr Graham and Ms Boniface.

**Applicant's submissions**

[2] Mr Graham attached to his submissions a without prejudice save as to costs letter from Ms Boniface dated 22 November 2010 offering a cash payment of $3,000 described as made up loosely of $1,680 lost wages and $1,320 being a contribution to costs to date.

[3] By letter dated 30 November 2010, Mr Graham in a without prejudice save as to costs letter rejected the offer on behalf of the applicant and put a counteroffer for

$8,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 and a contribution towards costs incurred in the sum of $3,000. The counteroffer was not accepted

[4] Mr Graham submits the applicant has incurred actual costs in sum of $8,878 inclusive of GST and $71.56 for a filing fee. He submits that a fair award of costs would be two thirds of that amount in the sum of $5,988.66 together with reimbursement of the filing fee.

**The respondent's submissions**

[5] Ms Boniface submits that the respondent's *Calderbank* offer made on 30 November 2010 was very close to that actually awarded to the applicant of $4000. She further submits that the Authority accepted that Ms Isherwood was not entitled to lost wages and that the counteroffer put to the applicant was significantly higher than that awarded by the Authority.

[6] Ms Boniface submitted that there had been financial difficulties faced by the company with the salon closing for seven days after the earthquake of 4 September 2010 and two weeks after the 22 February 2010. She also refers to embarrassment and humiliation for the director of the respondent in terms of publication of the case because, following an interview with Ms Isherwood, there was reference in the newspaper not only to the respondent company but to the franchise brand.

[7] Ms Boniface submits that each party should meet their own cost because:

- The respondent has had to pay significantly more than the applicant for legal expenses because the applicant was legally aided up to mediation;
- The *Calderbank* offer put was very close to the ultimate outcome;
- Although it is a business, the relative financial position of the respondent company is worse than that of the applicant; and
- There are certain financial and non-financial penalties that have occurred as a result of publication of the proceedings, worsened by Ms Isherwood talking to the media.

**Determination**

[8] The leading Employment Court judgment on costs in the Authority is *PBO Ltd (formerly Rush Securities Ltd) v. Da Cruz* [2005] 1 ERNZ 808. The Court in *PBO* set out the basic principles appropriate to the Authority in the exercise of its discretion as to costs. I apply those principles in the exercise of my discretion as to costs in this matter. In doing so, I note that awards in the Authority are frequently modest and judged against the notional daily rate that is now recognised as up to $3,000 per day.

[9] The applicant was a successful party in this matter. It is a well known principle that a successful party will usually be entitled to an award of costs unless there is good reason for there not to be. The respondent submits there are four reasons why costs should not be awarded to the applicant.

[10] I am not persuaded that the fact that the legal costs of the respondent were higher than those of the applicant is a good reason to depart from that principle. There is also reference to a *Calderbank* offer, however that was less than the award made to the applicant particularly if costs are taken into account.

[11] The financial difficulties of the company is certainly a matter that I can take into account in the exercise of my discretion as to an award of costs but of itself does not support departure from the usual principle that costs follow the event. The purpose of costs is not to punish or express disapproval and I am not persuaded that Ms Isherwood, talking to the media following release of the determination, is a relevant matter to take into account in term of considering costs incurred in the Authority investigation process.

[12] In conclusion, therefore, I am not persuaded that costs should not follow the event. The matter before the Authority was not factually complex but there were some legal complexities, particularly with remedies.

[13] The investigation meeting was not a full day although that is not always indicative of the preparation required and, in this matter, the Authority received carefully considered written submissions after the investigation meeting.

[14] I accept the parties did attempt to resolve matters, although it is clear they were some way apart in doing so. Neither offer reflected what was awarded.

[15] I do not consider this a case where I should depart from applying a daily rate. I recognise in the exercise of my discretion the difficult and trying financial issues facing the respondent. A suitable starting point for costs is $2000, judged on a notional daily rate where the meeting was less than a full day but nevertheless not an absolutely straightforward matter and I make an adjustment to that of $500 to reflect the preparation of written submissions.

[16] I order Insyn Limited to pay to Bridget Isherwood the sum of $2,500 costs and $71.56 disbursements.

Helen Doyle
Member of the Employment Relations Authority