

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 216  
5294901

BETWEEN                    RICHARD THOMAS  
                                      McALEVEY  
                                      Applicant

A N D                        MOLYNEUX PARK  
                                      CHARITABLE TRUST  
                                      Respondent

Member of Authority:      M B Loftus

Representatives:          Kieran Tohill and Mary Flannery, Counsel for Applicant  
                                      Justine Baird, Counsel for Respondent

Submissions Received:    20 September 2012 from the Applicant  
                                      1 October 2012 from the Respondent

Date of Determination:    10 October 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     On 30 August 2012 I issued a determination concluding Mr McAlevey had a personal grievance in that he was unjustifiably dismissed. Costs were reserved and Mr McAlevey, as the successful party, now seeks a contribution toward those he incurred.

[2]     Since filing his statement of problem Mr McAlevey's costs have been in the order of \$4,000 (just over) plus GST and disbursements of \$932.51. Toward that he seeks a contribution of \$3,000 plus disbursements.

[3]     In response the Trust notes Mr McAlevey chose to proceed with his claim despite the fact the Trust had ceased to function and was unable to pay any award of either compensation or costs. It also refers to a Calderbank in which it offered \$4,000 and a withdrawal of the dismissal in favour of a 'resignation'. There was no response either then or when the offer was subsequently reiterated. Both offer and reiteration occurred prior to the Trusts decision to wind up but before the investigation meeting.

[4]     The Trust (through counsel) goes on to say:

*The Applicant is legally aided and should have disclosed the merits of his case and the likelihood of payment in relation to any award being paid (or not as the case may be) to the Ministry of Justice. If he failed to disclose or the grant continued on notice to the Ministry of Justice then the risk in regard to payment of costs passes to the Applicant and the Ministry.*

*It is submitted the Applicant has pursued his application at significant cost to all parties without properly assessing his risk in terms of payment of any award and costs and without giving proper consideration to the without prejudice offer ...*

*I am instructed the Respondent has no ability to pay an award of costs.*

[5] Normally the Authority will use a daily tariff approach when assessing a costs award (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[6] The hearing took two days. Application of the above formula would therefore result in an award of \$7,000. That exceeds the amount sought which would, in the absence of an argument to the contrary, therefore be granted in full.

[7] The contrary arguments are twofold – the calderbank and impecuniosity. The calderbank is irrelevant. Mr McAlevey's award exceeded it, thus rendering it nugatory. The issue is the suggestion of impecuniosity as inability to pay is a circumstance that should be considered.

[8] Given evidence during the investigation meeting I accept the Trust itself no longer functions, but I am not so sure about an absolute inability to pay. First the Trust has managed to retain counsel. While I have no information about the details of the arrangement I note counsel's comment about both parties incurring significant costs. That raises questions about how the Trust's costs were met. Second there was, throughout the investigation and subsequently via press reports, indications of possible local authority involvement with the further possibility it has funding obligations. Given a lack of information regarding the actual situation I consider it appropriate to make an award and leave the issue of whether or not compliance is possible to the parties, especially as the question already exists in respect to the substantive award.

## **Conclusion**

[9] The respondent, Molyneux Park Charitable Trust, is to pay the applicant, Mr McAlevey, the sum of \$3,932.51 (three thousand, nine hundred and thirty two dollars and fifty one cents) as a contribution toward costs.

Mike Loftus  
Member of the Employment Relations Authority