

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 166  
5343099

BETWEEN JUNE MILNE  
Applicant

A N D BARNARDOS NEW ZEALAND  
Respondent

Member of Authority: M B Loftus

Representatives: Karina Coulston, Counsel for Applicant  
Linda Ryder, Counsel for Respondent

Submissions received: 7 July 2011 from the Respondent  
26 July 2011 from the Applicant

Date of Determination: 3 November 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 9 June 2011 I rejected Ms Milne's application for an urgent injunction compelling her return to a teaching position she had previously filled with the respondent, Barnardos New Zealand (Barnardos).

[2] The issue of costs was reserved with the successful respondent, Barnardos, being advised that if it wished to seek a contribution toward its costs, it should do so via a written application. It does.

[3] Barnardos incurred costs of \$9,500 in successfully defending Ms Milne's claim along with a further \$600 for preparing the costs submission. Toward the total of \$10,100 it seeks a contribution of \$9,600. GST is not included in the above figures.

[4] In support of the application Ms Ryder referred to the principles enunciated in both *Graham v Airways Corporation of New Zealand Ltd* (ERA Auckland AA39/04 28 January 2004) and *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 before noting that:

- a. The costs incurred were reasonable;
- b. The matter was important to the parties;
- c. Barnardos proposed mediation but Ms Milne rejected that approach;
- d. Ms Milne sought urgency which generated further cost;
- e. Barnardos was simply exercising rights bestowed by the employment agreement between the parties and that Ms Milne persistently refused to comply; and
- f. On 13 May Barnardos advised that it would *agree to a consent order for the applicant to return to work upon receipt of an independent medical assessment* but that there was no response. It is stated that the offer was made on the basis that it would be relied upon in relation to the issue of costs.

[5] Ms Ryder goes on to submit that while not monetary, the offer of 13 May is, effectively, a Calderbank and, in reliance on various cited cases, costs accrued after that date are recoverable. These amounted to \$9,077.55 plus GST.

[6] By way of response, Ms Coulston refers to *Okeby v Computer Associates (NZ) Ltd* [1994] 1 ERNZ 613 and *PBO Ltd v Da Cruz* before submitting that:

- a. A major portion of Barnardos submissions related to an unsuccessful argument that the Authority did not have jurisdiction to determine the matter;
- b. The matter was important to the applicant who felt severely disadvantaged given her absence from the workplace whilst a restructure was occurring;
- c. The applicant was without income during the period the parties were debating her ability to return to the workplace [though I note as an aside that whilst this is stated there is no claim that the applicant was in a dire financial position];
- d. The applicant genuinely believed her stance was appropriate;
- e. The application was neither vexatious or without merit.

[7] Ms Coulston closes by submitting that this is a case where there be either a minimal award or, preferably, costs be left to lie where they fall.

[8] Normally the Authority will assess costs on a daily tariff basis: refer *PBO Ltd v Da Cruz*. In assessing that tariff a common starting point is \$3,000 per day: refer *Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)* [2008] ERNZ 73. From that point adjustment may be made depending on the circumstances.

[9] This was a half day hearing so, applying *Da Cruz* and *Tawhiwhirangi (No 2)*, an appropriate award would be \$1,500.

[10] Two exceptions aside, I am not convinced by the arguments of either party that I should depart from this approach with the points made of the type I would normally expect.

[11] The exceptions referred to in 10 above are the alleged Calderbank and the fact that Barnardos jurisdictional argument failed.

[12] I say alleged Calderbank as the offer in question can not be considered a Calderbank. It was contained in an an e-mail from Ms Ryder to Ms Coulston. To be considered a Calderbank, the relevant communication must be clearly identified as being “without prejudice except as to costs” and even the term “without prejudice” is deemed inadequate (refer – *Pauanui Publishing Ltd v Loh* EmpC Wellington WC43B/01, 20 December 2001.)

[13] Neither phrase appears in Barnardos e-mail which is not surprising – it was not proffered on a without prejudice basis. It was an open offer and the e-mail in question was one of the exhibits in the substantive hearing – respondent document 25.

[14] That said, it was proffered in an attempt to settle and Ms Milne was put on notice that is would, if rejected, be used to support a costs application. It also addressed what was, from Ms Milne’s perspective, the central issue (namely her ability to recommence work) in a positive manner. The approach, whilst conditional, was in accordance with the rights bestowed upon Barnardos by the employment agreement between the parties and which were upheld in the substantive decision.

[15] Whilst costs should not be used to punish a party, it is well accepted that an increased award should be considered where costs are incurred unnecessarily or

unreasonably (see *NZ Air Line Pilots Assn IUOW v Registrar of Unions* (1989) ERNZ Sel Cas 304; [1989] 2 NZILR 550). Rejection of a reasonable offer which was delivered in a timely manner and addresses the needs of both parties does, in my view, put the parties to unnecessary costs and is a factor warranting an increased award. So too is the rejection of mediation, especially in a situation where the relationship is ongoing and mediation is sought at an early stage and here it should be noted that while this was only a half day hearing the issue had been simmering and costs accumulating for some time. Barnardos offered to mediate at an early stage and went so far as to ascertain mediator availability but Ms Milne rejected the approach. This too could have had the effect of curtailing an accumulation of costs at an early stage thus rendering some of those incurred as unnecessary.

[16] The second issue – namely Barnardos failure with the jurisdictional claim is not, in my view, a factor that should be taken into account. It was not significant in terms of the overall scheme of things. It required no evidential support and preparation and was, in terms of time taken during the investigation meeting, a sideshow.

[17] Having considered the issues and the arguments tendered by Counsel and, in particular Ms Milne's rejection of attempts to resolve the matter before costs escalated, I consider a contribution in the order of one half the total incurred, allegedly unnecessarily, on the substantive claim is appropriate. That is approximately \$4,500.

### **Conclusion**

[18] Ms Milne is to pay Barnardos the sum of \$4,500 (forty five hundred dollars) as a contribution toward costs.

Mike Loftus  
Member of the Employment Relations Authority