

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Dorothy Merle Mullay (Applicant)
AND Southern Institute of Technology (Respondent)
REPRESENTATIVES Mary-Jane Thomas, Counsel for Applicant
Christine French, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
SUBMISSIONS RECEIVED 30 November 2005
20 January 2006
DATE OF DETERMINATION 31 January 2006

COSTS DETERMINATION OF THE AUTHORITY

[1] The respondent was successful in its defence to the applicant's claim that she had been unjustifiably dismissed. The respondent now seeks costs from the applicant.

[2] The respondent's actual solicitor/client costs and disbursements excluding costs associated with mediation are \$10,519.24 (GST inclusive). It seeks an award of 60% of actual costs in the sum of \$6,311.54.

[3] The applicant is legally aided for the purposes of her employment relationship problem and there must therefore be under section 40(2) of the Legal Services Act 2000 exceptional circumstances before a costs award is made that exceeds the amount of the contribution the applicant is required to make under section 15(1). In this case the applicant was required to make a contribution of \$50.00.

[4] The respondent seeks an order for costs against the applicant personally on the grounds of exceptional circumstances and/or an order specifying what order for costs would have been made against the applicant if she had not been legally aided.

[5] The respondent relies on the following grounds in support of its application:

- From the outset, the respondent drew the applicant's attention to the problematic nature of her claim and put her on notice that it would seek full recovery of solicitor/client costs. The applicant chose to continue.
- That the applicant's conduct of the proceeding put the respondent to unnecessary expense in the ways set out below:
 - ❖ The various amendments to the claim.

- ❖ The abandonment of an earlier fixture. At the directions conference call, counsel for the applicant advised the Authority that the investigation meeting would only take one day because, following the mediation, counsel intended to redefine the case and narrow the issues. However, the amended Statement of Problem rather than narrowing the issues actually expanded them by introducing new factual allegations and at the same time repeating all the old ones. The one day hearing then had to be vacated.
- ❖ The respondent was put to the expense of having to adduce evidence about issues raised by the applicant but then abandoned at the investigation meeting.
- ❖ The applicant rejected an offer to settle. By email dated 24 August 2005, the respondent reiterated its view that the claim was misconceived but offered to allow the applicant the opportunity to withdraw gracefully and to do so without the respondent seeking costs. The offer of settlement was rejected and the respondent then put to the cost of the hearing.
- ❖ The respondent also relies on the Authority's finding that had the matter been properly analysed on the basis of what the discussion was actually about, it would never have got as far as an investigation meeting.

[6] The applicant submits that:

- The first statement of problem was filed without the advantage of mediation because the employer refused to mediate.
- The parties were referred to mediation by the ERA by letter dated 7 September 2004. Mediation occurred on 13 October 2004 and after that mediation an amended statement of problem was filed to take into account matters that arose at mediation.
- The adjournment was sought due to Ms Thomas's pregnancy.
- The applicant then by letter dated 19 August 2005 advised the respondent that her case would be amended relying on events from the meeting of 8 March onward.
- The amendments of the statements of problems were sensible concessions by the applicant.
- The circumstances of this matter do not amount to exceptional circumstances when compared to the circumstances in *X v Y* [2000] 2 NZLR 748. *Bradley v Salon D'Orsay Limited* [1998] 1 ERNZ 369 is also relied on.
- The applicant has limited financial means.

The Issues

[7] The issues for determination are:

- (i) Whether there are exceptional circumstances under section 40(2) of the Legal Services Act 2000 and if there are what would be a reasonable amount for the applicant to pay.
- (ii) Should there be an order under section 40(4) of the Legal Services Act 2000 specifying what order for costs would have been made if section 40 had not affected the applicant's liability.

Are there exceptional circumstances in this case?

[8] This was a case where the applicant was, prior to lodging her first statement of problem, put on notice by the respondent that her claim was problematic and finally in a last minute attempt to

save itself further costs the respondent put forward a settlement proposal. The applicant however chose to proceed with her claim.

[9] There were several amendments to the nature of the applicant's problem although that of itself is not exceptional. I note that the adjournment of the first meeting date was requested by the applicant on two grounds not one. The first was that it appeared the matter would take longer than one day and the second because of the solicitor's pregnancy. The adjournment is not exceptional.

[10] What was unusual was that the evidence from the applicant's own witness as to the pivotal meeting did not support the applicant's claim as reframed several times. This gave rise to a question from the Authority if in fact Ms Mullay's claim was about something other than as it appeared in the amended statement of problem. Although that of itself is not exceptional it does suggest that the strengths and weaknesses of the applicant's case had not been carefully analysed despite Miss French's letter of 5 April 2004 advising her client's instruction that the claim is so unmeritorious if the matter proceeded it would seek recovery of full solicitor/client costs and despite the settlement offer before the investigation meeting. It is difficult to see what else the respondent could have done to save itself the expense of preparation for and an investigation meeting.

[11] I have to consider the difficult question of whether the circumstances in this case are *exceptional circumstances*. Part of that consideration must, in my view, take into account the investigative role of the Authority and that the Authority is not bound to treat a matter being of the type described by the parties but rather is to concentrate on resolving the problem however described.

[12] Whether a claim is meritorious and/or proper may not always be able to be ascertained from the paperwork lodged by the parties and the Authority has wide powers with respect to investigation and calling for evidence. There were circumstances with Ms Mullay's claim and how it was progressed that I consider come perilously close to exceptional. It would be concerning if an applicant chose to pay little attention to sensible warnings or offers from a respondent because he/she had no vulnerability to costs regardless of outcome. But, balancing these concerns with the role of the Authority I do not consider that the circumstances in this case quite reach the high threshold required and I am not able to conclude that Ms Mullay was not entitled to have her claim investigated by the Authority.

[13] I do not find that there are exceptional circumstances in this case and therefore an order of costs will not exceed the amount of Ms Mullay's contribution.

Should there be an order under section 40(4) of the Legal Services Act 2000?

[14] I consider it would be appropriate to make an order under section 40(4) specifying what order for costs would have been made if Ms Mullay had not been legally aided.

[15] The actual costs and disbursements incurred by the respondent are reasonable. The respondent was entirely successful. The matter was able to be investigated in one day. There was early warning by the respondent that the claim was without merit. The respondent was required to do additional preparation in terms of the wider problem and there was a sensible settlement proposal. Balancing Ms Mullay's financial position against that I am of the view that a fair and reasonable award would be 40% of actual costs in the sum of \$4112.40 and full disbursements in the sum of \$238.40.

Determination

[16] I have not found that there are exceptional circumstances that would justify an award against Ms Mullay personally that exceeded her legal aid contribution.

[17] If Ms Mullay had not been legally aided then I would have awarded the respondent costs and disbursements in the sum of \$4350.80 under section 40(4) of the Legal Services Act 2000.

[18] Ms Mullay is ordered to pay to Southern Institute of Technology the sum of \$50.00 costs being the amount of her legal aid contribution.

Helen Doyle
Member of Employment Relations Authority