

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 85  
5407701

BETWEEN                      JOHN ROBINSON  
   Applicant

AND                              EMMERSON TRANSPORT  
   LIMITED  
   Respondent

Member of Authority:        Trish MacKinnon

Representatives:             John McDowell, Counsel for the Applicant  
   Bill Calver, Counsel for the Respondent

Submissions received:        20 June and 31 July 2014 from the Applicant  
   24 July from the Respondent

Determination:                26 August 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In my determination of 13 June 2014 I found Mr Robinson to have been justifiably dismissed and I reserved the issue of costs. The parties have been unable to resolve costs between themselves and Emmerson Transport Limited (ETL) now asks the Authority to make an award of costs in its favour.

[2]     ETL, through its counsel Mr Calver, initially submitted this is a case where the full legal fees it incurred in defending Mr Robinson's claims should be awarded. Particular factors leading to this conclusion were the complete failure of Mr Robinson's claims, the delays in bringing those claims to the Authority, the applicant's conduct and the presence of a Calderbank offer. The fees ETL incurred from the date the matter was filed in the Authority totalled \$9,500 plus goods and services tax and disbursements.

[3] On receipt of ETL's submissions on costs, Mr McDowell, counsel for Mr Robinson, informed the Authority that, "*(a)s you will be aware*", Mr Robinson was legally aided. That information had not previously been disclosed to the Authority or, according to Mr Calver, to ETL. Mr Calver asserts he has no record on his file of any advice from Mr McDowell regarding Mr Robinson's legally aided status.

[4] Mr McDowell's submissions in reply to those of ETL, which were delayed by almost three weeks beyond the deadline as counsel awaited the outcome of his request for further legal aid, refer to the standard practice in his office of notifying the opposing party of a grant of legal aid. He contends the employer was made aware of Mr Robinson's legally aided status.

[5] Mr McDowell submits that in normal circumstances a quantum of costs in the vicinity of \$2,000 to \$2,500 would be awarded for a fixture that he described as occupying a significant portion of, but not the whole, day. He notes efforts had been made up to the day of the hearing to resolve Mr Robinson's claims by negotiation with ETL, and the conduct of the hearing was unexceptional without factors to support a departure from the normal principles in respect of costs.

[6] He further notes Mr Robinson has experienced health issues and hospitalisation in recent months and is unable to drive. He is currently unemployed and, even if he were not legally aided, would not have the means to meet an award of costs.

[7] Following notification of Mr Robinson's legal aid status, Mr Calver acknowledged the Authority must have regard to the provisions of the Legal Services Act 2011 in relation to the liability for costs of a legally aided person. However, he reiterates there had been no notification of Mr Robinson's legally aided status, and no evidence supplied of such notification. He asks the Authority to make a finding of exceptional circumstances and indicate the costs it would otherwise have awarded against Mr Robinson.

### **Legal Services Act 2011**

[8] The relevant provisions of the Legal Services Act are contained in section 45, part of which is reproduced below:

#### **45 Liability of aided person for costs**

(1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.

(2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

(3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:

(a) any conduct that causes the other party to incur unnecessary cost:

(b) any failure to comply with the procedural rules and orders of the court:

(c) any misleading or deceitful conduct:

(d) any unreasonable pursuit of 1 or more issues on which the aided person fails:

(e) any unreasonable refusal to negotiate a settlement or alternative dispute resolution:

(f) any other conduct that abuses the processes of the court.

(4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.

(5) If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

[9] Under section 46 of the Legal Services Act the successful opponent of a legally aided person can, in certain circumstances, apply to the Legal Services Commissioner for payment by the Commissioner of some costs. Those circumstances occur where an order is made under section 45 specifying that a legally aided person would have incurred a liability, or a greater liability, for costs, if that section had not affected his or her liability. The successful opponent can apply for some or all of the difference between the costs (if any) actually awarded to that party against

the aided person and those to which that party would have been entitled if section 45 had not affected the aided person's liability.

**Are there exceptional circumstances warranting an order for costs?**

[10] While the Legal Services Act does not define "*exceptional circumstances*", the phrase has been construed to mean "*quite out of the ordinary*"<sup>1</sup>. Mr Calver submits all the factors specified in section 45(3) (a)-(f) support a finding of extraordinary circumstances in this case. In particular he says:

- (a) the claim should never have proceeded to the Authority and Mr Robinson "*peremptorily rejected a very reasonable Calderbank offer*";
- (b) the applicant's solicitor failed to adhere to timetabling directions as to the filing of evidence and the making of submissions;
- (c) Mr Robinson was disingenuous in his evidence to the Authority and his solicitor claimed ETL was aware he was legally aided when it was not;
- (d) Neither Mr Robinson's solicitor nor the Authority had been notified of the grant of aid as required under section 24(1) of the Legal Services Act. ETL had conducted the case erroneously believing it would be able to recover its costs; and
- (e) Mr Robinson's claim failed completely.

[11] The Calderbank offer was made by letter from Mr Calver dated 26 November 2013, shortly after receipt by ETL of Mr Robinson's statement of problem, and before it had filed its statement in reply. The offer was for \$2,500 under section 123(1)(c)(i) of the Employment Relations Act and remained open for 15 working days.

[12] The letter stated the respondent's belief that Mr Robinson's dismissal was justified. It also noted the likelihood of a substantial reduction in compensation if Mr Robinson were to succeed in his claim, because of his contribution to his dismissal. Mr Calver also put Mr McDowell on notice that ETL would be seeking indemnity costs in the

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<sup>1</sup> E.g. *Awa v Independent News Auckland Ltd* [1996] 2 NZLR 184 at 186 (High Court) referred to by Travis J in *Wadley v Salon D'Orsay Ltd* [1998] 1 ERNZ 369 at 375.

event that Mr Robinson rejected the offer and succeeded for less than the gross equivalent of what had been offered.

[13] Mr McDowell communicated his client's instruction to reject the offer as "not acceptable" by letter dated 11 December 2013. In the same letter Mr McDowell requested time and wages records and notes made during the disciplinary meetings with Mr Robinson; disclosed information about evidence to be given by witnesses if the matter proceeded to a hearing; and both offered, and sought, views regarding the length of the hearing. He did not respond to Mr Calver's advice that ETL would be seeking indemnity costs. I find this remarkable as it must have been obvious to Mr McDowell that Mr Calver would not have referred to seeking indemnity costs if he had been aware Mr Robinson was legally aided.

[14] I consider the Calderbank offer to have been a pragmatic and realistic one. It was made sufficiently early that only minimal costs would have been incurred by the respondent. Mr Robinson effectively had three weeks in which to consider the offer which is a reasonable timeframe. Although the rejection of the offer in hindsight was unwise I do not find it constitutes an exceptional circumstance.

[15] Mr McDowell did not comply with the timetable set by the Authority for the receipt of witness statements. When contacted by the Authority four days after the due date, Mr McDowell noted he had two witness statements completed but had not completed Mr Robinson's. He said he was aware of the time frames. Mr McDowell filed Mr Robinson's signed statement, and the unsigned statements of two other witnesses, eleven days after the specified date.

[16] This caused some inconvenience to the respondent and resulted in the timeframe for its witness statements, and for the applicant's reply statements, being extended. Mr McDowell filed Mr Robinson's reply witness statement within the new timeframe. I do not consider the inconvenience caused by the delay in filing the applicant's witness statements constituted extraordinary circumstances.

[17] Mr Calver has referred to conduct of both Mr Robinson and Mr McDowell under the heading of “misleading or deceitful conduct”. He described Mr Robinson’s conduct during the proceedings as “*disingenuous*”. I did not use that description in my determination, but it could be considered apt in light of Mr Robinson’s stance that recording incorrect starting or finishing times in his log book, and omitting to record rest breaks, was not falsifying his log book. However I do not find it constitutes an exceptional circumstance.

[18] Mr Calver observed in his submission in reply that he had considered whether the Authority had jurisdiction to order costs personally against Mr McDowell before properly determining it did not. Any award of costs would be made against Mr Robinson and not his solicitor. The Legal Services Act puts the onus on the provider, in this case Mr Robinson’s solicitor, to notify other parties and the Authority of his legally aided status. While ETL’s concerns are valid, they are not matters over which Mr Robinson had personal responsibility and I disregard them for the purpose of deciding this issue.

[19] Mr Calver is correct to describe the outcome of the case as having completely failed but I regard the claim as mistaken rather than completely lacking in merit. Matters of credibility were at issue and on the evidence before me I found ETL to be more reliable and consistent in the course of the investigation meeting.

[20] Overall, while I find there were no exceptional circumstances that would justify the award of legal costs against Mr Robinson, I regard it as appropriate to indicate what costs I would have awarded had he not been legally aided. The investigation meeting started at 9 a.m. and finished after 4.00 p.m. As there was insufficient time to hear the parties’ oral submissions, to supplement the written submissions of both counsel, they were heard by telephone the following morning. This took close to an hour which, added to the previous day’s hearing, resulted in a full day’s investigation meeting.

[21] Taking the notional daily tariff as the starting point, I would have considered the Calderbank offer to have merited an uplift of an additional

\$1,500. There would be no order for GST but disbursements, in accordance with the invoice provided by Mr Calver, would have been included. Accordingly I make an order that costs of \$5,000 and disbursements of \$26.09 would have been made against Mr Robinson, were it not for his exclusion from liability under s. 45(2) of the Legal Services Act 2011.

Trish MacKinnon  
Member of the Employment Relations Authority