

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2014] NZERA Auckland 371  
5378831**

BETWEEN                      AKANESI SISIFA  
   Applicant

AND                              BIG BLACK SACKS NEW  
   ZEALAND LIMITED PARKER  
   Respondent

Member of Authority:        Eleanor Robinson

Costs Submissions            21 July 2014 from Respondent  
   11 August 2014 from Applicant

Determination:                05 September 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] By determination [2014] NZERA Auckland 255 AA 474/10 the Authority found that the Applicant, Ms Akanesi Sisifa, had not been unjustifiably disadvantaged in her employment by the Respondent, Big Black Sacks New Zealand Limited (BBS).

[2] The parties have filed submissions in respect of costs. The Applicant was legally aided. In these circumstances it is normally the case that a recovery of a contribution to costs is unavailable

[3] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

***15 Power to award costs***

*(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

*(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[4] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*<sup>1</sup>.

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<sup>1</sup> [1996] 2 ERNZ 622

[5] Further, the then Chief Judge Goddard noted in *Registrar of Trade Unions v NZALPA*<sup>2</sup> that costs normally follow the event and are independent of any appeal, and the Court of Appeal in *Victoria University of Wellington v Alton-Lee*<sup>3</sup> observed at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[6] Section 40 of the Legal Services Act 2011 (LSA) is relevant to the determination of costs where a party to proceedings is legally aided. Section 45(2) LSA provides that no order for costs may be made against a legally aided person in civil proceedings unless the Authority is satisfied that there are exceptional circumstances.

#### *Respondent's Submissions*

[7] With reference to s 45(2) LSA, Mr Drake on behalf of BBS submitted that there were exceptional circumstances warranting a departure from the usual rule that costs against a legally aided person are limited to the amount of that person's contribution to a grant of legal aid. The exceptional circumstances Mr Drake cited in his submissions included:

- (i) The Applicant pleading her case poorly and continuing to change her assertions throughout the proceedings;
- (ii) The Applicant repeatedly missing deadlines for the provision of information to the Authority which resulted in significant delay to the progress of the case and which unnecessarily and unreasonably added to the Respondent's costs;
- (iii) The requirement for the Respondent to attend several telephone conference calls to deal with the issues outlined above;
- (iv) The Applicant's conduct of the case which involved the Applicant continually seeking to introduce new evidence without notifying the Respondent;
- (v) The Applicant attempting to introduce covert telephone recordings of conversations which did not meet the obligations of fairness or of being open, honest or active and constructive; and
- (vi) The Applicant changing her claims throughout the proceedings.

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<sup>2</sup> (1989) ERNZ Sel Cas 304

<sup>3</sup> [2001] ERNZ 305

*Applicant's submissions*

[8] Mr Darby on behalf of the Applicant submits that the Respondent has not discharged its obligation of proving that there are '*exceptional circumstances*' within the meaning of s 45 LSA.

[9] Mr Darby submits that in most contested cases one party or the other (or frequently both) is critical of the other party's conduct. This of itself does not create '*exceptional circumstances*'.

[10] Mr Darby further submits that the quality of pleadings does not come within the ambit of s 45 LSA, observing that the Authority is an institution which seeks to avoid legal niceties and which should be simple and easy to access by aggrieved parties.

*Do exceptional circumstances exist?*

[11] In *Wadley v Salon D'Orsay Ltd*<sup>4</sup> Judge Travis, citing *Awa v Independent News Auckland Ltd*<sup>5</sup>, construed '*exceptional circumstances*' as being something "*quite out of the ordinary*".

[12] In *Awa v Independent News Auckland Ltd* the High Court decided that a 'fact specific' approach was required. An unmeritorious or grossly exaggerated claim may be a factor in assessing whether exceptional circumstances exist, as may attempts to resolve the dispute and the common sense of a claim, particularly in light of the parties' respective financial positions.<sup>6</sup> I note that the threshold is high.

[13] I accept Mr Darby's submission that criticism of the other party's conduct in proceedings, and/or of the quality of proceedings, is not unusual in the cases which come before the Authority, and do not constitute '*exceptional circumstances*' *per se*.

[14] What is necessary for the purposes of s 45 (3)(a) LSA is that such conduct caused the other party: "*to incur unnecessary costs*".

[15] The Respondent was wholly successful in the unjustifiable disadvantage matter investigated on 12 June 2014.

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<sup>4</sup> Unreported, AEC 138/97

<sup>5</sup> [1996] 2 NZLR 184

<sup>6</sup> *Barrett v Te Runanga O Ngati Pu Incorporated* (unreported, Hamilton Registry, Chambers J, 16 April 2002, CP 52/00)

## **Determination**

[16] I am satisfied that in the circumstances of this case the Respondent was put to unnecessary additional costs in relation to the matter which was the subject of the investigation meeting held on 12 June 2014 in accordance with s.45 (2) LSA, and that these unnecessarily added to the costs of the Respondent.

[17] In particular I find that the following matters as set out in s 45 (2) LSA occurred:

- The Applicant did not respond to the directions I issued on 24 October 2013, namely that the Applicant provide an outline of her evidence to include an explanation of the changing nature of her claim. As the Applicant had not responded to that direction, I issued a further direction to the same effect on 1 November 2013.
- There was no response from the Applicant to these further directions by 22 November 2013.
- When received, the Applicant's response to my directions on 13 December 2013 failed to address all of the issues.
- Accordingly the Respondent was required to attend a telephone conference convened by the Authority on 13 February 2014 in order to progress the Applicant's claims at which it was agreed to allow the Applicant further time to file a memorandum with the Authority. The memorandum was to identify which claims the Applicant wished to pursue.
- The Applicant failed to identify the additional evidence necessary for the Investigation Meeting and consequently it was necessary for the Respondent to attend a further telephone conference call on 16 April 2014.
- On 17 April 2014 I issued a direction that the Applicant inform the Authority, by 9 May 2014 how she wished to proceed in identifying her claims. The Applicant failed to comply with this direction.
- It was not until 14 May 2014 that the Applicant finally identified the requested further evidence.

[18] I am satisfied that this conduct had the effect of increasing costs to the Respondent who had to contend with the changing nature of the claims against it, and that there was a failure to comply with procedural orders of the Authority.

[19] Whilst I appreciate the effect that Applicant's conduct of the case has had on the Respondent's needing to incur unnecessary costs, I take into consideration the fact that the Applicant had a number of changes in counsel during her pursuit of this matter, and this fact, largely beyond the control of the Applicant, contributed to the later delays in the course of the proceedings.

[20] In these circumstances I do not find that the high threshold of exceptional circumstances exist in accordance with s.45(2) LSA.

[21] Whilst the actual costs incurred by the Respondent are high, they have been properly supported by invoices provided to the Authority and appear to have been properly incurred in connection with these proceedings. In reaching this determination, I note that the Respondent is not claiming actual costs, but only that costs be awarded on the basis of the Authority's daily tariff approach.

[22] I accordingly record that any such award would have been awarded at the notional daily tariff rate in the Authority on the basis of a three day meeting. I accordingly indicate that I would have considered a \$10,500.00 contribution to BBS's costs to have been appropriate in accordance with the notional daily rate in the Authority.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**