

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 398  
5416862

BETWEEN                      LOPISENI TAKATAKA  
   Applicant  
  
A N D                              WAIKATO DISTRICT  
   HEALTH BOARD  
   Respondent

Member of Authority:      Anna Fitzgibbon

Representatives:              Simon Scott, Counsel for Applicant  
   Anthony Russell, Counsel for Respondent

Submissions Received:      23 and 30 August 2013

Date of Determination:      4 September 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]      In a substantive determination dated 8 August 2013<sup>1</sup> the Authority determined the dismissal of the applicant, Mr Takataka by the respondent, Waikato District Health Board was justified. Both parties have filed submissions as to costs.

[2]      The Authority's power to award costs rises from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs, on a principled basis.

[3]      The principles guiding the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>2</sup>. Those principles are so well recognised I do not need to restate them.

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<sup>1</sup>      2013 NZERA Auckland 348

<sup>2</sup>      [2005] 1 ERNZ 808

[4] The general principle is that costs follow the event. In this case, the applicant was legally aided. In such circumstances it is normally the case that a recovery of a contribution to costs is unavailable. Section 45 of the Legal Services Act 2011 is relevant to the determination of costs where a party to proceedings is legally aided. Section 45(2) provides that no order for costs may be made against a legally aided person in civil proceedings unless the Court, and in this case the Authority, is satisfied that there are exceptional circumstances.

[5] Mr Russell on behalf of the respondent, submitted that there were exceptional circumstances warranting a departure from the usual rule that no order for costs should be made against a legally aided person. The exceptional circumstances cited by Mr Russell in his memorandum as to costs included:

- (a) any conduct that causes the other party to incur unnecessary costs – this being the failure of the applicant to accept a without prejudice except as to costs offer by the respondent dated 7 June or to enter into negotiations based on such;
- (b) any unreasonable pursuit of one or more issues in which the aided person failed – the assertion by the applicant throughout the disciplinary process and at the investigation meeting that all witnesses for the respondent who were in attendance on the night of the incident were “colluding” and provided the Authority with a “pack of lies”;
- (c) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution – a *Calderbank* offer was made by letter of 7 June 2013 by the respondent and this letter was not responded to by the applicant;
- (d) other conduct that abuses the processes of the Authority – the alleged failure by the applicant to advise that he was legally aided until the filing of closing submissions on 30 July 2013.

[6] Mr Scott, Counsel for the applicant has responded to each of the submissions made on behalf of the respondent. Mr Scott submits that the applicant was clear he was seeking the remedy of reinstatement and was not interested in monetary compensation. The *Calderbank* offer did not address the applicant’s desire for reinstatement and his desire to clear his name.

[7] In relation to the submissions made on behalf of the respondent that the applicant made assertions which constituted an unreasonable pursuit of issues in which he ultimately failed, Mr Scott says and I accept, that it is for the Authority to make findings as to credibility and it did so in relation to the applicant's assertion that the respondent's witnesses were colluding.

[8] With regard to the allegation that there had been an unreasonable refusal to negotiate a settlement, Mr Scott submits that the settlement proposals by the respondent related to monetary compensation and not reinstatement which was the remedy sought by the applicant. Further, Mr Scott submits and I accept, that the applicant did attend mediation and was therefore not unreasonably refusing to negotiate.

[9] Finally, with regard to the alleged failure by the applicant to notify the respondent and the Authority that the applicant was the recipient of legal aid, Mr Scott says the letter from his office stating that the legal aid grant had been made on 25 June was a typing error. Mr Scott annexed the correspondence from the Ministry of Justice which confirms that legal aid was granted on 25 July and received at his office on 29 July. Mr Scott informed the respondent and the Authority of the grant on 30 July.

[10] It is my view that exceptional circumstances do not exist in this case. In *Wadley v. Salon D'Orsay*<sup>3</sup> Judge Travis, citing *Awa v Independent News Auckland Ltd* construed "exceptional circumstances" as being something "quite out of the ordinary".

[11] After consideration, the Authority is not persuaded that the matters advanced by counsel for the respondent constitute exceptional circumstances for the purposes of s.45(2) of the Legal Services Act 2011.

[12] The respondent was wholly successful in the substantive matter. Mr Russell advised that the respondent's actual costs incurred for the investigation meeting were \$24,000 excluding GST and has produced detailed breakdowns in support of the claim.

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<sup>3</sup> [1996] 2 NZLR

[13] Mr Russell seeks a contribution from the applicant of \$9,000. As no exceptional circumstances exist I am not making an order for costs against the applicant. Section 45(2) of the Legal Services Act 2011 provides that in the event that no order for costs is made against a legally aided person, an order may be made specifying what order for costs would have been made against that person but for the grant of legal aid.

[14] If the applicant had not been legally aided then, applying a tariff of \$3,500 per day as a reasonable costs award, an award of costs would have been in favour of the respondent in the sum of \$5,250.00.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**