

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** David Mitchell (applicant)

**AND** Blue Star Print Group (NZ) Limited t/a Printlink  
(respondent)

**REPRESENTATIVES** The applicant represented himself  
Carolyn Heaton for the respondent

**MEMBER OF AUTHORITY** Denis Asher

**SUBMISSIONS** 9, 19 & 23 May 2006

**DATE OF DETERMINATION** 2 June 2006

**COSTS DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. In my substantive determination dated 6 April 2006 (WA 53/06) I found against the applicant, David Mitchell's, claim for exemplary damages against the respondent, Blue Star Print Group (NZ) Limited t/a Printlink, and that it had constructively dismissed him.
2. Costs were reserved.

## Respondent's Position

3. In a submission received on 10 May, the Company's counsel, Ms Carolyn Heaton, at par 6, asks the Authority to "*exercise its discretion to make a reasonable order of costs in the (respondent's) favour.*"
4. Ms Heaton also sets out her unsuccessful efforts to contact the applicant so as to discuss her client's costs.
5. In claiming costs the respondent relies on *PBO Limited v Da Cruz* (Employment Court, Auckland, unreported, AC2A/05, Chief Judge Colgan and Judges Travis and Shaw, 9 December 2005).
6. A schedule of the respondent's actual billed costs was attached to Ms Heaton's submission. They total \$37,261.67. Also attached is an earlier *Calderbank* offer dated 30 November 2005, wherein the Company offered to pay Mr Mitchell \$10,000 plus \$3,000 toward his earlier costs. Payment would have been made under s. 123(1)(c)(i) of the Act. The Company also urged Mr Mitchell to obtain legal advice about its offer.
7. As Ms Heaton points out, her client's advice followed up similar, earlier advice from the Authority (refer to par 6 of the Authority's Record of Preliminary Conference dated 17 November 2005).
8. Also set out in Ms Heaton's submission are other timely instances of its efforts to settle this matter with Mr Mitchell.
9. Consistent with *Da Cruz*, the respondent seeks costs on several grounds including the following:
  - a. Its costs were reasonable and it did not increase costs unreasonably;
  - b. A *Calderbank* offer was put to the applicant. The Company was therefore put to the unnecessary expense of preparing for and appearing at the Authority's investigation on 23 March 2006;

- c. Mr Mitchell was wholly unsuccessful and costs should follow the event.

### **Applicant's Position**

10. Mr Mitchell wrote to the Authority a letter dated 18 May 2006. In it he refers to the invitation to the parties set out in the Authority's determination to agree between themselves on costs. Apart from a complaint that the respondent has not provided him sufficient time to respond to its costs claim, the remainder of the applicant's communication addresses other matters including Mr Mitchell's decision to challenge the determination. It could be inferred from Mr Mitchell's letter that, as he disagrees with the Authority's determination and is challenging it, he relies on "*common sense*" to not negotiate with the Company in respect of its costs.
11. At my request a letter dated 23 May was forwarded to the applicant inviting his submissions on the costs claim on an as soon as possible basis and no later than 1 June 2006. Mr Mitchell was advised that the Authority would proceed to issue a costs determination in the event no submissions were received from him. By telephone, Mr Mitchell subsequently advised he would not be making further submissions in respect of costs.

### **Costs Decision**

12. I see no reason in this case to depart from the well-established principle that costs should follow the event: *Da Cruz* (above). The Company is therefore entitled to recover a contribution to its reasonable costs.
13. While the Company's costs invoices are particularised, the detail or content of each invoice is not. It is therefore not possible to measure the reasonableness of its costs from the information supplied to date. While parties may feel disappointment at the Authority's failure to inquire into the breakdown of their costs (par 23, *Len Reid Oils Limited v Noel Walker*, unreported, WC 8/06, Shaw J, 24 May 2006) I suggest their feelings are best protected by a reasonable expectation that relevant detail is advanced in the first instance.

14. However, and bearing in mind the tenets set out in *Da Cruz* (above), I make the following findings in respect of this application:
- a. Mr Mitchell was on early notice as to the value of obtaining experienced legal representation for the purposes of, amongst other matters, effectively particularising his claim and advocating his employment relationship problem – refer to par 6 above. He elected not to act on that advice.
  - b. The Company's costs are, I accept, all the greater for the vague but far-reaching nature of Mr Mitchell's claim, not only in his statement of problem but also in all other aspects of the applicant pursuing his claim.
  - c. Mr Mitchell's claims have been entirely unsuccessful. In particular, it could be foreseen that the applicant's claim of constructive dismissal could not succeed because Mr Mitchell was, and remains, unfit to work and continues to remain on ACC.
  - d. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct, although (as I make clear above) conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
  - e. Mr Mitchell's decision to challenge the Authority's determination is not, in this case, reason for the Authority to set aside a costs decision against the applicant.
  - f. The Company's *Calderbank* offer cannot be relied on to enhance its costs claim: *Shanks v Agar t/a Rod Agar & Company* [1996] 2ERNZ 578.
15. Consistent with well-established case law, and after having regard to the above, the duration of the investigation and the fact that Mr Mitchell is in receipt of regular ACC compensation payments, I am satisfied that the applicant should pay to the respondent, as a fair and reasonable contribution to its costs, the figure of \$6,000.
16. Consistent with Mr Mitchell's ACC status, the parties may wish to attempt to reach agreement on a costs payment regime.

**Decision**

17. As is made clear above, I direct the applicant, David Mitchell, to pay to the respondent, Blue Star Print Group (NZ) Limited t/a Printlink, as a contribution to its fair and reasonable costs, the sum of \$6,000.00 (six thousand dollars).

**Denis Asher**

**Member of Employment Relations Authority**