

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 114/10
5151352

BETWEEN

JACQUI WASTNEY
Applicant

A N D

THE CHIEF EXECUTIVE OF
THE DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: James Crichton

Representatives: David Beck, Counsel for Applicant
Stephen Wragg, Counsel for Respondent

Submissions Received: 15 March 2010 from Applicant
26 March 2010 from Respondent

Determination: 11 May 2010

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 1 October 2009, the Authority reserved the question of costs in the present matter.

[2] The parties have been unable to resolve matters by agreement between them and now apply to the Authority for costs to be fixed.

The claim for costs

[3] Counsel for the applicant seeks an award of costs on a full solicitor client basis in the sum of \$6,843.90 such as to reimburse the Legal Services Agency for its costs in the matter. The applicant was partially successful in her claim for disadvantage and it is contended that that justifies the award of full indemnity costs in the matter.

[4] The respondent, on the other hand, while acknowledging that the applicant was partially successful in her claim for disadvantage, points out that the applicant was completely unsuccessful in her claim for unjustified dismissal and it is suggested that the *major issues before the Authority* were determined in the respondent's favour rather than the applicant's. That being the case, the respondent's submission is that costs should lie where they fall.

[5] Interestingly, that submission is supported in the present case by a *Calderbank* offer in just those terms dated 21 October 2009 which was not accepted by the applicant.

[6] The respondent also properly draws the Authority's attention to the common practice in fixing costs where the determination has resulted in mixed success for each party, of seeking to identify which party has been predominantly successful.

[7] That is a helpful approach in the present case. There can be no doubt whatever that the party who was predominantly successful in the present case was the respondent. On general principles then, all other things being equal, the respondent could look to obtaining a costs award against the applicant on the footing that costs follow the event. However, that fundamental principle is abrogated in the present case by the fact that the applicant is legally aided and, of course, the effect of s.40(2) of the Legal Services Act 2000 is that only in exceptional circumstances can a costs award be contemplated against a legally aided person.

[8] Here, the respondent quite properly waived any thought of achieving a contribution to its costs from the substantially unsuccessful applicant, but was confronted with the applicant claiming costs herself as a consequence of her modest success in the substantive matter.

[9] As I mentioned, the respondent confronted that reality by offering a *Calderbank* letter in respect to the costs issue (that costs should lie where they fall), but the applicant still persevered with her claim nonetheless.

Determination

[10] There is no basis on which the respondent ought to be required to make a contribution to the applicant's costs in the present matter. The respondent was substantially successful in the determination. Because the applicant is legally aided,

there is no realistic prospect of obtaining a costs award against her, although I hold that the respondent was primarily the victor in the substantive proceedings. I am satisfied that there are no exceptional circumstances that would allow contemplation of a costs award to the applicant.

[11] Finally, there is no reason in principle why the *Calderbank* offer advanced by the respondent ought not to be brought into the equation. It is exactly on point and it is entirely appropriate that it be called in aid by the respondent in determining the fixing of costs in the present matter.

[12] The proper course is for costs in the present matter to lie where they fall.

James Crichton
Member of the Employment Relations Authority