IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 42
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	BETWEEN	DAVID PAUL O'CONNOR and DEBORAH JOY O'CONNOR Applicants
	A N D	PETER PEEVERS and HELEN PEEVERS Respondents

Member of Authority:	James Crichton
Representatives:	Kylie Graham, Counsel for Applicants Larna Jensen, Counsel for Respondents
Submissions Received:	29 November 2010 from Applicants 4 August and 31 December 2010 from Respondents
Date of Determination:	14 March 2011

COSTS DETERMINATION OF THE AUTHORITY

The substantive decision

[1] The Authority's substantive decision on the employment relationship problem between these parties was issued on 29 April 2010. In that decision, the Authority found that Mr and Mrs O'Connor did not have personal grievances but the Authority did order that certain sums were due and owing to the applicants by the respondents.

[2] Costs were reserved.

The claim for costs

[3] Both parties claim costs against the other. There were discussions between the parties after the issue of the substantive determination which sought to resolve issues of costs and the payment of the sums the Authority ordered to be paid by the

respondents to the applicants. The respondents sought to set off payment of those sums against an amount of costs but that suggestion was rejected by the applicants.

[4] The applicants are legally aided and they seek to shelter behind the effect of s.40(2) of the Legal Services Act 2000 which requires a finding of *exceptional circumstances* before an order for costs *may be made against an aided person in a civil proceeding*. It is contended that there are no exceptional circumstances in this case.

[5] Conversely, the applicants seek an order for costs because of the alleged failure of the respondents to appropriately participate in the mediation set down for November 2009. The total amount claimed in this regard is $2,016.90.

[6] Like the respondents, the applicants made *Calderbank* offers and those *Calderbank* offers were rejected.

[7] The respondents claim costs because it is alleged that the applicants' claims were *unmeritorious* and that the pursuit of those claims was *unreasonable* and that, in rejecting the *timely Calderbank* offer of the respondents, the applicants caused the respondents further unnecessary cost.

The legal principles

[8] Both parties refer in their helpful submissions to a variety of sources for the relevant law. In particular, both appropriately rely on the principles set out in the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. That decision clearly enunciates the broad principles that apply to the fixing of costs in the Authority.

[9] In the present case, it is also necessary to reflect on the relevant provisions of the Legal Services Act and particularly s.40.

[10] It is a truism that costs typically follow the event. In the present case, the Authority was not persuaded that the personal grievances of either applicant was made out. However, the applicants were given some benefit by the Authority's decision in requiring repayment of certain sums to the applicants by the respondents. It is this relief on which the applicants rely for their claim for costs, but only in regard to the very narrow window occasioned by the alleged impropriety in the respondents not properly addressing mediation in November 2009.

[11] The respondents' argument for costs to be awarded in their favour is based squarely on the contention that the claim brought by the applicants was so totally devoid of merit as to put the respondents to proof in circumstances where no reasonable party would have sought to proceed.

[12] Further and finally, the existence of *Calderbank* offers going both ways is a further balancing factor that the Authority must consider in the fixing of costs.

Determination

[13] Looking at the matter in the round, it is fair for the Authority to observe that there are factors going each way, the one balancing the other out. There are *Calderbank* offers made by both parties and rejected by their opponents. While the applicants were unsuccessful in their claimed personal grievances, they were accorded some relief in the Authority's substantive decision.

[14] Most fundamentally of all, the Authority at first instance found that both parties were *bona fide*. The Authority referred to the protagonists as all having *integrity* and at para.[26] of the substantive determination said *both these couples are genuine and honest people*.

[15] While the applicants were not successful with the claim they brought, they were given relief by the Authority. While the respondents may say that the applicants' claim was without foundation, the Authority nonetheless found that the respondents were in error.

[16] Again, the legal aid aspect is also relevant. I find it impossible to conclude that there are *exceptional circumstances* which would justify me in requiring the applicants to contribute to the costs of the respondents. Exceptional circumstances means circumstances which are *quite out of the ordinary*. The respondents' claim for costs rests on the proposition that they have been put to trouble and expense defending claims which have no validity. But that, looked at in the round, is not the decision that the Authority made. Certainly the Authority found that there were no personal grievances, but there were deficits in the respondents' behaviour and those deficits sounded in the Authority's substantive decision. It follows that I am not satisfied that the argument for exceptional circumstances has been made out and on that basis the respondents' claim for costs against the applicants fails.

[17] As if that is not enough, I note that the respondents have to date failed to honour their obligations in respect of satisfying the Authority's substantive decision in respect of the moneys owed by the respondents to the applicants. The applicants rightly point out that a claim for costs does not operate as a stay; had the respondents wished to stay the Authority's original decision, they ought to have applied for that relief. What is more, the fixing of costs is a discretionary remedy and, in the present circumstances where there has been a failure by the respondents to honour their obligations to the applicants pursuant to the Authority's substantive decision, the Authority declines to exercise its discretion in favour of the respondents.

[18] Equally though, the Authority is not persuaded that the applicants have made out their claim for costs to be awarded against the respondents either. If the applicants can be described as having been successful in their claim before the Authority, it must be fair to describe that success as minimal. There were *Calderbank* offers advanced by each party and none were accepted. The applicants' principal claims of personal grievance were comprehensively rejected by the Authority.

[19] In my opinion, this is a case where, for the foregoing reasons, I conclude that costs should lie where they fall and that is the order of the Authority.

James Crichton
Member of the Employment Relations Authority