

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 357  
5296379

BETWEEN                      WAYNE ALLAN DUGGAN  
   Applicant  
  
AND                                DAVID AND KAREN HORI  
   TRADING AS ORETE DAIRY  
   FARM  
   Respondents

Member of Authority:        Yvonne Oldfield  
  
Representatives:              Darryl Andrews for Applicant  
   Jeremy Paterson for Respondents  
  
Submissions received:        2 August 2011 from Applicant  
   28 July 2011 from Respondents  
  
Determination:                11 August 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In a determination of Member Campbell dated 13 July 2011 the Authority concluded that Mr Duggan had had an ongoing employment relationship with the respondents and ordered them to pay outstanding holiday pay to him in the amount of \$2,447.48. His other claims (for unjustified disadvantage and unjustified dismissal) were not accepted. Costs were reserved.

[2]     Mr Duggan has been legally aided throughout these proceedings. Section 45 (2) of the Legal Services Act 2011 ('the Act') states that no order for costs may be made against an aided person in a civil proceeding unless there are exceptional circumstances. Notwithstanding the fact that Mr Duggan was partially successful in his claim and notwithstanding the fact that he was legally aided, the respondents now seek an award of costs against him. They say that he rejected a reasonable Calderbank

offer and this not only reverses the usual principle that costs follow the event, but in itself amounts to exceptional circumstances.

[3] In determining whether exceptional circumstances exist account is to be taken of the following as set out in s.45 (3) of the Act:

- i. *“Any conduct that causes the other party to incur unnecessary cost;*
- ii. *any failure to comply with the procedural rules and orders of the court;*
- iii. *any misleading or deceitful conduct;*
- iv. *any unreasonable pursuit of 1 or more issues on which the aided person fails;*
- v. *any unreasonable refusal to negotiate a settlement or refuse to participate in alternative dispute resolution;*
- vi. *any other conduct that abuses the processes of the court.”*

[4] The respondents’ Calderbank offer of \$3,000.00 was made by letter dated 10 June 2010, well before the Authority investigation meeting took place in May 2011. In rejecting the Calderbank offer, the solicitors then acting for the applicant (not Mr Andrews firm) had written:

*“Should the matter proceed to the Employment Relations Authority a statutory bar exists under section 40(2) of the Legal Services Act 2000 preventing awards of costs against legally aided applicants except in ‘exceptional circumstances.’*

[5] The applicant in turn offered to settle for \$15,000.00. That turned out to be the end of settlement negotiations. The respondents wrote back saying:

*“You advise that Mr Duggan is legally aided and you imply that your client is able to threaten costs but not be liable. This is not the case. We draw your attention to your responsibilities not to abuse the legal services provided to your client and we will treat this as an exceptional circumstance given that your client’s position is unsustainable.”*

[6] The Authority has not been informed of the date that Mr Duggan changed solicitors but when his application was lodged, on 20 December 2010, it was by Mr Andrews’s firm.

[7] Mr Paterson advised that the respondents' actual costs and disbursements came to \$4,661.60 however they sought a contribution to costs equalling the award made against them, namely \$2,447.48, and argued:

*"The applicant is in a position to pay as the respondent does not seek a cost award that exceeds the amount of \$2,447.48."*

[8] For the applicant, Mr Andrews argues that there are no exceptional circumstances and each party should simply be responsible for its own costs. He says that the applicant was entitled to bring a personal grievance on a number of issues which had affected him throughout his employment, and the lodging of a personal grievance on valid grounds is not conduct that causes the other party to incur unnecessary costs. He says it was not unreasonable to refuse the one proposal for settlement offered by the Respondents and rejects the suggestion that any of the other factors apply in this case.

### **Determination**

[9] The respondents' argument is essentially that circumstances in which the making of a Calderbank order have been followed by a successful defence amount, in themselves, to exceptional circumstances in terms of section 45 (3) of the Act. I am not persuaded by this. The respondents have been put to additional expense by the rejection of the Calderbank offer and would, I find, have been entitled to an order for costs if the applicant had not been legally aided.

[10] Section 45 (5) of the Act provides:

*"If because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability."*

[11] Section 46 of the Act goes on to provide:

*"(1) This section applies if an order is made under section 45 that specifies that an aided person would have incurred a liability, or a greater liability, for costs if that section had not affected his or her liability."*

*(2) If this section applies, the party to the proceedings who is prejudiced by the operation of section 45 ...may apply to the Commissioner in the prescribed manner for payment by the Commissioner of some or all of the difference between the costs (if any) actually awarded to that party against the aided person and those to which that party would have been entitled if section 45 had not affected the aided person's liability."*

[12] I am satisfied that it is appropriate for me to specify what order would have been made in this case. The employment relationship problem was the subject of a one day investigation meeting at which several different issues were investigated as set out in Ms Campbell's decision. The respondents' actual costs were at the lower end of the range given the material which needed to be traversed.

[13] **Had the applicant not been legally aided the Authority would have made an order for \$2,447.48 contribution to costs as sought by the respondents.**

Yvonne Oldfield

Member of the Employment Relations Authority