

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 112
3014852**

BETWEEN

DANIEL O'FLAHERTY
Applicant

AND

LANDSEER INVESTMENTS
AUCKLAND LTD t/a ANDREW
SIMMS NEWMARKET
Respondent

Member of Authority: Eleanor Robinson

Costs Submissions 16 March 2018 from Applicant
29 March 2018 from Respondent

Determination: 5 April 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2018] NZERA Auckland 50 the Authority found that the Applicant, Mr Daniel O'Flaherty, had not been unjustifiably disadvantaged by the Respondent, Landseer Motor Investments Limited trading as Andrew Simms Newmarket (Andrew Simms).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. However the parties have filed submissions in respect of costs.

Costs

[3] This matter involved a one and a half day investigation meeting. Ms Raewyn Gibson, on behalf of Andrew Simms, citing actual costs of \$18,716.25 (excluding GST), is seeking a contribution to costs above the notional daily tariff rate in the Authority on the basis of exceptional circumstances, specifically that Mr O'Flaherty refused to accept a reasonable offer to resolve the claims.

[4] Mr O'Flaherty was legally aided during the course of the Investigation Meeting. In these circumstances it is normally the case that a recovery of a contribution to costs is unavailable unless there are 'exceptional circumstances' pursuant to s 45 of the Legal services Act 2011 which states as follows:

- (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
- (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

[5] The exceptional circumstances referred to in s45(2) of the Legal Services Act 2011 are set out in s 45 (3) as follows:

- (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
 - (a) any conduct that causes the other party to incur unnecessary cost;
 - (b) any failure to comply with the procedural rules and orders of the court;
 - (c) any misleading or deceitful conduct;
 - (d) any unreasonable pursuit of one or more issues on which the aided person fails;
 - (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution;
 - (f) any other conduct that abuses the processes of the court.
- (4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.
- (5) If, because of this section, no orders 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.

Principles

[6] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[7] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[8] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*².

[9] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[10] It is also a principle that costs are not to be used to punish the unsuccessful party.

Determination

[11] Ms Gibson has submitted that not only are there exceptional circumstances which support the awarding of costs against Mr O’Flaherty as a legally aided person, but also that these exceptional circumstances support the raising of the notional daily tariff rate in this case.

[12] Mr O’Flaherty was unsuccessful in all of the issues he brought before the Authority and as a consequence was not awarded the remedies which he had been seeking. I consider that taking that fact into consideration when assessing the submission that costs should be awarded above the notional daily tariff rate level of costs to be awarded, would have the effect of further ‘punishing’ an unsuccessful party before the Authority, including Mr O’Flaherty, which is not a principle to be used when assessing costs.

[13] Of more persuasion is the submission that costs should be awarded on exceptional grounds against Mr O’Flaherty as a legally aided person, specifically Ms Gibson submits that Mr O’Flaherty refused to accept a reasonable offer to resolve the matter.

[14] Ms Gibson submits that Andrew Simms made a Calderbank⁵ offer, that is a without prejudice save as to costs offer, to Mr O’Flaherty on 13 and 22 September 2017.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

⁵ *Calderbank v Calderbank* [1976] Fam 93 (CA)

[15] It is necessary for me to consider the effect the Offer should have on costs. I note that the Offer was made 13 September and reiterated on 22 September 2017. The Investigation Meeting took place on 7 and 8 February 2018. There was therefore an opportunity for Mr O’Flaherty to consider the Offer prior to the Investigation Meeting; however he did not accept it.

[16] Mr Hayes, on behalf of Mr O’Flaherty, submits that the Offer does not constitute exceptional circumstances in that it is not: “*quite out of the ordinary*”⁶. Further that it was reasonable for Mr O’Flaherty to reject the Offer on the basis that it was a complex case in which Mr O’Flaherty believed he had reasonable evidence to support his position, and where he was also relying on the situation that awards in the Employment Court for compensation for hurt and humiliation are on the increase.

[17] Mr Hayes also submits that Mr O’Flaherty complied with the procedural rules and orders of the Authority, had not been guilty of any misleading or deceitful behaviour at any time to the Authority or Andrew Simms, and he attended mediation, therefore not unreasonably refusing to participate in alternative dispute resolution.

[18] I accept that Mr O’Flaherty did attend mediation; I am also mindful of the approach taken by the courts when there has been a Calderbank offer involved. The Court of Appeal in *Aoraki Corporation Ltd v McGavin*⁷ noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these Calderbank offers without costs being impacted:

The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.

[19] I also observe that the Offer was made on 13 September 2013, a date in advance of the Investigation Meeting. There is no evidence that Mr O’Flaherty attempted to negotiate after he had received the Offer.

[20] The existence of a Calderbank offer is usually a significant reason to take into consideration when considering an application by the successful party for an uplift in the usual tariff costs award in the Authority, even in circumstances in which a party has been

⁶ *Laverty v Fara Franchising Ltd* [2006] 1 NNZLR 650 (CA) at [31]

⁷ [1998] 1 ERNZ 601

successful in a claim, albeit in an award of a lesser amount than that contained in the Calderbank offer.

[21] However as Mr O’Flaherty was legally aided, the Offer becomes one of a number of factors to be considered to establish if there are exceptional circumstances to justify an order for costs being made against him.

[22] In *Awa v Independent News Ltd*⁸ the High Court held that exceptional circumstances mean something “*quite out of the ordinary*”. This view was upheld by the Court of Appeal in *Laverty v Para Franchising Limited*⁹

[23] In the circumstances of this case, I am not persuaded that the Offer was exceptional when considered as “*something quite out of the ordinary*” given that Calderbank offers are not uncommon in employment matters.

[24] I also accept that Mr O’Flaherty fully participated in the mediation process.

[25] Mr Hayes has submitted information that Mr O’Flaherty is not financially in a position to pay any costs awarded against him, although no evidence has been submitted in support of that submission.

Costs award if Mr O’Flaherty had not been legally aided

[26] I record that, if s 45(2) of the Legal Services Act 2011 had not limited Mr O’Flaherty’s liability to pay costs to Andrew Simms, I would have awarded costs at the notional daily tariff rate in the Authority on the basis of one and a half meeting.

[27] I accordingly indicate that I would have considered a \$6,250.00 contribution to Andrew Simms’ costs to have been appropriate.

Eleanor Robinson
Member of the Employment Relations Authority

⁸ [1996] 2 NZLR 184

⁹ [2006] NZLR 650