

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 135A/09
5129220

BETWEEN KRYSTLE ANDERSON
 Applicant

AND CLIP JOINT HAIR SALON
 Respondent

Member of Authority: James Crichton

Representatives: Ina Stewart, Counsel for Applicant
 Rachel Brazil, Counsel for Respondent

Submissions Received: 30 September 2009 from Respondent
 5 November 2009 from Applicant

Determination: 16 November 2009

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 24 August 2009, the Authority resolved the employment relationship problem between these parties by determining that Ms Anderson had not been constructively dismissed but had suffered a disadvantage as a consequence of unjustifiable actions of her employer (Clip Joint).

[2] Costs were reserved.

The claim for costs

[3] Clip Joint seeks an award of costs and disbursements on the footing that it is the successful party. The actual costs incurred by Clip Joint subsequent to the unsuccessful mediation the parties engaged in, are said to be \$6,000 and it is that sum which the respondent seeks to have fixed as costs in its favour.

[4] Counsel for Ms Anderson resists any order for costs on the footing that Ms Anderson was partially successful in her claim against Clip Joint and, in addition, Ms Anderson is legally aided therefore the effect of the Legal Services Act 2000 applies.

[5] It is the case that Ms Anderson was partially successful; although her claim was one of constructive dismissal, the Authority, while finding no constructive dismissal did find that Ms Anderson had suffered a disadvantage as a consequence of the unjustified actions of Clip Joint.

The legal principles

[6] The full bench of the Employment Court in *PBO Ltd v. Da Cruz* AC2A/5 identifies the salient principles relied upon by the Authority in a costs setting and confirms the appropriateness of those principles. The Court also specifically approves the *tariff based approach* often used by the Authority as long as the particular circumstances of the individual case were taken into account as well.

The effect of legal aid

[7] The relevant provision in the Legal Services Act 2000 is s.40. It provides that the party in receipt of legal aid must not be held liable for an order for costs that is unreasonable for that person to pay having regard to all the circumstances which includes the party's means and the conduct of the parties in relation to the dispute. The section goes on to provide that except in exceptional circumstances a costs award against a person in receipt of legal aid may only be made up to the level of the contribution that the Legal Services Agency requires from the legally aided person.

[8] There is also provision in the section for what amounts to a *but for* situation where an order may be made indicating what level costs would have been fixed at but for the effect of the Legal Services Act. The Court or Tribunal is given specific power to make a declaration in that regard.

[9] Clip Joint say that this is a case where there are exceptional circumstances while Ms Anderson contends that there are no exceptional circumstances that would justify an award of costs being made against the applicant.

The *Calderbank* offer

[10] A further issue in the present case is the existence of a *Calderbank* exchange between the parties. There is no doubt that a properly constituted *Calderbank* letter was provided to the applicant and that the effect of that *Calderbank* offer would have been significantly more beneficial to Ms Anderson than her compensation award made by the Authority. It follows also that Clip Joint incurred significant additional costs in defending its position from the date of the *Calderbank* offer down to the completion of the proceedings in the Authority. Those costs would not have been incurred if Ms Anderson had accepted the *Calderbank* offer.

Conclusion

[11] Ms Anderson understandably refers me to the decision of Judge Shaw in *Jack v. Ministry of Justice* WC6/05, 18 March 2005. Her Honour's decision in that case is directly on point. *Jack's* case involved both a legally aided party, a *Calderbank* offer and cross claims from both parties seeking costs.

[12] In that decision, Her Honour refers to the High Court decision in *Awa v. Independent News Limited* [1996] 2 NZLR 184 in which the High Court held that there was no intrinsic test for the phrase *exceptional circumstances* and that each application needed to be looked at in relation to the particular factual matrix.

[13] Applying that dicta to the present case, I am not satisfied that there are exceptional circumstances which would justify making any significant order in respect to costs against Ms Anderson. Her claim was not completely without merit, although it was decided in her favour on a basis different from her actual claim, as the Employment Relations Act allows. The Authority found that Clip Joint had erred in a particular respect and I conclude that any order for costs made against Ms Anderson would be punitive rather than reimbursing in nature.

[14] The next issue then is the appropriate treatment of the *Calderbank* offer and there is nothing in the factual matrix which encourages me to depart from the clear statutory prohibition on making an award of costs against the legally aided person *except in quite exceptional circumstances*. The *Calderbank* offer is simply a factor in a case such as this (as Judge Shaw makes clear) and I decline to give the *Calderbank* offer any undue weight in that circumstance.

[15] Although Ms Anderson does not make a claim for costs herself, she does resist the application for costs from Clip Joint, at least in part on the footing that she was partially successful in her claim. Had she made an application for costs, I should have rejected that application as well, again in reliance on the decision of the Court in *Jack* because had Ms Anderson taken the *Calderbank* offer when that was proffered, she might well have been better off herself (subject to the arrangements between her and the Legal Services Agency) and certainly Clip Joint would have incurred less costs of their own than in fact they did.

Determination

[16] This is a case where in my opinion in effect costs should lie where they fall. The liability of Ms Anderson for contributing to the costs of Clip Joint is I hold limited to her contribution to the Legal Services Agency and she is ordered to pay such amount to Clip Joint to conclude matters.

[17] For the avoidance of doubt, I decline to make a declaration about the level of costs that would have applied had the Legal Services Act not been in play.

James Crichton
Member of the Employment Relations Authority