

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 33
5311299

BETWEEN

MARK CHAMBERLAIN
Applicant

A N D

DYNAMIC COMPOST TEA
LTD
Respondent

Member of Authority: David Appleton

Representatives: Heather Mckinnon, Counsel for Applicant
John Levenbach, Counsel for Respondent

Submissions Received: 3 February 2012 from Respondent
17 February 2012 from Applicant

Date of Determination: 23 February 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of a determination dated 10 January 2012 I found that the applicant had failed in his personal grievance of unjustifiable constructive dismissal and his claim for unpaid wages. He succeeded in his claim for unpaid business expenses.

[2] The respondent succeeded in its counter claim for breach of contract.

[3] The respondent seeks a contribution to its costs.

[4] The applicant is in receipt of legal aid under No. 10043469. Sections 45(1) to (5) of the Legal Services Act 2011, dealing with the liability of legally aided persons for costs, 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.*
- (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.*

[5] Section 46 of the Legal Services Act applies if an order is made under s.45 that specifies that an aided person would have incurred a liability or greater liability for costs if that section had not affected his liability and gives a right to the party to the proceedings who is prejudiced by the operation of s.45 to apply to the Legal Services Commissioner for payment by the Commissioner of some or all of the difference between the costs actually awarded against the aided party and those to which that party would have been entitled if s.45 had not applied.

[6] The respondent argues that there are *exceptional circumstances* in the manner in which the applicant pursued his personal grievance against the respondent to such

an extent that the applicant's pursuance of that claim is *quite out of the ordinary*. (*Wadley v. Salon D'Orsay Ltd* [1988] 1 ERNZ 369.)

[7] The factors that the Authority may take into account in determining whether there are exceptional circumstances under s.45(2) of the Legal Services Act are set out in s.45(3), although the list is not exclusive. The respondent argues that several of these factors are satisfied in the current case.

Any conduct that causes the other party to incur unnecessary cost

[8] The respondent states that the applicant and his solicitors had failed to respond to a settlement offer, although copies of emails disclosed by the applicant's counsel show that this is incorrect and that the applicant had rejected the offer 18 days after it had been sent. That alleged conduct, therefore, is not correct.

[9] The respondent also states that the applicant's representatives took over two months to advise that legal aid had been granted to the applicant. They say that the respondent could have pursued a different tack had it been advised sooner. The applicant responds to this that the respondent had been advised of the grant of legal aid over one month before the date of a mediation meeting between the parties and nearly nine months before the applicant had filed proceedings with the Authority. I am satisfied, therefore, that the delay of two months in advising the respondent of the grant of legal aid was not material in increasing the respondent's legal costs and does not amount to an *exceptional circumstance*.

[10] The respondent also points out that the applicant had two qualified and experienced lawyers preparing for the investigation meeting and representing the applicant at the meeting. However, I agree with the applicant's counsel that that fact did not have any material bearing on the respondent's costs.

Misleading or deceitful conduct

[11] The respondent argues that the applicant provided evidence at the investigation meeting that was not factually correct and that the applicant made 21 complaints against the respondent which the applicant alleged arose during the course of his employment, and which he relied upon in his claim for constructive dismissal.

[12] Whilst I was not convinced that the 21 alleged problems relied upon by the applicant in arguing his constructive dismissal claim entitled him to succeed, and whilst I also preferred the evidence of the respondent in relation to most of these 21 alleged problems, in many cases that was because I preferred the respondent's interpretation of agreed events, rather than finding that events had been alleged by the applicant which had not occurred. Whilst it is my belief that many of the problems relied on by the applicant were relied on in a *ex post facto* manner (in that they were taken into account after the resignation to bolster the claim of constructive dismissal) this is often the case in constructive dismissal claims and does not necessarily mean that an applicant is being misleading or deceitful in relying upon those matters. Sometimes it is only with the benefit of hindsight that seemingly unconnected incidents fall into place for an employee or ex employee.

[13] Therefore, I am not satisfied that the applicant manifested misleading or deceitful conduct in any material way that would satisfy the requirement of *exceptional circumstances*.

Any unreasonable pursuit of one or more issues on which the aided person fails

[14] The respondent argues that the applicant unreasonably pursued the following issues on which he failed:

- (a) whether or not the applicant resigned or was dismissed;
- (b) the applicant relying on 21 complaints against the respondent;
- (c) the issue as to propensity, with the applicant subpoenaing as witnesses two persons who were contracted by other companies, not the respondent, in their capacity as self employed contractors, not as employees during the period prior to the applicant commencing employment with the respondent company.

[15] It is very common for the Authority to have to determine the issue of whether an applicant resigned or had been constructively dismissed and that, in itself, does not give rise to any exceptional circumstance. In my determination of the substantive matter I had found that the applicant had not resigned in reliance on a repudiatory breach by the respondent. However, I am satisfied that the circumstances surrounding the resignation were uncertain and complex enough to justify the applicant pursuing a

personal grievance for constructive unjustifiable dismissal. The fact that the applicant failed in that personal grievance does not mean that he, or his advisers, had been unreasonable in pursuing it.

[16] Although I had found that the vast majority of the 21 alleged problems on which the applicant had relied in arguing a cumulative repudiatory breach of contract had not been made out so as to enable the applicant to succeed, none of the alleged problems relied on had been unreasonably pursued to any material extent in my view.

[17] With respect to the propensity evidence, I had concluded that it was of limited value, for various reasons. It was not, however, wholly without value in assisting me to reach my conclusions and therefore I do not believe it was unreasonable for the applicant to have partially relied on it.

[18] Taking all these matters into account, I do not find that the applicant had unreasonably pursued one or more issues on which he had failed and, therefore, I do not believe that these issues enabled the respondent to argue that exceptional circumstances apply.

Any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution

[19] A *Calderbank* offer had been put to the applicant in June 2010 on the basis that, if the applicant withdrew his notice of personal grievance within five working days, then the respondent would not take action to recover the sums it alleged were owed to it in respect of the failure to give notice of his resignation.

[20] Counsel for the applicant argues that this offer was in the nature of a *walk away* offer, ranking the applicant's chance of success at zero percentage and effectively rejecting the existence of any litigation risk for the respondent. I am not persuaded that the offer had those characteristics. Rather, it appears that the respondent acknowledged that there was some risk to it, albeit a risk that it ranked as carrying a low chance of success for the applicant. The success of the respondent's counterclaim would have relied on the failure of the applicant's constructive unjustifiable dismissal claim and the offer appears to have been made on the basis of an acknowledged shared risk. If nothing else, the offer would have recognised the nuisance value of the applicant's threatened claim and did carry some value for the applicant.

[21] However, the applicant did engage in mediation and I do not believe he was unreasonable in rejecting the offer made to him given that the threatened success of the respondent's counterclaim was wholly dependant on the applicant failing in his unjustifiable constructive dismissal claim.

[22] Therefore, taking all this into account, I do not believe that the applicant's failure to accept the *Calderbank* offer constitutes an *exceptional circumstance* entitling the respondent to costs.

The respondent's hardship

[23] Counsel for the respondent argues that the respondent has suffered financially as a result of the applicant's claim and that one of the owners and directors of the company has suffered stress as a result. However, whilst there is no doubt that the applicant's personal grievance has had an adverse impact upon the respondent, this is by no means exceptional and the hardship detailed by the respondent's counsel does not appear to be particularly out of the ordinary.

Summary

[24] Taking all these factors into account, I am not satisfied that there are exceptional circumstances which justify the award of costs against the applicant in view of him being a legally aided person.

[25] Finally, the respondent requests that the Authority specifies the amount of costs that would have been awarded against the applicant had s.45(2) of the Legal Services Act 2011 not limited the unsuccessful applicant's liability to pay costs to the respondent.

[26] The principles governing the setting of costs in the Authority were promulgated in the case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. These include the principles that conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award, costs generally follow the event, that awards will be modest and that, frequently, costs are judged against the notional daily rate.

[27] I do not believe that the conduct of the claim by the applicant was in any way unusual in light of the nature of the claim. I am also mindful of the fact that there was

some late disclosure of documentary evidence by the respondent right up until the last day preceding the investigation meeting.

[28] Therefore, I do not see any reason to depart from the usual practice of adopting a notional daily tariff of \$3,000 per day. The investigation meeting took two full days and I am therefore satisfied that the award of costs against the applicant would have been the sum of \$6,000 if s.45(2) of the Legal Services Aid 2011 had not limited the applicant's liability to pay costs to the respondent.

Order

[29] No costs are awarded against the legally aided applicant on the basis that no exceptional circumstances apply which permit the award of costs.

David Appleton
Member of the Employment Relations Authority