

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 157
5429518**

BETWEEN

JARON COOPER
Applicant

AND

RESENE SANTANO LIMITED
Respondent

Member of Authority: Eleanor Robinson

Costs Submissions 16 April 2014 from Applicant
8 April 2014 from Respondent

Determination: 01 May 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2014] NZERA Auckland 95 the Authority found that the Applicant, Mr Jaron Cooper, had not been unjustifiably dismissed by the Respondent, Resene Santano Limited (RSL).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

Costs

[3] This matter involved a two day investigation meeting. Mr Murray French, on behalf of RSL, citing actual costs in excess of \$12,400 (excluding GST), is seeking a contribution to costs above the notional daily tariff rate in the Authority in the sum of \$10,000.00, on the basis that (i) the claims against RSL made by Mr Cooper were found by the Authority to be without merit, and (ii) Mr Cooper refused to accept a reasonable offer to resolve the claims.

[4] Mr Cooper 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.

[5] Section 45 of the Legal Services Act 2011 is relevant to the determination of costs where a party to legal proceedings is legally aided. Section 45(2) provides that no order for costs may be made against a legally aided person in civil proceedings unless the Authority is

satisfied that there are exceptional circumstances. The exceptional circumstances as set out in s45(2) of the Legal Services Act 2011 include:

- (a) *Any conduct that causes the other party to incur unnecessary cost;*
- (d) *any unreasonable pursuit of 1 or more issues on which the aided person fails;*
- (e) *any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution.*

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.”

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

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

Determination

[11] Mr French has submitted not only that exceptional circumstances exist for the awarding of costs against Mr Cooper 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 Cooper 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. 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 I consider would have the effect of further ‘punishing’ Mr Cooper, 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 Cooper as a legally aided person, specifically Mr French submits that Mr Cooper refused to accept a reasonable offer to resolve the matter.

[14] Mr French submits that account should be taken of the fact that the RSL made a Calderbank⁵ offer, that is a without prejudice save as to costs offer, to Mr Cooper. This offer was made in a letter dated 12 September 2013 (the Offer), which is before the Authority.

[15] It is necessary for me to consider the effect the Offer should have on costs. I note that the Offer was made 12 September 2013. The Investigation Meeting took place on 11 and 12 February 2014. There was therefore ample time for Mr Cooper to consider the Offer prior to the Investigation Meeting; however he did not accept it.

[16] Mr Scott, on behalf of Mr Cooper, submits that the Offer does not constitute exceptional circumstances in that it is not: “*quite out of the ordinary*”⁶. Further that it failed to address Mr Cooper’s perception that he was not interested in monetary compensation but seeking to establish that he had been unfairly treated and was seeking reinstatement.

[17] Mr Scott further submits that on this basis Mr Cooper did not unreasonably refuse to negotiate a settlement, highlighting the fact that Mr Cooper did attend mediation on 21 August 2013 and therefore he did not unreasonably refuse to participate in alternative dispute resolution.

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

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

[18] I accept that Mr Cooper 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 12 September 2013, a date following mediation and well in advance of the Investigation Meeting. There is no evidence that Mr Cooper attempted to negotiate after he had received the Offer.

[20] The existence of a Calderbank offer is usually a powerful reason to award costs, even in circumstances in which a party has been successful in a claim, albeit in an award of a lesser amount than that contained in the Calderbank offer.

[21] However as Mr Cooper 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] Mr Scott has also submitted information relating to Mr Cooper’s weekly income and out-goings per week. In light of this submission I am not persuaded that Mr Cooper is in any position in which to make any contribution to costs.

⁷ [1998] 1 ERNZ 601

⁸ [1996] 2 NZLR 184

⁹ [2006] NZLR 650

[25] I do record however that any such award would have been awarded at the notional daily tariff rate in the Authority on the basis of a two day meeting. I accordingly indicate that I would have considered a \$7,000.00 contribution to RSL's costs to have been appropriate.

Eleanor Robinson
Member of the Employment Relations Authority