

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

CA 147A/10
5166749

BETWEEN MICHAEL HALSEY
 Applicant

AND COMPUTER MATE LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: J Beck, counsel for applicant
 J Guthrie, counsel for respondent

Memoranda received: 13 September 2010 from applicant
 26 August 2010 from respondent

Determination: 1 October 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 16 July 2010 I found Mr Halsey was dismissed justifiably, and did not accept his personal grievances on the ground that his employment had been affected to his disadvantage by unjustifiable actions of the employer's.

[2] Costs were reserved.

[3] Mr Halsey was in receipt of a grant of legal aid. Accordingly the respondent has sought an order for costs on the basis that:

- a. an order should be made against Mr Halsey because exceptional circumstances exist under s 40 of the Legal Services Act 2000; or
- b. the Authority indicate the award it would have made but for Mr Halsey's legal aid status.

Exceptional circumstances under the Legal Services Act

[4] Section 40 of the Legal Services Act provides in part:

(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 and deceitful conduct;*
- (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;*
- (f) any other conduct that abuses the processes of the court.*

[5] Ms Guthrie pointed in particular to: conduct on Mr Halsey's part which caused the respondent to incur unnecessary costs; the unreasonable pursuit of one or more issues on which he failed; and an unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution.

[6] As a matter of fact and degree I do not believe exceptional circumstances existed here, and find the factors relied on are better dealt with in the context of assessing the award I would have made but for Mr Halsey's legal aid status.

[7] This is because, although the respondent has been forced to incur costs which it considers were unnecessary, this was not for reasons I consider exceptional. Costs were incurred because the respondent was forced to defend itself against a claim which did ultimately fail. Mr Halsey pursued a number of issues on which he failed, and although some allegations made in support of his allegation of bullying in particular were so weak they should not have been made they were also too minor to warrant sounding in costs. The bullying claim itself also failed, but overall I do not accept that Mr Halsey's pursuit of the claim was unreasonable. Finally, Mr Halsey participated in mediation and attempted to negotiate a settlement. While a different stance might have achieved a settlement nothing in the material available to me indicates that his negotiating position was unreasonable.

Costs but for the grant of legal aid

[8] Section 40(5) of the Legal Services Act permits orders in respect of the award that would have been made against an aided person if section 40 had not affected that person's liability.

[9] Accordingly Ms Guthrie sought an order for payment of \$4,400, being two thirds of the respondent's actual costs. She submitted that there should be a higher award than is usual for a meeting in the Authority of the existence of a pre-meeting offer of settlement made without prejudice save as to costs.

[10] Ms Beck submitted that an appropriate award on a 'free of legal aid considerations' basis would be no more than \$2,000.

[11] The respondent's offer of settlement was set out in a letter dated 9 September 2009. It followed mediation, as well as an offer from Mr Halsey to settle for the sum of \$4,000. It was couched as follows:

Our client however has instructed us to make a final without prejudice offer of \$1,500 compensation payable under s 123(1)(c)(i)Employment Relations Act 2000 in full and final settlement of your client's claim.

This offer is made in good faith and without acceptance of liability and is open until 4.00 pm on Friday 11 September 2009.

[12] The offer was declined on the ground that it did not meet Mr Halsey's costs to date. The response also advised that Mr Halsey had just been granted legal aid. Ms Guthrie commented in her memorandum on costs that the sum offered was almost double the usual guideline fee for a grant of legal aid up to and including mediation. Although there is no direct information on the point from the perspective of either party it seems from the contents of Ms Beck's memorandum that the amount of the offer was very slightly more than the costs incurred to date. If that is correct then at best Mr Halsey's acceptance of the offer would have left him with only a token amount after costs.

[13] Mr Halsey was unsuccessful in the Authority, and has incurred significantly more costs of his own as well as exposure to an order for costs against him. He is worse off than he would have been had he accepted the offer.

[14] The most recent statement of principle regarding Calderbank offers is set out in the judgment of the Court of Appeal in *Bluestar Print Group (NZ) Limited v Mitchell*¹ The court determined costs rather than remitting the matter to the Employment Court, and in doing so said:

We consider that the potential for vindication to be a relevant factor does not mean that the developed jurisprudence under the High Court Rules costs regime should be ignored. ... As this Court has previously said a 'steely' approach is required. It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors.

[15] Mr Halsey did not cite vindication as a reason for rejecting the offer of settlement made to him, and there are other differences between the *Bluestar Print* case and this one, but the passage above is cited because of its comments on the role of settlement offers. The comments are not irrelevant to matters in the Authority.

[16] The usual approach to costs in the Authority is to apply the principles in *PBO Limited (formerly Rush Security Limited) v da Cruz*.² As Mr Halsey was not successful in any of his claims, if I applied a notional daily rate to the setting of costs I would have ordered that he contribute to the respondent's costs in the sum of \$2,000 as the investigation meeting took a little over half a day. However a consideration of all of the circumstances can affect that assessment. Here the offer of settlement is a further relevant factor, particularly as Mr Halsey is worse off than he would have been if the respondent's offer had been accepted.

[17] Taking that matter into account, I increase the notional daily rate that would otherwise have been awarded. Ms Guthrie asked that I increase the amount to \$4,400. The amount she cites is very reasonable in the light of the number of allegations her client was obliged to address.

¹ [2010] NZCA 385

² [2005] ERNZ 808

[18] Accordingly, the order I would have made but for Mr Halsey's legal aid status is that he contribute to the respondent's costs in the sum of \$4,400.

R A Monaghan

Member of the Employment Relations Authority