

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 510
5391231

BETWEEN

TUI VAAI
Applicant

A N D

MOANA PACIFIC FISHERIES
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Malcolm Dreaneen, Counsel for Applicant
Penny Swarbrick, Counsel for Respondent

Submission Received: 7 October 2013 from Applicant
10 September 2013 from Respondent

Date of Determination: 12 November 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In the substantive determination issued as [2013] NZERA Auckland 370, the Authority determined that Mr Vaai had no personal grievance.

[2] Costs were reserved.

The claim for costs

[3] Moana Pacific Fisheries Limited as the successful party seeks an award of costs of \$3,500.

[4] The Authority is advised that Moana Pacific incurred costs in excess of \$10,000 but the claim for an order of \$3,500 is based on the daily tariff often applied by the Authority in a costs setting.

[5] It is submitted that the situation justifies a finding of “exceptional circumstances” because Mr Vaai’s claim was completely without merit, the evidence for Mr Vaai did not come up to proof, his central claim that he was forced to resign was entirely without evidential support and the argument that he ran was essentially based on an alleged failure by his Union at the time the employment came to an end. In a real sense, Moana Pacific contend that Mr Vaai’s grievance was with his Union rather than with his former employer. As such the proceedings were, it is suggested, entirely misconceived.

[6] However, Moana Pacific Fisheries acknowledge that Mr Vaai is legally aided and that as a consequence, there can only be an award of costs against him if the Authority finds there are “exceptional circumstances” in terms of s.45(3) of the Legal Services Act 2011.

[7] In the alternative Moana Pacific Fisheries seek an order from the Authority setting out what the costs would have been if Mr Vaai had not been legally aided, relying on the provisions of s.45(4) and (5) of the Legal Services Act 2011.

A response

[8] Submissions for Mr Vaai indicate that he has an unqualified grant of aid, that there are no exceptional circumstances and that Mr Vaai is genuinely impecunious.

[9] As to the latter, the submissions indicate that Mr Vaai has no income whatever, is living off his wife’s Working for Families payments and being otherwise supported by his siblings. Both Mr and Mrs Vaai are unemployed and they have five dependant children. They live in rental accommodation and so, by implication, presumably have few, if any, assets.

Discussion

[10] The law on costs fixing in the Authority is well settled and need not be stated again here. Less frequently dealt with though is the relevant law where the unsuccessful party is legally aided.

[11] The relevant statutory provision is s.45 of the Legal Services Act 2011.

[12] The principles established in that section of the statute first of all confirm that a grant of legal aid does not make a party immune from a costs order if they are

unsuccessful in their civil proceeding but it does set out the parameters in which such an order may be made.

[13] In particular, s.45 provides that a costs order may not be made against a legally aided person unless the Court (or in this case the Authority) is satisfied that there are exceptional circumstances. The section then proceeds to define exceptional circumstances to include conduct causing the other party to incur unnecessary cost, failure to comply with directions of the Court, misleading or deceitful conduct, unreasonable pursuit of issues, unreasonable refusal to settle or negotiate or any other conduct that abuses the processes of the Court.

[14] Finally, for our purposes, there is a provision which allows the tribunal to make a “but for” order, that is an order fixing the costs that would have applied if the party were not legally aided.

[15] The fundamental precept though that the Authority derives from s.45 is the principle that the costs liability ... *must not exceed an amount ... that is reasonable for the aided person to pay having regard to all the circumstances ...*

[16] In the present case, the Authority is satisfied from the submissions received for Mr Vaai that he has no ability whatever to make a contribution to the costs of Moana Pacific Fisheries. This is because he has no obvious means of support, no assets, and has five dependent children. On that basis, it seems unrealistic to expect any tangible contribution from him to the costs incurred by Moana Pacific Fisheries.

[17] Both parties refer the Authority to the leading case on the meaning of the phrase “exceptional circumstances” as that phrase is used in the Legal Services Act 2011, a Court of Appeal decision, *Laverty v. Para Franchising Limited* [2006] NZLR 650. While that judgment considers the predecessor to s.45 of the Legal Services Act 2011, the analysis is nonetheless useful for our purposes.

[18] The Court of Appeal emphasised that the question of whether there were or were not exceptional circumstances must be dealt with on a case by case basis and considered that exceptional meant *out of the ordinary*.

[19] While Moana Pacific Fisheries argue that Mr Vaai’s claim was entirely unmeritorious and therefore *out of the ordinary*, it is important to note that in *Laverty*, the Court of Appeal had no difficulty in identifying that even although Mr and Mrs

Laverty, had, to put it loosely, been difficult in their litigation, the Court of Appeal found that there was nothing in Mr and Mrs Laverty's behaviour which amounted to exceptional circumstances.

[20] The short point is that the Authority is not persuaded that Mr Vaai is in any financial position to make any contribution to costs in this matter. The next question is whether the Authority should fix costs on a *but for* basis in reliance on s.45(5) of the Legal Services Act 2001. That section applies where the Authority is satisfied that because of the fact of legal aid, no award of costs can be made.

[21] The Authority has given earnest consideration to the question whether it can fix costs in reliance on that sub-section and concluded that it cannot. This is because the reason that the Authority has determined that no costs can reasonably be fixed in this matter is not because Mr Vaai is legally aided but because he is impecunious.

[22] While the two may amount to the same thing in reality, it seems to the Authority that a proper construction of s.45(5) of the Legal Services Act 2011 is that the *but for* costs fixing is able to be made *because of this section*.

[23] In the present case, the Authority's decision not to require Mr Vaai to make a contribution to the successful party's costs and therefore to allow costs to lie where they fall is based not on the fact that Mr Vaai was legally aided but, as the Authority has noted, on the fact that Mr Vaai is impecunious and is not in any position to make any contribution to costs whatever.

Determination

[24] Accordingly, the Authority determines that for the particular reasons identified in this determination, costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority