

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 12A/06
ARC 39/04**

IN THE MATTER of a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN BARRY FUNNELL
Plaintiff

AND BRUCE A. SHORT LIMITED
Defendant

Hearing: By submissions filed on 16 May, 30 June, 3 and 6 July 2006

Judgment: 18 August 2006

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The defendant seeks a substantial order of costs against the plaintiff in respect of Mr Funnell's challenge that was substantially unsuccessful in the sense that the determination of the Employment Relations Authority was found to have been correct.

[2] Mr Funnell was legally aided in respect of this proceeding and his solicitor advises me that the Legal Services Agency is not seeking a contribution towards his grant from it. Mr Funnell's legal aid contribution has not been disclosed to me.

[3] Irrespective of the question of legal aid, this is a case that, for all of the unusual circumstances set out in the principal judgment, should now be closed. In my assessment, both principal protagonists (Messrs Funnell and Short) have focused unduly on this case for too long. Although Mr Funnell was unsuccessful in persuading the Court that he was employed for as long as he claimed, that his agreed rate of remuneration was twice that paid to him, and that his redundancy was not genuine, many of the company's fundamental stances in the case were equally

unsuccessful. Included among these was its unsustainable assertion that Mr Funnell was not, at any time, an employee of Bruce A. Short Limited. There were also a number of assertions made in evidence by the defendant's principal witness that I concluded were fanciful.

[4] I do not accept the defendant's assertion that the challenge was driven solely or even principally by Mr Funnell's vindictiveness towards Mr Short. Although wrong in many respects, I do not seriously doubt the genuineness of Mr Funnell's beliefs in his righteousness.

[5] To order the plaintiff to pay costs equivalent to his contribution to the legal aid grant would be meaningless. I am not persuaded that there are special circumstances which make it just to determine what I might have ordered by way of costs against Mr Funnell had he not been legally aided, thus allowing the defendant to pursue its quest for costs against the Legal Services Agency.

[6] In all the circumstances of the case I have determined that the most just will be to make no order for costs in this Court and to leave the position in the Authority unaffected.

GL Colgan
Chief Judge

Judgment signed at noon on Friday 18 August 2006

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