

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**WC 9/07  
WRC 24/06**

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

AND IN THE MATTER of an application for costs

BETWEEN SOUTH TARANAKI FREE  
KINDERGARTEN ASSOCIATION  
Plaintiff

AND LYNNE MCLENNAN  
Defendant

Hearing: Written submissions received 31 January, 16 and 26 February 2007

Judgment: 6 March 2007

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**COSTS JUDGMENT OF JUDGE C M SHAW**

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[1] This is an application by the plaintiff for two awards of costs. The defendant had succeeded in her claim for unjustified dismissal before the Authority which had ordered that she be reinstated to her former position. Her claim for unjustified disadvantage was dismissed. The Authority reserved costs but did not determine them as no application was made by the parties.

[2] The plaintiff accepted the substantive findings but successfully challenged the order for reinstatement. The defendant opposed the challenge and sought an order for increased monetary remedies. The plaintiff has applied for the Court to set the costs payable to the defendant for the Authority investigation as well as costs relating to the Employment Court challenge.

### **Calderbank offers**

[3] Before the Authority investigation meeting the plaintiff made a Calderbank offer of \$7,500 to the defendant. Before the Employment Court hearing it made a second Calderbank offer of \$15,000.

[4] The Authority made an order of \$10,000 compensation and payment of the defendant's loss of earnings from the date of her dismissal to the date that the reinstatement took effect. Both of these were reduced by one-third to recognise the defendant's contribution. There is an issue as to whether the defendant recovered more or less than the offers.

### **Costs in the Authority**

[5] The pre-investigation meeting Calderbank offer was for \$7,500. While the Authority's award of compensation amounted to \$6,666.66 (being two-thirds of \$10,000), in addition the defendant received an award of loss of wages bringing the amount she was entitled to recover well above the offer of \$7,500. This offer does not therefore affect the award of costs.

[6] The plaintiff acknowledged that the defendant is entitled to a contribution to her costs in the Authority because she was successful in her claim of unjustified dismissal but points out she was not successful in her unjustified disadvantage claims based on a final warning and suspension which she received prior to her dismissal.

[7] The plaintiff submitted that any award of costs made in favour of the defendant for the Authority's investigation should reflect her lack of success in the unjustified disadvantage claim and that the order for reinstatement was eventually overturned by the Court.

[8] Counsel suggested on the basis of the Authority's general daily rate of \$1,500 it might have granted a \$3,000 award for the 2-day investigation meeting reduced by one-third to reflect the defendant's loss on both the unjustified disadvantage claim

and the later overturning of the reinstatement award leaving an amount of \$2,000 payable by the plaintiff to the defendant.

[9] The primary submission for the defendant was that costs should lie where they fall but Ms Hughes submitted that there should in any event be no reduction in any award of costs to the defendant by reason of her unsuccessful claim for unjustified disadvantage.

### **Decision**

[10] It is open to the Court to adjust an award of costs by the Authority in the light of the outcome in the substantive case in the Court<sup>1</sup> and I accept the plaintiff's submissions in this regard.

[11] I order that the plaintiff pay the defendant the sum of \$2,000 as a contribution towards her costs in the Authority. This sum is based on \$1,500 a day with a reduction to recognise her lack of success on the unjustified disadvantage claim and the subsequent overturning of the order for reinstatement.

### **Costs in the Employment Court**

[12] Before the Employment Court hearing was held, a second Calderbank offer was made in significantly more detailed terms. It comprised an offer of \$15,000 compensation plus lost wages to the date of the offer. It also proposed that the parties were to bear their own costs, that no costs would be pursued in relation to the Employment Relations Authority hearing, and that Ms McLennan would not pursue reinstatement.

[13] The effect of the Employment Court judgment was to confirm the award of monetary compensation made by the Authority. This award was well below the amount offered for compensation in the Calderbank offer. The loss of wages awarded to the defendant was on the same basis as that offered in the Calderbank letter save that, because the time was extended by the challenge, the loss of wages extended beyond the date of the Calderbank offer. Overall, the loss of wages award

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<sup>1</sup> *PBO v Da Cruz* [2005] 1 ERNZ 808 at 815

is on a par with the offer. The Calderbank offer made was more generous than what was ultimately achieved by the defendant and this factor must be reflected in the award of costs to be made against her.

[14] The plaintiff's actual costs were \$11,221 plus disbursements of \$935. It submits that \$8,000 which is approximately two-thirds of that should be the starting point for a contribution towards its costs.

[15] In opposition to the claim for costs, the defendant's counsel submits that because she had accumulated savings the defendant was ineligible for legal aid and has had to fund the litigation from her reserves. She has been unable to find alternate profitable employment. Given that her costs before the Court were close to \$11,000, it was submitted that this is an appropriate case where the costs should lie where they fall. The reasons given for this were that she had been unjustifiably dismissed and the consequences of her loss of work have been catastrophic because of the limitations of obtaining satisfactory alternative work.

### **Decision**

[16] It is appropriate that the defendant pay at least a proportion of the plaintiff's costs in this matter. This is because of the Calderbank offer made before the Employment Court hearing and at a time when the only issue was as to remedies including reinstatement. In the circumstances, it was a generous offer and realistic given the Court's findings that reinstatement would not be practicable. Acceptance of that offer before the Employment Court hearing would have saved both parties the cost of bringing the Court case and for that the defendant should bear some responsibility.

[17] In fixing the award of costs I take into account the difficult circumstances in which the defendant finds herself as far as future employment is concerned and recognise that she has had to call upon her retirement savings to fund this litigation. These two factors have persuaded me not to order full indemnity costs as would be open to the Court in the case of a successful Calderbank offer. I accept the plaintiff's submission that a sum of \$8,000 is realistic.

[18] The defendant is ordered to pay to the plaintiff the sum of \$8,000 plus disbursements comprising a Court filing fee of \$200 and the \$725 hearing fee. This amount is to be offset by the award of costs to the defendant for the Employment Relations Authority investigation making a sum total due to the plaintiff of \$6,925.

[19] Finally, it appears from correspondence from counsel that there may be an outstanding issue between the parties about the calculation of the wages due to the defendant. The parties are encouraged to resolve this but otherwise leave is reserved for either party to apply to the Court to decide this issue if they cannot.

**C M Shaw  
JUDGE**

Judgment signed at 11.30am on 6 March 2007