

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 10A/06
WRC 16/05**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN BENJAMIN HARRY TIMMINS
Plaintiff

AND ASURE NEW ZEALAND LIMITED
Defendant

Hearing: Papers Received 27 July 2006 and 23 August 2006

Judgment: 2 November 2006

COSTS JUDGMENT OF JUDGE C M SHAW

[1] The plaintiff was unsuccessful in his claim against the defendant. He received legal aid to conduct his case in the Employment Court. The defendant seeks an order in terms of s40 of the Legal Services Act 2000 that, but for his receipt of legal aid, he would have been liable to pay a contribution representing 80 percent of the defendant's actual and reasonable costs.

[2] Section 40 of the Legal Services Act restricts the extent to which costs may be awarded against a person who is legally aided:

- An order for costs must not exceed what is reasonable for the person to pay bearing in mind their circumstances, the means of the parties, and their conduct in connection with the dispute.
- Any order for costs must not exceed the amount of the contribution that the aided person was required to make under the Act except in exceptional circumstances.

- The Court may make an order specifying what costs would have been made against the person if no exceptional circumstances had been made out.

[3] The defendant does not rely on exceptional circumstances but submits that, in making an order as to what costs would otherwise be ordered, the Employment Court should exercise its very wide discretion to order costs on the usual basis of a percentage of reasonable costs actually incurred. The defendant claims that this percentage should be 80 percent because:

1. The majority of the plaintiff's grievances were almost 2 years out of time.
2. The plaintiff was wholly unsuccessful.
3. The plaintiff's application faced a number of insurmountable hurdles including his failure to sign an offered employment agreement.

[4] The plaintiff's actual costs amounted to \$71,700 plus disbursements of \$6,281.51 plus GST.

[5] In a very brief memo, counsel for the plaintiff submits that it would be inappropriate for the Court to deal with any order as to costs except to state that there should be no orders as to costs due to the plaintiff's impecuniosity and his legal aid position. He also submitted it may be premature to deal with the costs until such time as the appeal lodged against the substantive decision has been dealt with. However, for completeness, costs should be determined before then so that the issue of costs can be included in the appeal if necessary.

[6] The first question is whether an order should be made specifying what order for costs would have been made above the legal aid contribution. The circumstances of the parties and the claim are relevant to that decision.

[7] In the substantive hearing, evidence was given of High Court proceedings which had been taken against the plaintiff arising out of actions he took in the course of his employment. He has been injuncted in the course of those proceedings and faces a defamation trial. He has also suffered from medically diagnosed stress. At the time of the hearing he was not in work which supports the submission that he is impecunious. His case was, however, without merit and he was wholly unsuccessful.

[8] The defendant successfully defended all of the plaintiff's claims. It is a large State-owned enterprise with 900 staff. It is plainly able to meet its own costs although understandably is anxious to recoup at least a percentage of the considerable expenses incurred in the course of the proceedings.

[9] The consequences of an order under s40(4) (previously s86(3) or (4) of the Legal Services Act 1991) were described by the High Court in *Amev Life Assurance V Dixon-McIver*¹. When an order has been made, a party prejudiced by the operation of s40 may apply to the Legal Services Board for the whole or part of the difference between the costs actually awarded and those to which the party will have been entitled. In considering the matter the board takes into account the criteria set out in s41(2) and may, if it considers it appropriate, order a payment accordingly. Any indicative order made by the Court will therefore be relevant but the decision as to costs is ultimately one to be decided by the board.

Decision

[10] Given the unmeritorious claim brought by the plaintiff, it is appropriate to make an order under s40(4) of the Legal Services Act. However, the order is significantly less than sought. Apart from the means of the parties, one of the factors to be considered in the exercise of the discretion to award costs is that costs are not to be a penalty against the unsuccessful party. In the light of the evidence of the plaintiff's circumstances, an award of 80 percent or even the usual 60 percent of the costs would be harsh to the extent that it would be seen to amount to a penalty.

[11] I order that the order for costs that would have been made against Mr Timmins is \$5,000. This is a nominal award in the circumstances but one which reflects the impecuniosity of the plaintiff.

C M Shaw
JUDGE

Judgment signed at 11.30am on 2 November 2006

Solicitors: V E Donaghy, Chapman Tripp, Christchurch for Defendant
Bruce Andrews, Solicitors, Palmerston North for Plaintiff

¹ [1993] 1 NZLR 733