

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC45
ARC 73/09**

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

AND IN THE MATTER OF an application for costs

BETWEEN DANNY BACHU
 Plaintiff

AND DAVIE MOTORS LIMITED
 Defendant

Hearing: By submissions filed by the defendant on 31 March 2011 and by the
 plaintiff on 6 April 2011

Judgment: 20 May 2011

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] On 17 March 2011 I delivered a judgment rejecting Mr Bachu's challenge to the determination of the Employment Relations Authority (the Authority). Mr Bachu was unsuccessful in his personal grievance claims. The Authority awarded costs against him of \$10,000 plus disbursements of \$325. Pursuant to s 183(2) of the Employment Relations Act 2000 (the Act) that determination on costs is now an order of this Court. I reserved the issue of costs on the challenge to enable submissions to be filed. These have now been received.

[2] The defendant now seeks a substantial contribution to costs but concedes that the matter is the subject of the Legal Services Act 2000. Section 40 of that Act states as follows:

40 Liability of aided person for costs

- (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
- (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 or 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.
- (4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.
- (5) If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

...

[3] In respect of s 40(1) of that Act I have not received any information from Mr Bachu as to his means. I am aware that in order to procure a stay of the Authority's determination as to costs he was ordered to make regular periodic payments to the Registrar of the Court; such sums to be held in an interest bearing account. The amount presently held by the Registrar is \$3,000.

[4] Ms Swarbrick in her memorandum in support of costs submits that there are exceptional circumstances entitling the Court to make an order for costs. Under the heads contained in s 40(3) of the Legal Aid Act 2000, she submits as follows:

a) Mr Bachu's conduct has caused the defendant to incur unnecessary costs. This consists of his original actions in simply abandoning his employment. He did not raise a personal grievance until consulting his solicitors nearly 90 days after leaving. The defendant responded promptly to that. Nearly a month after that Mr Bachu requested mediation. The defendant agreed to attend mediation but Mr Bachu took no steps to ensure mediation took place. Nearly two years then elapsed before Mr Bachu filed an application with the Authority. Even then Mr Bachu failed to comply with timetabling set by the Authority. The Authority's determination was dated 14 August 2009. Mr Bachu filed his challenge on 11 September 2009.

b) Once the challenge was filed it was the subject of further delays occasioned by Mr Bachu's behaviour. Whereas he indicated he was in the process of applying for legal aid, he did not do so in a timely manner. The defendant's solicitors were forced to incur unnecessary costs and fruitless correspondence with the Legal Services Agency.

c) The plaintiff failed to comply with procedural requirements in an orderly and timely fashion. This involved failure to comply with pleadings requirements and therefore further interlocutory applications to the Court, which should not have been necessary. The plaintiff failed to ensure ongoing legal representation and hearings had to be adjourned.

d) The application by the plaintiff for a stay of the costs determination was not accompanied by adequate evidence as to financial circumstances. This led to the Court having to grant a stay conditional upon the periodic payments into Court.

e) The plaintiff's behaviour in giving evidence should be taken into account. This includes the evasive ways he gave evidence. There was also

his application for an adjournment for health reasons on the day of the hearing of the challenge; unsupported by medical evidence.

f) The pursuit of his challenge was clearly without merit. He unreasonably refused to negotiate settlement in the face of Calderbank offers made in the proceedings before the Authority and the challenge to the Court.

[5] Ms Swarbrick submits that because of these actions by the plaintiff the Court should express its disapproval by a finding of exceptional circumstances and an order for costs. Alternatively, if no order for costs is made she seeks an order pursuant to s 40(5) of the Legal Services Act specifying what order for costs would have been made against the plaintiff if the section had not affected his liability.

[6] The plaintiff has not complied with the order for stay. Some periodic payments have been made to the Registrar but not on the basis ordered by the Court in granting a stay. No payment was made in January 2011 and the plaintiff has made no payments since March 2011.

[7] Mr Lankovsky, counsel for the plaintiff, accepts some of the delay occasioned by the plaintiff as submitted by Ms Swarbrick. However, he submits that these factors do not amount to exceptional circumstances. He questions whether it is open to the court to order a release to the defendant of the funds now held in the Court. He submits that there is no legislative authority for this to be done. No financial information as to the plaintiff's financial circumstances is provided in Mr Lankovsky's memorandum.

[8] Ms Swarbrick in her submissions, states that the legal fees incurred by the defendant directly related to preparation for the challenge and appearance, exceed \$25,000. Of that sum approximately \$1700 excluding GST was incurred as a result of the need for the defendant's solicitors to communicate with the Legal Services Agency from time to time in the absence of the plaintiff providing adequate information.

[9] Ms Swarbrick in her submissions refers me to the legal authorities of *Laverty v Para Franchising Ltd*¹ and *Dowd v Gubay*². Those decisions involve considerations by the High Court and Court of Appeal on the issue of “exceptional circumstances” in the Legal Services Act 2000 and its predecessor Act.

[10] In *Laverty*, paras [23] and [24], the Court of Appeal stated as follows:

[23] Mr Upton QC submitted to us that the general approach of the Courts to the application of s 40 when fixing costs, in cases involving exceptional circumstances, had been to impose a figure by way of costs which marked the Court’s disapproval of the way that litigation on behalf of an aided person had been conducted but which also had regard to what the person concerned realistically could afford to pay. We agree that an approach to ss 40 and 41 which takes those conflicting considerations into account will also be in accordance with the purpose of these provisions.

[24] We would not, however, confine the issue of exceptional circumstances to cases where the aided party’s conduct of the litigation warranted a mark of disapproval. There may, for example, be cases where the aided party is quite wealthy but significant assets have not excluded a grant of aid, perhaps because they are the subject of the dispute or otherwise exempted from calculation. Or possibly the aided party may succeed against one of multiple parties and accordingly be in a position to meet or pass on an award of costs. In other words, the question whether there are exceptional circumstances needs to be examined on a case-by-case basis, whether or not those involve disapprobation.

[11] In *Dowd* Wylie J, when considering “exceptional circumstances” pursuant to s 17(2)(e) of the Legal Aid Act 1969 provided an example as follows:

5 That, of course, exceeds the contribution of \$25 required to be paid on the legal aid grant. Unless there are “exceptional circumstances” I can order the payment of no more than \$25. To do so in the circumstances of this case would in my opinion be absurd. This plaintiff has put the defendants to a very great deal of expense in defending successfully a claim which, while it may have had on paper an appearance of some substance, was exposed as a case of no merit owing largely to the woeful inadequacy and unreliability of the plaintiff’s own evidence. That he should not make a proper contribution to the costs of the defendants while at the same time retaining a property in which he appears to have an equity of something between \$650,000 and \$1m offends all reason and justice. While I understand and accept that in the ordinary circumstances of a litigant with a modest home and of modest means, he should be able to obtain assistance in his litigation without having to give up his home, it is in my opinion incomprehensible that legal aid should be available to a plaintiff owning the kind of home that this plaintiff enjoys — one beyond the dreams of people for whom legal aid

¹ [2006] 1 NZLR 650 (CA).

² (1991) 6 PRNZ 154 (HC) and (1992) 6 PRNZ 158 (CA).

should be available. However that is the effect of the Act, which by s 19 excludes the value of an interest in a home from an applicant's disposable capital. That should not, however, deter me from ordering the plaintiff to pay a proper amount to the defendants. The system may enable him to avoid his own legal fees at the expense of the taxpayer. He should not be permitted the same luxury in respect of party and party costs properly payable by him at the total expense of the defendants. I regard the ownership, albeit jointly with his wife, of a property of this value as an exceptional circumstance justifying me in ordering him to pay costs to the defendants in the sums I have mentioned.

[12] On appeal to the Court of Appeal the Court upheld Wylie J's decision and indicated that the assessment was very much one for the trial Judge's discretion.

[13] In the present case, of course, Mr Bachu did not have a grant of legal aid for the proceedings before the Authority. He was able to procure a stay of the enforcement of the Authority's determination on costs on the condition that he make periodic payments into Court. Mr Bachu challenged both the determination of the Authority on the substantive issue and the determination on costs. The effect of s 183 of the Act is that in rejecting the challenge, the order for costs in the Authority becomes an order of the Court. I do not accept Mr Lankovsky's implied submission that there is no jurisdiction for the Court to order release of the funds paid into Court by Mr Bachu to the defendant. Any grant of legal aid in respect of the Court challenge cannot affect the issue of costs in respect of the proceedings before the Authority. That entire award of costs is enforceable by the defendant against Mr Bachu. It is appropriate that the funds held in Court be released to the defendant and that the defendant should then be entitled to pursue Mr Bachu for the balance.

[14] Having regard to the nature of the proceedings before the Court including the interlocutory proceedings, the preparation necessary including the briefing of the witnesses called and attendance at trial of one day, the sum claimed of \$25,000 together with disbursements of \$60 appears fair and reasonable. Mr Lankovsky does not make any submissions to the contrary in his memorandum. I note that of this sum, I have already mentioned that \$1700 relates to the correspondence with the Legal Services Agency which would not have been necessary had the plaintiff properly cooperated.

[15] The principles upon which costs awards are considered in this Court are now well established.³ The Court generally awards two thirds of actual costs reasonably incurred by the successful litigant. Obviously in considering an award of costs the Court has regard to the financial circumstances of the unsuccessful litigant, particularly where that is the former employee as in the present case. However, no information whatsoever has been provided as to Mr Bachu's present financial circumstances and I am left with having to assume, despite the fact that he was granted legal aid, that he can afford any award of costs.

[16] The main issue, however, is whether there are exceptional circumstances in this case, which would entitle the Court to make an award of costs against Mr Bachu, pursuant to s 40(4) of the Legal Services Act 2000 or whether, if no order for costs is made against Mr Bachu, the Court should nevertheless make an order specifying what order of costs would have been made pursuant to s 40(5) of that Act. In this case the type of considerations existing in *Dowd* as to the substantial asset position of the legally aided litigant are absent from the information provided by Mr Bachu. However, if Mr Bachu does own unencumbered assets or has a substantial equity in assets then the Legal Services Agency would be entitled to take a charge, not only in respect of the fees incurred by his counsel and charged to the agency but in respect of any award of costs against him. In this case the type of exceptional circumstances, which were elaborated upon both in *Laverty* and *Dowd* do exist. I accept those matters specified in Ms Swarbrick's submissions. They include Mr Bachu's actions in causing the defendant to incur additional legal costs by reason of his delay in attending to the progress of the proceedings in a proper and timely fashion and the fact that the challenge in particular was without merit. His challenge was made in the face of the well reasoned determination of the Authority following the investigation. This is not a case where the Court would ordinarily consider costs on a full indemnity basis against Mr Bachu. Nevertheless, it is an appropriate case where an order for two thirds of the actual costs incurred would be made.

[17] For these reasons I make an order for costs against Mr Bachu in respect of the proceedings before this Court. Pursuant to s 40(4) I make an order specifying that

³ *Victoria University v Alton-Lee* [2001] ERNZ 305, *Binnie v Pacific Health* [2002] 1 ERNZ 438 and *Health Waikato v Elmsly* [2004] 1 ERNZ 172.

the order for costs which would have been made against Mr Bachu with respect to the proceedings if the section had not affected his liability is \$16,500 plus disbursements of \$60.

[18] I confirm that in respect of the Authority's determination of costs, the full award made is enforceable beyond the balance of \$3,000 held by the Registrar which sum is now to be released to the defendant.

M E Perkins
Judge

Judgment signed at 9.50am on 20 May 2011