

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 2/09
WRC 19/06**

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

AND IN THE MATTER OF an application for costs

BETWEEN DAVID MITCHELL
 Plaintiff

AND BLUE STAR PRINT GROUP (NZ) LTD
 Defendant

Hearing: Submissions received on 22 January and 9 February 2009

Judgment: 19 March 2009

COSTS JUDGMENT OF JUDGE C M SHAW

[1] Mr Mitchell was successful in his challenge to an Employment Relations Authority determination. The Court found he had been unjustifiably constructively dismissed.¹ He was awarded \$10,000 compensation under s123(1)(c)(i) of the Employment Relations Act 2000.

[2] In the course of the hearing of the challenge Mr Mitchell formally accepted that he was not entitled to the exemplary damages of over \$400,000 he had claimed. He also accepted that if any loss of wages or any benefit arose out of his personal injury under the Injury Prevention, Rehabilitation, and Compensation Act 2001 (IPRC Act) he would not be entitled to compensation for that.

¹ WC 21/08, 23 December 2008

[3] Mr Mitchell acted for himself in the Authority and the Court proceedings although he had taken some professional advice before mediation and the Authority's investigation, as well as in preparing papers for the challenge.

[4] In his brief costs memorandum Mr Mitchell set out the costs and disbursements which he has incurred since he commenced his claim as follows:

[4]	<i>Costs Including Disbursements (Mediation and ERA)</i>	\$
	<i>Legal & Associated Costs</i>	
	<i>Bartlett & Partners</i>	956.25
	<i>Adept Consultants (including successful ACC Review)</i>	<u>3,345.94</u>
	<i>Total Legal & Associated Fees</i>	<u>4,302.19</u>
	<i>Disbursements:</i>	
	<i>Employment Relations Filing Fee</i>	70.00
	<i>Paper, copying and binding (estimate)</i>	300.00
	<i>Travel to/from Wellington – one day (ERA) (estimate)</i>	<u>50.00</u>
	<i>Total Personal Disbursements (partly estimated)</i>	<u>420.00</u>
[5]	<i>Costs including Disbursements (Employment Court)</i>	\$
	<i>Legal & Associated Costs</i>	
	<i>Initial Advice from Marshall Coley (Advocate) (no receipt)</i>	500.00
	<i>Young Gough – Law Office (drafting Amended Statement of Claim & associated matters)</i>	<u>4,139.50</u>
	<i>Total Legal & Associated Fees</i>	<u>4,639.50</u>
	<i>Disbursements:</i>	
	<i>Court Filing Fee</i>	200.00
	<i>Court Hearing Fee</i>	490.00
	<i>Paper, copying and binding (estimate)</i>	300.00
	<i>Travel to/from Wellington – two days (estimate)</i>	<u>100.00</u>
	<i>Total Personal Disbursements (partly estimated)</i>	<u>1,090.00</u>
	...	
	<i>The plaintiff also respectfully asks the court to consider other disbursements ...</i>	
	<i>Hotel Cost from evening of accident</i>	100.00
	<i>Towing fees</i>	101.00
	<i>Doctors costs that are not covered by ACC</i>	750.00

[5] Mr Mitchell also seeks guidance from the Court whether he could claim the value of an insurance policy he cashed up to contribute to the costs of the proceedings. He also noted that the Court had heard evidence of other financial

steps he had to take including increasing his mortgage on the family home to fund the proceedings.

[6] In his evidence to the Court during the challenge Mr Mitchell gave evidence that he had approached at least 5 lawyers or employment advocates for assistance. A few of them did some work for him. One of them charged \$956. Another, who he subsequently found could not represent him in Court, first agreed to wait the outcome of the case but instead has been attempting to recover his costs which are \$3,345. From Mr Mitchell's schedule of costs and an analysis of the defendant's schedule of legal costs I take these two sets of costs to have been incurred in or related to the mediation as well as preparation for the Authority. Mr Mitchell represented himself at the Authority hearing.

[7] Mr Mitchell advised that he has been unable to provide receipts for all of the expenses incurred but has provided what is, in his mind, a fair estimate of the amounts incurred.

Costs in the Authority

[8] The Authority dismissed all of Mr Mitchell's claims and ordered him to pay \$6,000 costs to the defendant.

[9] For the defendant, Ms Heaton submitted that, although the plaintiff had successfully challenged the Authority's determination, when considered in the round there are factors that make it inappropriate for costs to be awarded against the defendant. She submitted that costs should be awarded against Mr Mitchell because of a Calderbank offer made to him by the defendant before the Employment Relations Authority investigation meeting. The defendant offered to pay him \$10,000 plus \$3,000 towards his legal costs. That offer was rejected.

[10] The defendant points out that of its total legal costs \$47,026.37 was incurred following the Calderbank offer.

Costs in the Court

[11] Ms Heaton further submitted that Mr Mitchell's success in the challenge was circumscribed. The significant monetary remedies he sought were barred by the IPRC Act. He had received legal advice to this effect over the years but chose not to follow it nor did he take the advice of the Authority member and the Court to get some legal advice about the state of his pleadings.

[12] She submitted that because of his failure to take legal advice the defendant had to apply for an order for the plaintiff to file a more explicit statement of claim in May 2006. It took him 2 years to comply and then he filed a voluminous statement of claim which included lengthy submissions and evidence.

[13] In summary, Ms Heaton submitted that the plaintiff's drawn out pursuance of this matter, often with periods of silence for months, if not years, and his unfocussed and lay approach to the claims has unnecessarily increased the costs to the defendant.

Calderbank offers

[14] Regulation 68 of the Employment Court Regulations 2000 gives the Court discretion to take such offers into account when the Court is ordering costs.

[15] In the absence of any specific Employment Court regulation which covers the effect on costs of such an offer, the Court can resort to the High Court Rules. In this case rule 14.11(3) provides that, subject to the Court's discretion as to costs, an offeror is entitled to costs on the steps taken after the offer is made if the offer exceeds the amount of judgment obtained or would have been more beneficial to the offeree. By rule 14.11(4) an offer may be taken into account if it is close to the value or benefit of the judgment obtained by the offeree.

[16] In this case the order of compensation to be paid to Mr Mitchell was equal to that offered by the defendant in its Calderbank offer. On the face of it the plaintiff did not gain any more or the Court proceedings were no more beneficial to him than if he had accepted the Calderbank offer. However, a feature of the plaintiff's personal grievance was his desire for personal vindication on the issue of the way he

had been treated by the defendant particularly in relation to its actions with respect to his ACC compensation.

[17] The Court has previously held that where a personal grievance proceeding is motivated by a desire for vindication then a Calderbank offer from the other party may not be effective if it fails to address that element of vindication, for example by acknowledging wrong-doing and/or apologising.²

[18] The most significant of the defendant's breaches of duty to Mr Mitchell when he became ill were failing to respond to his complaints about work difficulties and the incorrect statements made by a staff member to ACC about his outside work activities which led to Mr Mitchell feeling betrayed when he discovered what had been incorrectly said about him. It was clear from Mr Mitchell's evidence and his willingness to abandon large monetary claims that his primary aim in litigation was to have a Court fully hear and assess his claim that he had been treated unfairly in these regards. He was entirely successful in these claims.

[19] For this reason I will disregard the Calderbank offer.

Recovery by lay litigant

[20] Generally, except in exceptional cases, a lay litigant is not entitled to recover costs for their own time and effort although the Court has a discretion to allow disbursements.

[21] Both the High Court and the Employment Court have taken a liberal approach to the classification and assessment of the "reasonable disbursements" of litigants in persons.³ In *South Canterbury District Health Board v Milner*⁴ a self-represented litigant had received legal advice prior to the hearing. The Employment Court held that her legal costs were incurred in the course of the case before the Court. Judge Palmer made an award comprising 60 percent of the legal costs incurred plus an award of disbursements.

² *Burns v Attorney General in respect of the Chief Executive of the Inland Revenue Department* CC 16B/02, 19 August 2002; *Wellington Racing Club Inc v Welch* [2002] 1 ERNZ 685

³ *Jagwar Holdings Ltd v Julian* (1992) 6 PRNZ 496

⁴ CC 9A/02, 22 May 2002

[22] Rule 14.12 of the High Court Rules defines disbursements in relation to a proceeding as:

- (1) *In this rule, –*
 - disbursement**, in relation to a proceeding, –
 - (a) *means an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs; and*
 - (b) *includes –*
 - (i) *fees of court for the proceeding;*
 - (ii) *expenses of serving documents for the purposes of the proceeding;*
 - (iii) *expenses of photocopying documents required by these rules or by a direction of the court;*
 - (iv) *expenses of conducting a conference by telephone or video link; but*
 - (c) *does not include counsel's fee.*
 - relevant issue**, in relation to a disbursement, *means the issue in respect of which the disbursement was paid or incurred.*
- (2) *A disbursement must, if claimed and verified, be included in the costs awarded for a proceeding to the extent that it is –*
 - (a) *of a class that is either –*
 - (i) *approved by the court for the purposes of the proceeding; or*
 - (ii) *specified in paragraph (b) of subclause (1); and*
 - (b) *specific to the conduct of the proceeding; and*
 - (c) *reasonably necessary for the conduct of the proceeding; and*
 - (d) *reasonable in amount.*
- (3) *Despite subclause (2), a disbursement may be disallowed or reduced if it is disproportionate in the circumstances of the proceeding.*

...

[23] For these reasons Mr Mitchell is able to claim appropriate legal expenses as a disbursement.

Conduct of the plaintiff

[24] The conduct of litigants in person was discussed by former Chief Judge Goddard in *Murphy and Routhan t/a Enzo's Pizza v van Beek*:⁵

If the efficient conduct of the proceeding is impeded by a litigant in person in that the case cannot move on at the same pace as it would if the parties before it both had representations from counsel or advocates experienced in the ways of the particular Court or tribunal, that cannot be helped, for all people – whether they are represented or not – are guaranteed access to justice by the New Zealand Bill of Rights Act 1990 and by the unwritten common law of New Zealand... So they have the same rights as a litigant

⁵ [1998] 2 ERNZ 607 at 612 - 613

represented by counsel or an advocate to be fully heard by the Court or Tribunal.

[25] In the present case there is no doubt that for a variety of reasons Mr Mitchell's unskilled conduct of the case has contributed to considerable delays. This includes the fact that his desire for vindication led him to adduce voluminous material and evidence to the Court and present his case in an unfocussed manner which resulted in some frustration and inconvenience to the defendant, but given the history of this case and factors referred to in *Murphy* I will not make a reduction in costs because of these matters.

Conclusions

[26] The Calderbank offer will not be taken into account in assessing costs. Although it was precisely the amount ordered by the Court the offer did not address the personal vindication element of the personal grievance which was at the heart of Mr Mitchell's claim to the Court.

[27] Mr Mitchell is entitled to a contribution to his costs of advice and to disbursements reasonably incurred in the proceedings both in the Authority and the Court but excluding mediation.

[28] I assess the contribution to be paid by the defendant for legal costs incurred for the purpose of the Authority hearing at \$1,000.

[29] I also order the defendant to pay a contribution towards Mr Mitchell's legal costs associated with the Employment Court hearing in the sum of \$3,000.

[30] Mr Mitchell is also entitled to disbursements as claimed for filing and hearing fees in both the Employment Court and the Employment Relations Authority; for costs of paper copying and binding; and for travel to and from Wellington for the hearings. Other costs claimed which arise from his accident including hotel, towing fees and medical costs do not arise out of these proceedings and cannot be classified as disbursements.

[31] Finally I find that the cashing up of Mr Mitchell's insurance policy and the increases to the mortgage to assist with his costs are a consequence of or an opportunity cost of litigation and is not recoverable by way of an order of costs.

Summary

[32] The defendant is to pay Mr Mitchell:

1. \$1,000 contribution towards his costs in the Authority
2. \$3,000 contribution towards his costs in the Employment Court
3. \$1,510 disbursements

C M SHAW

JUDGE

Judgment signed at 3.00pm on 19 March 2009