

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 30A/09
ARC 36/08**

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

AND IN THE MATTER OF an application for costs

BETWEEN MASONRY DESIGN SOLUTIONS
 LIMITED
 Plaintiff

AND NICHOLAS BETTANY
 Defendant

Hearing: By memoranda of submissions filed on 21 and 28 September 2009

Judgment: 12 November 2009

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] Masonry Design Solutions Limited (MDSL) seeks an order for costs against Nicholas Bettany. MDSL says it incurred actual costs of \$16,857.50 in the Employment Relations Authority and \$15,525 plus disbursements of \$580 in the Court.

[2] MDSL successfully challenged the Authority's determination (AA154/08) and the Court's decision (AC 30/09) now stands in its place.

[3] Mr Bettany was legally aided. Section 40(2) of the Legal Services Act 2000 provides that 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.

[4] MDSL submitted that exceptional circumstances exist that warrant an order for costs being made against Mr Bettany. Should no exceptional circumstances be found, in the alternative, MDSL seeks an order pursuant to s40(5) of the Legal Services Act specifying what order for costs would have been made against Mr

Bettany. MDSL cited several instances of Mr Bettany's conduct during the substantive proceeding that it said give rise to exceptional circumstances under s40(2).

[5] Counsel for Mr Bettany submitted that no exceptional circumstances exist for the purposes of s40(2). Counsel sought to justify or downplay the basis on which MDSL based its arguments for exceptional circumstances.

[6] Usually in a case such as this, the Court has considerable discretion to award costs in a range from nil to indemnity although the notional starting point is usually two-thirds of costs actually and reasonably incurred.

[7] In cases in which unsuccessful parties are legally aided, the Court must be satisfied that there are exceptional circumstances and in this case I am not so satisfied. Even though MDSL's de novo challenge to the Authority's determination was successful, Mr Bettany's defence of the proceedings was not outside the range of what is reasonable and acceptable in adversarial proceedings in all the circumstances and taking into account the conduct outlined in s40(3)(a)-(f) of the Legal Services Act.

[8] I therefore decline to make any order for costs.

[9] I am, however, prepared to give MDSL an order specifying what order for costs would have been made against Mr Bettany with respect to the proceedings had s40 not affected his liability to contribute to the company's costs.

[10] I certify, pursuant to s40(5), that an order of costs against Mr Bettany of two-thirds of costs actually and reasonably incurred would have been made, but for s40(2), being \$21,372.45 for costs both in the Authority and in the Court.


GL Colgan
Chief Judge

Judgment signed at 11 am on Thursday 12 November 2009