

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 41
ARC 50/10**

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

AND IN THE MATTER OF an application for costs

BETWEEN ABC DEVELOPMENTAL LEARNING
CENTRES (NZ) LIMITED
Plaintiff

AND DONNA PLASMEYER
Defendant

Hearing: By memoranda of submissions filed on 6 April and 4 May 2011

Appearances: Jo Douglas, counsel for plaintiff
Steven Zindel, counsel for defendant

Judgment: 6 May 2011

COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The parties have been unable to settle between themselves the plaintiff's claim to costs after its successful challenge to the Employment Relations Authority's determination.¹

[2] The plaintiff's costs of representation by counsel in the Employment Court (inclusive of GST and disbursements) were \$12,282.87. I accept the reasonableness of this fee overall.

[3] The defendant was legally aided and the plaintiff accepts, therefore, that, under s 40(2) of the Legal Services Act 2000, the Court may only make an order

¹ AA195/10, 28 April 2010.

against the defendant if satisfied that there are exceptional circumstances. Factors to be taken into account are set out in s 40(3) of that Act.

[4] The plaintiff says that the defendant's conduct caused the plaintiff to incur unnecessary cost so that, pursuant to s 40(3)(a), this exceptional circumstance warrants an award against her. In particular, the plaintiff says that in her statement of defence, the defendant pleaded unmeritorious positions which were unsupported by evidence including that she was compelled to leave work with the plaintiff in Morrinsville because of the working conditions there.

[5] Next, the plaintiff says that the defendant failed to notify that, in advance of the hearing, she would not be attending. The plaintiff had prepared for the hearing on the basis of cross-examining the defendant and had briefed and called the evidence of several witnesses to answer issues raised by the defendant in her defence. Although, in the circumstances, it was unnecessary for the plaintiff to call these witnesses, it nevertheless incurred the cost of preparing to do so.

[6] In these circumstances, the plaintiff seeks an order of \$8,000, being approximately two-thirds of the actual costs incurred and which, it says, would be an appropriate award if the defendant was not legally aided.

[7] Alternatively, the plaintiff seeks an order setting out the amount to which the plaintiff would otherwise have been entitled pursuant to s 40(4) of the Legal Services Act.

[8] The defendant has explained her parlous financial situation which includes her inability to repay her grant of legal aid and to meet the judgment debt. She and her husband have three young children. They have incurred a loss on the sale of their Morrinsville home and there have been recent illnesses in the family. In these circumstances, the defendant was unable to attend the court hearing in Auckland.

[9] The plaintiff does not object to an order under s 40(4) of the Legal Services Act, specifying a sum of \$5,000, but opposes that order under s 40(2) on the basis that there are no "exceptional circumstances".

[10] The defendant submits that her proceedings were conducted responsibly and relatively efficiently. The hearing took less than a day. She emphasises the strict application of s 40(2) as illustrated by the judgment of the Court of Appeal in *Laverty v Para Franchising Ltd.*² The defendant says that her circumstances are not “quite out of the ordinary” following *Awa v Independent News Auckland Ltd (No 2)*.³

[11] Although I am prepared to, and do, make an order under s 40(4) specifying that, but for the grant of legal aid, the Court would have allowed the plaintiff costs of \$8,000, I am not prepared to find that there are exceptional circumstances justifying an actual award of costs under s 40(2). That is for the following reasons.

[12] This was, in a sense, a test case for the plaintiff which wished to establish that its training/qualification bond arrangements were lawful and enforceable. It has achieved that objective which was not necessarily clear, especially after the Authority’s determination. The use of what I assume was Australian employment relations terminology in the plaintiff’s employment agreement did not contribute to clarity and the plaintiff may care to consider, at an appropriate time, redrafting its employment agreements to use concepts and terms that are familiar to New Zealand employment law to avoid future confusion.

[13] Although it was unfortunate that the defendant did not advise the plaintiff before the hearing both that she would not be relying on some of the allegations in the statement of defence and that she would not be attending the hearing, I do not consider that these deficiencies added significantly to the plaintiff’s costs. Put another way, the plaintiff would nevertheless have had to call the same witnesses to establish the disputed points that it did. In the end, the real issues were argued economically by the defendant.

² [2006] 1 NZLR 650.

³ [1996] 2 NZLR 184, 186.

[14] For these reasons I am not satisfied that there were such exceptional circumstances pursuant to s 40(2) that would warrant an actual order for costs being made against the legally aided defendant.

GL Colgan
Chief Judge

Judgment signed at noon on Friday 6 May 2011