IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 129
CRC 31/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	METALLIC SWEEPING (1998) LIMITED Plaintiff
AND	SANDRA FORD Defendant

Hearing: on the papers

Appearances: Owen Paulsen, counsel for the plaintiff
No appearance for the defendant

Judgment: 30 September 2010

JUDGMENT OF JUDGE A A COUCH

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[1] This case raises three interrelated issues. The first is how the Court can conduct a de novo hearing of a costs determination made by the Employment Relations Authority. The second is the extent to which the Court should call for information when a defendant fails to take any steps in the proceeding. The third issue is the manner and extent to which a party's financial circumstances should be taken into account in making an award of costs.

[2] Ms Ford was employed by Metallic Sweeping (1998) Limited as a clerical worker from April 2001 until she was dismissed in July 2005. She pursued personal grievances alleging that her dismissal was unjustifiable and that she was unjustifiably suspended immediately prior to her dismissal. Those claims were investigated by the Authority which dismissed them in its determination dated 6

August 2009[1]. The Authority reserved costs which were then the subject of written submissions and determined on the papers[2]. The plaintiff challenges that costs determination and, in its statement of claim, sought a hearing de novo.

[3] A statement of claim was filed in the Court on 26 November 2009 but a copy was not properly served on the defendant until 31 March 2010. The period of 30 clear days in which the defendant could file a statement of defence therefore ran until 30 April 2010. The defendant did not file a statement of defence. Rather, she sent a letter to the registrar dated 23 April 2010, parts of which were:

> 1. I do not at this time have a representative acting on my behalf as my former Advocate Mr Robert Thompson informed me by email when I was served with the court documents regarding this challenge to the costs. I am not in the financial position to employ a solicitor to take over where Mr Thompson left off.
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> 2. My present circumstances are that I am being fully supported financially by my current partner due to on going health issues which means that I am now only in paid employment for 4.25 hours per week, I am attaching a copy of a current pay slip
>
> ...
>
> 5. I have no further information to add to what my former Advocate Mr Robert Thompson has already presented to the Authority regarding costs.

[4] Attached to the letter was a copy of a payslip showing that the defendant was paid $13.25 per hour for 13 hours work in a pay period ending on 7 March 2010.

[5] For the plaintiff, Mr Paulsen provided the Court with a copy of the costs submissions he had made to the Authority. When asked if he wished to have an oral hearing, Mr Paulsen confirmed that the plaintiff was content for the Court to decide the matter on the papers.

[6] The Authority's costs determination was brief. It was also written for the parties in the sense that it made general references to the history of the proceeding but no details. For example, the Authority said:

> [2] This matter has had an almost labyrinthine progress to determination which has inflated costs incurred by both parties beyond the usual, given the

[1] CA126/09, 6 August 2009.
[2] CA126A/09, 30 October 2009.

> uncomplicated matter involved. The history is simply that and is well known to the parties.

[7] Later in its determination, the Authority referred to "the intricacies and delays which muddy the water in this particular matter" but, again, did not elaborate.

[8] Although Mr Paulsen's memorandum was reasonably detailed and informative, it shed only a limited amount of light on the events so obscurely referred to by the Authority.

[9] Another aspect of the Authority's determination was its reference to the financial position of the defendant. The Authority said:

> [5] Mr Thompson has forwarded information on the applicant's current financial position. Ms Ford has secured employment for 20 hours a week and has a school aged daughter to support. The applicant's financial position is far from comfortable and the Authority is required to put this in the balance.

[10] While not saying so explicitly, it appears that its perception of the defendant's ability to pay caused the Authority to reduce an award of costs of $4,500 it would otherwise have made to one of $1,500.

Nature of a de novo hearing on costs

[11] In the exercise of its statutory rights under s179 of the Employment Relations Act 2000 (the Act), the plaintiff was entitled to seek a hearing de novo of the Authority's costs determination. Where it is sought, the Court must hold a de novo hearing unless a good faith report is requested under s181of the Act and the Court is satisfied that the plaintiff failed to properly participate in the Authority's investigation.[3] There is no suggestion of that in this case.

[12] That raises the question of how the Court can and should conduct a de novo hearing of an application for costs. As in this case, most claims for costs are determined by the Authority on the basis of written submissions by the parties or their representatives. All concerned have been directly involved in the investigation

[3] See s182(1) and (2).

and, as the Authority did in this case, may make only brief and general references to the events which are relevant to the outcome. Evidence is rarely if ever given in relation to costs. Rather, the Authority relies on its own knowledge of events, particularly in relation to interlocutory matters and the manner in which the parties have conducted their cases.

[13] When conducting a de novo hearing of substantive issues, the Court effectively puts the Authority's determination to one side and decides the matter on the basis of the evidence adduced before it. Given the nature of the process by which costs determinations are made, however, that is simply impractical when the Court is asked to decide what costs ought to have been awarded by the Authority. The Court receives nothing from the Authority. There is no record of the investigation meeting. While it would be possible for oral evidence to be given by the parties about every aspect of the Authority's investigation and each other's conduct on which they seek to rely, that could easily lead to a hearing out of all proportion to what is at stake.

[14] It seems to me that the only practical way of deciding a challenge to a costs determination is for the Court to be primarily informed through the submissions of the parties, with the possibility that this may be supported by affidavit evidence about contentious issues. In most cases, there will not be a hearing at which the parties or their agents appear in person. Thus, resolving differences between the parties or their representatives will be problematic. Inevitably, a Judge of the Court deciding a challenge can never be as well informed about events as the member of the Authority who conducted the investigation but I can see no realistic means to bridge that gap. In areas of uncertainty, the Court will need to have regard to the Authority's assessment of matters in a manner it would not do when deciding a substantive challenge by way of a hearing de novo. It may also be helpful and appropriate for the Court to have regard to the Authority's substantive determination.

[15] Where the challenge relates to the principles applied by the Authority, the quality of its reasoning in relation to stated facts or the assessment of issues which are documented, these problems will not arise. In such cases, the Court should be able to decide the matter in as well informed a manner as the Authority.

Calling for information

[16] In his submissions, Mr Paulsen referred only very briefly to the defendant's ability to pay any award of costs which might be made. In the material before the Court, however, including the Authority's determination and the defendant's letter of 23 April 2010, there were indications that it may be a real issue in this case. Were it guided strictly by legal principles, the Court would not have regard to that material. The determination was the subject of a challenge by way of hearing de novo. The letter was from a defendant who had not filed a statement of defence and therefore had no standing.

[17] As well as having regard to legal principles, however, the Court is also given discretion to act in equity and good conscience. Section 189 of the Act provides:

> **189 Equity and good conscience**
>
> (1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.
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> (2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[18] In light of the indication that ability to pay may be a real factor in this case, I formed the view that it would be both inequitable and unconscionable for the Court to ignore the issue. I therefore issued a minute to the plaintiff, part of which was:

> [3] Although she has taken no formal steps, Ms Ford has written to the Court. In that letter, dated 23 April 2010, she essentially says that she has very limited financial resources and attaches a pay advice slip in support of this. In case Ms Ford did not copy that letter to Mr Paulsen, a copy is attached to this minute.
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> [4] In her letter, Ms Ford also refers to submissions made to the Authority by her former representative, Mr Thompson. As is usual on a challenge, no documents are sent to the Court by the Authority. Thus, the Court does not have a copy of those submissions.
>
> [5] Fixing costs requires the exercise of discretion. That must be done judicially and in accordance with principle. One of the key principles

applicable to the fixing of costs is that any order made should not cause undue hardship to the party required to pay.

[6] Ms Ford's letter to the Court suggests that ability to pay is a real issue in this case. That being so, I take the view that the Court ought to consider the material readily available to it which bears on this issue, even though the proceeding is not formally defended.

[7] To this end, I propose taking into account the contents of Ms Ford's letter dated 23 April 2010. I also propose calling for a copy of the submissions about costs made to the Authority by Ms Ford's former representative, Mr Thompson. These steps may properly be taken by exercising the powers conferred by s189(2) of the Employment Relations Act 2000. Before doing so, however, I give the plaintiff an opportunity to be heard about whether this is appropriate. Mr Paulsen should convey the plaintiff's view to the Court, together with any submissions he may wish to make in support of that view, by 4pm on Friday 28 May 2010.

[19] In response, Mr Paulsen provided helpful submissions which I dealt with in a second minute issued to both parties, part of which read:

[1] In my minute dated 17 May 2010, I expressed concern about indications that the defendant's means were limited to the extent that it was properly a factor to be taken into account in fixing costs. I proposed having regard to the letter sent to the Court by the defendant and the submissions made by her former advocate to the Authority and invited Mr Paulsen to make submissions about whether that was appropriate.

[2] Mr Paulsen filed a thoughtful memorandum dated 28 May 2010. While acknowledging that the Court has jurisdiction to call for and consider evidence of its own volition, Mr Paulsen urged me not to do so. Essentially, he submitted that the onus was entirely on the defendant to provide evidence of her means and she had failed to do so. In the alternative, Mr Paulsen submitted that the information contained in the documents I proposed taking into account was too limited to enable the Court to draw any conclusions about the defendant's ability to pay.

[3] As to Mr Paulsen's first submission, I return to the observation I made in my first minute. Fixing costs requires the exercise of discretion. That must be done judicially and in accordance with principle. One of the key principles applicable to the fixing of costs is that any order made should not cause undue hardship to the party required to pay. The Court is also directed by s189 of the Employment Relations Act 2000 to make its decisions in equity and good conscience. Having regard to those factors, and the fact that the plaintiff seeks an award of costs in excess of $18,000, it would be wrong for the Court to simply ignore the very real possibility in this case that the defendant would be unable to pay such an amount.

[4] Having said that, Mr Paulsen is undoubtedly correct that the extent and quality of the material currently before the Court is insufficient to draw any proper conclusions about the defendant's ability to pay. To assess a party's means to pay requires knowledge not only of income but also of expenditure, assets and liabilities.

> [5] I have decided that the Court should call for that further information. This is not in order to assist the defendant but rather in an effort to ensure that any order made is just.
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> [6] That additional information may most conveniently be obtained by the defendant having an examination as to her means conducted by the staff of the District Court. That examination would be on oath and likely to take less than half an hour.
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> [7] I do not direct the defendant to undertake that examination. Rather I give her that opportunity to ensure that the Court is properly informed as to her means. If she chooses not to take that opportunity, it will be assumed that she is able to pay any award made without undue hardship.

[20] After receiving Mr Paulsen's submissions, I called for and considered the costs submissions made to the Authority by Mr Thompson. This enabled me to make the observations I did in paragraph [4] of the second minute.

[21] The defendant took the opportunity to provide detailed evidence as to her means. In addition to completing the usual statement of means form used in the District Court, the defendant also provided further information in the form of:

a) A letter from her accountant describing her interest in three properties.

b) A letter from her employer confirming her hours of work and wages.

c) A signed statement from the defendant regarding support of her daughter.

d) An email confirming a debt owing by the defendant on a department store credit card.

e) Emails from the defendant's former advocate regarding her outstanding account for services.

[22] On 5 August 2010 I issued a further minute to the plaintiff attaching a copy of all of this information and giving Mr Paulsen a 14 days to make further submissions in light of it. Mr Paulsen duly filed a further memorandum.

[23] In addition to the materials I have referred to so far, the Court also has before it the first determination of the Authority granting leave to the defendant to pursue her personal grievance out of time[4] and the papers relating to the subsequent

[4] CA164/06, 24 November 2006.

challenge to that determination which was withdrawn but required a decision as to costs.[5]

Circumstances and submissions

[24] From the various materials before the Court, I was able to reconstruct to a reasonable extent the history of the dispute between the parties.

[25] The plaintiff was originally advised and represented by Tim McGinn, a Christchurch solicitor experienced in employment matters. Mr McGinn took an active part in the disciplinary process which occurred in July 2005. He was present at disciplinary meetings and is recorded by the Authority as having "chaired" them. He also drafted key correspondence and acted as the plaintiff's representative in its dealings with the defendant's union.

[26] After the defendant was dismissed, she did not raise her personal grievance within the 90 day time limit provided for in s114(1) of the Act. She sought the leave of the Authority to proceed out of time and this was granted. The plaintiff challenged that determination but withdrew the challenge after seeing the expert opinion evidence for the defendant. The plaintiff was ordered to pay costs and disbursements in relation to that challenge but, although costs in the Authority were reserved, it appears they were never fixed and not taken into account in the costs decision currently under challenge.

[27] The parties went to mediation in the third quarter of 2007 but were unable to resolve their differences. Apparently as a result of what was discussed at mediation, Mr McGinn recognised that he had a conflict of interest and ought to withdraw as counsel. Mr Paulsen was then instructed.

[28] There were then several directions conferences with the Authority. Mr Paulsen records that two investigation meetings which had been scheduled had to be abandoned, one because a witness was ill and the other because a witness had not been informed of the date. He then refers in his submissions to a hearing which

[5] CC11/07, 23 May 2007.

commenced but was then abandoned. Mr Paulsen says that the reason was the belated introduction by the defendant of a second personal grievance based on her suspension prior to dismissal. I note, however, that Mr Thompson recorded in his submissions to the Authority that the reason was a failure by the Authority staff to send a copy of an amended statement of problem, including the second grievance, to Mr Paulsen.

[29] On 30 April 2008, Mr Paulsen wrote to Mr Thompson. The letter was marked "without prejudice except as to costs" and contained an offer of settlement. The offer was to treat the defendant's dismissal as a resignation on grounds of ill health, to give her a positive reference and to pay her $3,000. That offer was not accepted.

[30] For reasons which are unclear, an investigation meeting was not rescheduled until 7 April 2009. Mr Paulsen suggests that further amended pleadings had to be filed before the matter could proceed but it hard to see how that could have resulted in nearly a year of further delay. This aspect of the matter remains obscure.

[31] On the face of its substantive determination, the Authority records that the investigation meeting was held on 7 April 2009, the implication being that it took no more than one day. In his submissions, however, Mr Paulsen says that the investigation continued on the morning of 16 April 2009. This seems to be confirmed by the statement in the Authority's costs determination that the "investigation meeting took 1½ hearing days."

[32] Attached to Mr Paulsen's submissions are 11 invoices to the plaintiff for legal services in relation to the defendant. Of those, nine are from Mr McGinn and two are from Mr Paulsen's firm. Mr Paulsen has also provided a table in which he characterises the nature of the work to which each invoice relates and suggests the extent to which the invoice should be regarded as costs to which the defendant ought to contribute. In all, it appears the plaintiff incurred costs totalling $35,600 exclusive of GST.

[33] Deducting the costs associated with work done prior to proceedings being lodged in the Authority and making some allowance for duplication of work after he was instructed, Mr Paulsen submits that the defendant ought to contribute to costs of $22,560 comprising $12,700 prior to the offer of 30 April 2008 and $9860 subsequently. He suggests that the defendant should be ordered to pay two thirds of the costs incurred prior to the offer of settlement and to reimburse the plaintiff fully for the costs incurred after the offer was refused. On this basis, the plaintiff seeks an order that the defendant pay costs of $18,242. The plaintiff also seeks reimbursement of disbursements totalling $211.21 inclusive of GST.

[34] In support of this claim, Mr Paulsen made a number of submissions. At the outset, he acknowledged that the principles which should guide the Court when deciding costs in the Authority are those set out by the full Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz.*[6] The essence of the decision is in the following three paragraphs:

> [44] The costs principles which the Authority now applies are not necessarily as comprehensive or as prescriptive as those set out in *Okeby*[7] and similar earlier judgments. The Authority is able to set its own procedure and has, since its inception, held to some basic tenets when considering costs. These include:
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> - There is a discretion as to whether costs would be awarded and what amount.
> - The discretion is to be exercised in accordance with principle and not arbitrarily.
> - The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
> - Equity and good conscience is to be considered on a case by case basis.
> - Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
> - It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable.
> - That costs generally follow the event.
> - That without prejudice offers can be taken into account.
> - That awards will be modest.

[6] [2005] ERNZ 808.
[7] *Okeby v Computer Associates (NZ) Limited* [1994] 1 ERNZ 613.

- That frequently costs are judged against a notional daily rate.
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

> [45] We hold that these principles are appropriate to the Authority and consistent with its functions and powers. They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. While these general principles are applicable also to the court, the Authority is not bound by the *Binnie*[8] principles which extend the range of costs which the court may award beyond what could reasonably be labelled "modest."
>
> [46] We find there is nothing wrong in principle with the Authority's tariff based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case. For example, even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay or, on the other hand, the daily rate may not adequately reflect the conduct of the parties or the preparation required in a particularly complex matter. The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.

[35] Mr Paulsen identified four of the principles referred to in paragraph [44] of this extract which he submitted favoured the plaintiff's claim.

[36] Firstly, Mr Paulsen referred to the principle that costs should generally follow the event and submitted that its application in this case meant that the plaintiff should receive an award of costs in relation to the substantive proceeding. I agree and see nothing in this case which would warrant a departure from that principle. Its proper application, however, requires that allowance be made for aspects of the case in which the defendant was successful. In particular, the defendant was successful in obtaining leave to pursue her grievances out of time. She incurred costs in overcoming the plaintiff's opposition to leave being granted and is entitled to a contribution to those costs. There is no information available to me about what those costs were and little about the hearing except that it was conducted in one day, involved detailed evidence and appears to have been fully argued. That is consistent with the plaintiff apparently incurring costs of $3,500 in relation to it. Taking a daily tariff approach, a reasonable allowance for that aspect of the matter is $2,000.

[8] *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438 (CA).

[37] Mr Paulsen's second submission was based on the principle that, to the extent that the manner in which the defendant's case was conducted unnecessarily increased costs, the award to the plaintiff may be increased. In this regard, Mr Paulsen relied on four aspects of the manner in which the defendant's case was conducted.

[38] The first was "unfounded claims" concerning Mr McGinn that led to alternative counsel being instructed and which "greatly increased" the plaintiff's costs. According to Mr Paulsen, these claims were not pursued and Mr McGinn's evidence was not challenged. The proposition underlying this submission is that, had the defendant not questioned Mr McGinn's role in events, he could have continued as counsel throughout. I do not accept that proposition. By taking an active part in the disciplinary process, Mr McGinn inevitably had a conflict of interest and could not have properly appeared as counsel at the investigation meeting. The ethical principles applicable in such circumstances have been brought into sharp relief by the recent decision of the Supreme Court in *Vector Gas Limited v Bay of Plenty Energy Limited*[9] but those principles are longstanding ones.

[39] The second aspect of the defendant's case criticised by Mr Paulsen was that adding a second personal grievance based on the defendant's suspension caused the investigation meeting on 30 April 2008 to be abandoned "as leave had not been sought or provided and the [plaintiff] had no notice of that as a separate claim." "Detailed preparation was required as well as further amended pleadings to respond to this claim." This account of the matter was disputed by Mr Thompson in his submissions but, even if it is correct, it seems to exaggerate the significance of the issue. The suspension occurred in the course of the overall disciplinary process and would seem to have required very little if any additional evidence to that already briefed in relation to the unjustifiable dismissal grievance. It is notable that the Authority dealt with the suspension issue in one relatively brief paragraph of its determination. In any event, this issue is more to do with the substance of the defendant's case rather than the manner in which the case was conducted. I place little weight on this factor.

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[9] [2010] NZSC 5, [2010] 2 NZLR 444 at [147].

[40] Next, Mr Paulsen referred to one of the investigation meetings being abandoned because the defendant failed to notify one of her witnesses of the date and said that this "necessitated duplication of preparation". While the plaintiff, its witness and counsel may have had some wasted time in relation to this abandoned hearing, I do not accept that preparation for the hearing would have had to be repeated to any great extent. This factor justifies a small increase in costs.

[41] The fourth factor relied on by Mr Paulsen was that the defendant's "evasive and argumentative behaviour at the hearing extended the hearing time." Accepting this statement at face value, it is relevant but Mr Paulsen did not quantify the extent to which he suggested the hearing was prolonged. It is therefore difficult to give it any more than token effect.

[42] Mr Paulsen's third major submission was that the defendant unreasonably rejected the plaintiff's offer of settlement made on 30 April 2008 and that she ought to fully reimburse the plaintiff for all costs incurred in resisting her claims after that date. There is undoubtedly a good deal of weight in this submission but it is not automatic that a party who makes an offer of settlement which is unreasonably rejected is entitled to be indemnified for all subsequent costs. This is particularly so in the context of proceedings before the Authority. Such a claim will also be limited by the extent to which the costs subsequently incurred were reasonable.

[43] The final submission made by Mr Paulsen was "Other factors are the significant total costs incurred by the [plaintiff] because the [defendant] was insistent in having her day(s) in the Authority." While this statement may be correct, it was the defendant's right to have her claims determined by the Authority. Exercising that right could not, of itself, be a factor justifying an increased award of costs.

[44] Although the plaintiff seeks an award of costs based on the costs it actually incurred, Mr Paulsen did not directly address in his submissions the extent to which the costs actually incurred by the plaintiff were reasonable. That was one of the factors referred to by the full Court in the *Da Cruz* case and one which, in this case, must be taken into account.

[45] It is implicit in Mr Paulsen's submissions that the plaintiff was ready to proceed with the investigation on 30 April 2008. Up to that point, the plaintiff had incurred costs of $20,190. It seeks a contribution from the defendant to $12,700 of that sum. It is clear that parts of those costs were not reasonably incurred. An obvious example is the costs incurred in opposing the defendant's application for leave to pursue her grievance out of time. It appears this involved costs to the plaintiff of about $3,500. Deducting that sum from the amount claimed, the question becomes whether it was reasonable for the plaintiff to incur costs of $9,200 in preparing for hearing.

[46] Even after Mr Paulsen was instructed, both he and Mr McGinn continued to render invoices to the plaintiff in relation to the proceeding. In respect of many aspects of the matter, including the drafting of briefs of evidence and the preparation of opening submissions, both have charged for this work. Equally, they have both charged for the time spent in acquainting Mr Paulsen with the file when he was instructed. This duplication has been acknowledged to an extent by deducting $4,750 from the amount on which the plaintiff's claim is based but, in my view, that is insufficient to render the final amount reasonable. This was a straightforward matter involving events which occurred over a period of three weeks. There were only two witnesses for the plaintiff, one of whom was Mr McGinn. It involved no contentious issues of law. Even allowing for contingencies and the unusual amount of time required for pre hearing matters, costs of $9,200 for preparation exceeded what was reasonable.

[47] In relation to the hearing which eventually took place in April 2009, the plaintiff incurred further costs of $10,850. Of this, a contribution is sought to costs of $7,550. In the absence of specific information about these costs were calculated, I am guided by the High Court Rules in assessing what is reasonable.

[48] The matter was fully prepared for hearing on 30 April 2008. The only additional aspect introduced after that date was the claim relating to the defendant's suspension. For the reasons given earlier, this cannot have required any more than minor additions to the evidence and submissions for the plaintiff. Counsel would have required no more than half a day to attend to those changes and to reacquaint

himself with the matter. The large majority of the work required was attendance at the investigation meeting and preparation of final submissions. The investigation meeting occupied one and a half days. Given that the matter involved the application of settled principles of law to uncomplicated facts, it should have taken counsel no more than half a day to prepare final submissions. That makes a total of two and half days.

[49] In terms of the categories provided for in rule 14.3 of the High Court Rules, this proceeding would have to be regarded as category 1 or, at most, somewhere between categories 1 and 2. The daily recovery rate for category 1 is $1,250 and that for category 2 is $1,880. While it is only possible in High Court proceedings to apply one or other of those rates, I use them by analogy to fix a daily recovery rate in this proceeding before the Authority of $1,500 per day. As daily recovery rates are fixed on the basis that they are two thirds of reasonable costs, this equates to reasonable costs for two and a half days of $5,625. Even allowing for contingencies, I find that $7,550 also exceeded the level of reasonable costs for work after 30 April 2008.

[50] The plaintiff seeks two thirds of costs incurred up to 30 April 2008 and the whole of the costs incurred subsequently. While that approach may have some merit in relation to costs in the Court, at least to the extent of the relevant proportions of costs reasonably incurred, it is inconsistent with the broader and more moderate approach to be taken when fixing costs in the Authority. The defendant's unreasonable refusal of the offer made on 30 April 2008 is undoubtedly an important factor to be taken into account but it cannot operate to exclude all other considerations. Other than that offer, there is little reason to depart from the conventional daily rate applied by the Authority in most cases.

[51] Taking all relevant factors into account, I conclude that an appropriate award of costs in respect of the substantive aspects of this case is $7,500. From that must be deducted the $2,000 I have found was a just award in favour of the defendant on the application for leave. The balance of $5,500 is, of course, then subject to the defendant's ability to pay.

Ability to pay

[52] It is a well established principle applicable to the award of costs in the Court that they should be limited by the ability of the party concerned to pay without undue hardship. It is appropriate to observe a similar principle when fixing costs in the Authority.

[53] Where the ability to pay is in question, it must be assessed by reference to the whole financial position of the party concerned. This should include not only income and outgoings but also assets and liabilities.

[54] This case illustrates the importance of having full information. The defendant has only a small income which does not meet her outgoings. She relies on her partner for day to day financial support. She is therefore unable to pay any significant sum out of her income.

[55] On the other hand, the defendant's capital position is strong. The statement provided by her accountant shows that she has more than $400,000 equity in three properties. Two are rented out. The third is used by a business in which the defendant also has a share. The defendant clearly has ample assets from which to pay an appropriate award of costs.

Disbursements

[56] In addition to an award of costs, the plaintiff also sought reimbursement of disbursements totalling $211.21. These are not identified in Mr Paulsen's submissions but I infer that they are the disbursements shown in the two invoices to the plaintiff from Mr Paulsen's firm. They are:

a)	Copying, postage, forms etc	$79.69
b)	Bulk photocopying fee on briefs, bundle of documents and submissions	$120.00
c)	Mobile or toll call fees	$11.52

[57] It is only appropriate to order reimbursement of true disbursements, that is sums which have necessarily been expended to obtain goods or services from third parties or filing fees. Although unsupported by invoices, I accept that the bulk photocopying and specific telephone charges sought by the plaintiff fall into that category. The other sum claimed is more in the nature of general business overheads and reimbursement of it is not ordered.

Conclusion

[58] In summary, my decision is:

a) The challenge is successful.

b) The determination of the Authority as to costs is set aside and this decision stands in its place.

c) The defendant is ordered to pay the plaintiff $5,500 for costs and $131.52 for disbursements.

Costs

[59] The plaintiff is also entitled to an award of costs and disbursements in relation to this challenge. The actual costs incurred by the plaintiff should be modest as counsel relied on the submissions previously provided to the Authority. Since the challenge was filed, however, counsel has provided two memoranda relating to the process. Rather than put the plaintiff to the additional expense of having counsel file another memorandum, I fix costs at $800 together with disbursements of $200 being the filing fee. These sums are to be paid by the defendant in addition to the total of $5,631.52 for costs and disbursements in the Authority.

A A Couch
Judge

Signed at 10.30am on 30 September 2010