

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2010] NZEMPC 24
ARC 40/08
ARC 76/08**

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN YUN YAN TIAN
Plaintiff

AND HOLLYWOOD BAKERY (HOLDINGS)
LIMITED
Defendant

Hearing: By submissions filed by the plaintiff on 5 January 2010
and by the defendant filed on 27 November 2009 and 26 January 2010

Judgment: 22 March 2010

COSTS JUDGMENT OF JUDGE B S TRAVIS

[1] The defendant successfully defended two challenges brought by the plaintiff and now seeks costs. It incurred costs totalling \$35,086.88 for counsel and its solicitors. The application for costs sets out in detail the professional time incurred by both counsel and the solicitors and itemises the services performed. I am informed that attempts were made by the defendant to reach agreement as to costs with the plaintiff but that such attempts have been unsuccessful.

[2] The submissions of Mr Liu for the defendant, in support of the application for costs, refer to the three well known Court of Appeal decisions, *Victoria University of Wellington v Alton-Lee*¹, *Binnie v Pacific Health Ltd*² and *Health Waikato Ltd v*

¹ [2001] ERNZ 305 (CA).

*Elmsly*³. I accept that the appropriate starting point is two thirds of the costs actually and reasonably incurred by the defendant. I am satisfied that costs in the sum of \$35,086.88 have been incurred by the defendant and the first question is whether such costs were reasonably incurred. Mr Liu accepted that the costs incurred may appear to be at the higher end of the scale for a two day hearing in which modest awards were being sought by the plaintiff. Mr Liu submitted that the costs incurred by the defendant were increased because of the way the plaintiff's representative conducted the case.

[3] Mr Liu referred first to the difficulties in obtaining a statement of claim which complied with the Employment Court Regulations 2000 (the Regulations) and which would have permitted the defendant to be properly informed of the claims against it. Mr Liu set out the attendances which were required to try and clarify the plaintiff's pleadings which, in the event, still did not produce a statement of claim in either set of proceedings which complied with the Regulations.

[4] Second, Mr Liu referred to the plaintiff's witness briefs which were discursive and covered material that was not relevant and which were not even read from or confirmed during the hearing.

[5] Third, Mr Liu referred to the hearing being unnecessarily lengthened by the plaintiff's advocate subjecting the defendant's witnesses to a lengthy and discursive cross-examination.

[6] Fourth, Mr Liu noted that the hearing was further unnecessarily lengthened by the plaintiff's advocate raising unsustainable objections during the course of the hearing.

[7] Mr Liu submitted that in these circumstances the costs incurred were reasonable and the appropriate starting point should be two thirds of them, namely \$23,391.25.

² [2002] 1 ERNZ 438 (CA).

³ [2004] 1 ERNZ 172.

[8] Mr Liu then compared the amount of costs being sought on behalf of the defendant with what might have been awarded in a High Court proceeding based on either a 2B or a 2C case under the High Court Rules. This was \$17,280 and \$32,320 respectively.

[9] There are difficulties with applying the High Court scale of costs to proceedings in this Court because the steps to be taken by a defendant are not directly analogous with the steps that might be taken by a defendant in High Court proceedings. I note, for example item 2 in the defendant's claim contemplates a substantial sum based on two days attendance and substantial preparation time. These proceedings had been brought by way of challenges to two determinations of the Employment Relations Authority which had carried out full investigations. Of necessity therefore there would be duplication which should have reduced the costs incurred by the defendant in the Employment Court.

[10] The other difficulty is that the plaintiff's claims, although not clearly spelt out, were very modest and the defendant's costs would not usually be based by analogy on the High Court proceedings. The plaintiff had been paid \$800 compensation by the defendant, as awarded by the Employment Relations Authority and sought an additional \$870 inclusive of costs. The second claim brought by the plaintiff was for \$4,257.16. The total of the plaintiff's claim, if not covered by the Employment Relations Act 2000, would have been within the jurisdiction of the Disputes Tribunal for which no costs would have been awarded.

[11] Perhaps of more relevant assistance is the daily rate which represents two thirds of the average costs for such proceedings in the High Court. The amount suggests \$1,600 a day for the two days of the hearing plus an allowance for preparation and the appearances and attendances required to try and obtain the proper pleadings from the plaintiff.

[12] Mr Liu's submissions went further and sought to increase the two thirds to full indemnity costs. This is based on the Court's finding that the plaintiff gave no evidence in support of her claims for the compensation award of \$800 nor in support of her claim for arrears of wages of \$4,257.16.

[13] As a second ground for indemnity costs, Mr Liu submitted that in accordance with reg 68 of the Regulations the Court should take into account previous Calderbank offers made by the defendant to settle the issues. Mr Liu produced two Calderbank offers to the plaintiff to settle her claims made on 15 September 2008, each in the sum of \$500.00. He submitted that these offers were substantially more than what the plaintiff ultimately recovered at trial and could have greatly minimised the defendant's costs which were only \$6,356.25 at that stage.

[14] Third, as a further ground for indemnity costs Mr Liu submitted that because of the plaintiff's inadequate pleadings, the defendant had been put to substantial expenses and should be recompensed for these.

[15] Mr Liu's submissions then addressed the plaintiff's ability to pay. He submitted that the accepted principle is that a party will be presumed to be able to pay an award for damages unless the Court is satisfied on proper evidence that to do so will cause undue hardship. He observed that it had been previously argued on behalf of the plaintiff in the Employment Relations Authority that she was unable to meet any costs award, that she was a single mother caring for her nine year old daughter and was in receipt of a domestic purposes benefit. Mr Liu observed that the defendant had received no updating from the plaintiff concerning her current situation but submitted that she was in fact able to pay costs and that no undue hardship would be caused if substantial costs were awarded against her.

[16] Mr Liu's research referred to a property which the plaintiff had owned prior to the challenges on a mortgage free basis and noted that since the filing of the challenges the plaintiff had transferred that property into the name of a company. The property had a rating valuation of \$505,000 and was transferred to that company for the consideration of that amount. Mr Liu observed that the plaintiff and her advocate, Mr Qusimodo Li, were the only shareholders and directors of the company. Mr Liu also observed that the company owns another mortgage free property which has a rating valuation of \$610,000. Mr Liu calculated that the plaintiff has a nett capital position of at least \$501,000. He therefore submitted that whilst a costs award in the sum of \$35,086.88 might cause a measure of hardship, it would not cause undue hardship and therefore ought to be awarded. As an

alternative, he submitted that four fifths of the amount totalling \$28,069.50, should be awarded as a contribution towards the defendant's costs.

[17] Mr Qusimodo Li, who described himself as counsel for the plaintiff, submitted a memorandum in response. Under the heading "Event Background" Mr Qusimodo Li complained that counsel's fees cannot be asked for when a lawyer attends as a witness. Although it is not precisely clear, I presume he is referring to Mr Liu, who gave evidence in the hearing of the challenges. These objections, however, cannot apply to the fee of Mr Skelton who appeared as counsel. Details of Mr Skelton's fee were supplied in the memorandum in support of costs.

[18] Mr Qusiomodo Li then complained about the evidence that was given, appeared to attack the merits of the Court's finding on credibility and made allegations that the defendant's witnesses fabricated false evidence.

[19] The findings in my judgment speak for themselves. There has been no application for leave to appeal them. Other submissions contained under this heading in the plaintiff's memorandum appear to be of a philosophical or political nature, are difficult to follow, and do not advance the plaintiff's position on the defendant's costs application.

[20] Under the heading "A proposal on the defense [sic] counsel fees" again there is an allegation of false testimony and an apparent attack on the level of the fees incurred and the failure of counsel to sign the relevant tax invoices. The lack of a signature is irrelevant. There are also some religious submissions which I did not find of any assistance.

[21] Under the heading "The problem about the plaintiff's repays [sic] capacity", Mr Qusimodo Li submitted that the defence witnesses were fully aware of the plaintiff's current living conditions and appear to attack certain tax documents which I could not see were relevant to the costs claim. Throughout the submissions Mr Qusimodo Li seems to identify himself as the plaintiff rather than Yun Yan Tian, who I understood to have been his former wife. He refers to himself, for example, as being an historian and advises of an intention to reserve documentary evidence

which will show that the defence witnesses committed perjury. He then revisits the plaintiff's claim for wages. He acknowledges that the plaintiff has a 1996 average car, and then states "the plaintiff believes that the two properties can pay the defendant's legal fees".

[22] Then, under a heading "Issue of the Payment Calculation Model of the Defendant's Legal Charges", Mr Qusimodo Li again complains that counsel's tax invoices relating to the fees charged have not been signed and do not therefore amount to any formal receipt confirmed by the Inland Revenue Department. He submitted that the legal fees should therefore be deemed to be invalid. At one point he appears to submit that the total working hours incurred by counsel should be no more than 18 for a total charge of no more than \$9,000. Mr Qusimodo Li concludes this part of his submissions by stating that the plaintiff refuses to acknowledge the defendant's legal fees because of the defendant's failure to "coordinate with [sic] law".

[23] Under the heading, "On Verdict of Legal Fee", after some derogatory remarks about the defendant and its counsel, Mr Qusimodo Li, observed that the case lasted for 23 months and could finally now come to an end. He accuses the defendant of succeeding in a conspiracy that involves false evidence. He accuses the defendant of conducting illegal businesses. Mr Qusimodo Li indicates an intention to inform the Chinese people of the actions taken in this case but does not deal with any other aspect of the defendant's submissions in support of its claim for costs.

[24] Mr Liu responded to these allegations by asserting that they were political statements and unsubstantiated. He submitted that although a lengthy response would be justified, counsel did not propose to respond to those unsubstantiated allegations and he limited his response to the issues that were directly relevant to the present costs application. He repeated his previous submissions concerning the lengthening of the hearing by the actions taken on behalf of the plaintiff, which included unproven allegations of fraud, tax evasion and sexual harassment that had to be responded to.

[25] As to the ability to pay, Mr Liu addressed again the situation regarding the purchase of the two properties and noted that the plaintiff had failed to explain how she was able to transfer the property on a mortgage free basis, if, as might be able to be inferred from Mr Qusimodo Li's memorandum, there were outstanding loans. Mr Liu submitted that the onus lies on the plaintiff to adduce proper evidence to satisfy the Court of her undue hardship. He submitted that there was no material in Mr Qusimodo Li's memorandum which rebutted the evidence that the plaintiff has a nett capital position of at least \$501,000. Mr Liu also observed that in the case management conference on 15 March 2009, I had specifically warned the plaintiff that she might be liable for costs if she continued to pursue her claims and was unsuccessful.

Conclusion

[26] As I held in the substantive proceedings, the plaintiff's claims were unsubstantiated. The allegations made on her behalf and the way the proceedings were conducted by Mr Qusimodo Li greatly increased the defendant's costs.

[27] As I have stated, I am satisfied that costs have been incurred by the defendant in the total sum of \$35,086.88. The issue then becomes what would be a reasonable contribution towards those costs or should they be awarded on the basis of a full indemnity.

[28] Whilst I have considerable sympathy for the defendant's position in this matter and the additional cost it has been put to by the way the plaintiff's representative conducted these proceedings, the amounts in dispute were very modest and the amounts incurred by the defendant in defending these claims were at the higher end of the scale. I appreciate that the defendant's reputation was being challenged by the very serious and unfounded allegations made on behalf of the plaintiff and have taken this factor into account. It did require competent representation on the defendant's behalf to deal with the way the plaintiff's advocate presented the plaintiff's claim.

[29] To an extent the case was akin to a rerun of the investigation meeting before the Authority and therefore I do not consider it appropriate to make a substantial allowance for costs.

[30] Bearing in mind the amount at risk to the defendant in monetary terms, and the appropriate daily recovery rate, the amount of \$1,600 for each day of the hearing, plus an additional \$4,800 for the three days for both preparation and the interlocutory matters, a total of \$6,400 would be the starting point.

[31] As to the level that the plaintiff ought to contribute to what has been actually incurred by the defendant, I am satisfied that the conduct of these proceedings does justify an uplifting from the starting point of \$6,400. Taking into account the Calderbank offers, as the Court of Appeal in *Elmsly* has directed the Court to do, the additional time caused by the inadequate pleadings and the way that the plaintiff's representative conducted the challenges, which considerably increased the time the hearing took, I consider that an award towards indemnity costs in the sum of \$15,000 would be appropriate.

[32] I am not persuaded that the plaintiff is unable to meet such an award or that it would place an undue burden upon her. The plaintiff had the opportunity to counter the defendant's counsel's full submissions on her property ownership but apparently chose not to do so. Indeed from the passages I have referred to above it appears that she acknowledged the property ownership.

[33] I therefore order the plaintiff to pay to the defendant as a contribution to the defendant's costs in the Court, the total sum of \$15,000.

[34] I note that no orders for costs were made in the Authority and there was no challenge relating to this. I therefore make no orders regarding costs in the Authority.

B S Travis
Judge

Judgment signed at 1pm on 22 March 2010