

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2010] NZEMPC 34
ARC 51/08**

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

AND IN THE MATTER OF an application for costs

BETWEEN BAY MILK DISTRIBUTORS LIMITED
 Plaintiff

AND MICHAEL JOPSON
 Defendant

Hearing: by memoranda of submissions received on 26 February and 26 and 31
 March 2010

Judgment: 31 March 2010

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The plaintiff was successful in its challenge to the Employment Relations Authority's determination and the Court found that Michael Jopson had not been dismissed unjustifiably. The plaintiff is entitled to costs on the successful change but the parties have not been able to agree that issue and the Court must now decide the amount.

[2] As to costs in the Employment Relations Authority (to which the plaintiff is also entitled on its successful challenge), it seeks the application of what it describes as the "notional daily rate" of \$3,000 in that forum. The Authority's investigation meeting lasted less than a day but, not surprisingly, required significant preparation although the cases of two former employees were heard together so that much of the preparation for Mr Jopson's case included preparation for the other. In these circumstances the plaintiff seeks a contribution towards its costs of litigation in the Employment Relations Authority of \$2,000. That is a reasonable contribution in all the circumstances and the plaintiff is entitled to it.

[3] The plaintiff also seeks as a disbursement in the Authority a witness fee of \$168.75 for Dianne Wood, the business's accountant who attended at the Authority investigation.

[4] Turning to the plaintiff's costs on the challenge to this Court, it says that only in Mr Jopson's final brief of evidence did he make a number of new allegations of fact including of unfairness by bias as a result of previous disciplinary action against him. These new and belated allegations were said to have required the plaintiff to undertake further investigation and preparation beyond that put in for the Authority's investigation. The plaintiff also says that its costs were increased because Mr Jopson cross challenged and sought a hearing de novo, expanding the nature of the plaintiff's original challenge significantly. The plaintiff says that although it prepared its case accordingly, it was only during opening submissions at the hearing that counsel for the defendant conceded that he was not challenging the substantive justification for his dismissal, that is that there was no genuine business decision to make some employees redundant. The plaintiff points out that although counsel assured the Court at a call-over as long ago as 15 October 2008 that all interlocutory matters were complete, in February 2009 the defendant sought document disclosure of a number of employment agreements, job descriptions, wage and time records, and rosters despite this information having been provided previously. The plaintiff says that the defendant insisted on inspecting the originals of these documents and this took place in mid July 2009. These developments are said to have caused the original fixture to have been adjourned although the request for disclosure is said to have been unnecessary and employed as a delaying tactic and with the purpose of increasing the plaintiff's costs.

[5] On 5 February 2009 counsel for the plaintiff made a *Calderbank* offer to Mr Jopson of \$1,000 in full and final settlement of the proceedings but this was rejected. In these circumstances the plaintiff seeks indemnity costs. These, excluding disbursements, are said to amount to \$13,681.42. The plaintiff also claims disbursements, including the court filing fee of \$200, and witness expenses for each of Dianne Wood of \$337.50 and Cherie Farrington of \$371.25. Ms Wood's fee is for her time in preparing for and attending the hearing as the plaintiff's accountant although she was not required to give evidence because of the defendant's abandonment of his

challenge to substantive justification. Ms Farrington is a legal executive who attended relevant meetings as a note taker.

[6] In opposing an award of the magnitude sought by the plaintiff, the defendant points out that he was successful in an interlocutory hearing before Judge CM Shaw on his challenge to objection to documents. Mr Jopson says that he should be entitled to a credit for having succeeded in this interlocutory element of the litigation. He says that he is impecunious and unable to pay costs. His counsel says that he is currently in receipt of the domestic purposes benefit and supporting a child as a solo parent. Evidence from the Department of Work and Income confirms that Mr Jopson was granted this benefit from 5 October 2009 and received \$239.55 per week net. Counsel for Mr Jopson advises that he has no assets of any substance from which to meet a costs award and does not have the means to pay either the plaintiff or his own solicitors. In these circumstances, Mr Jopson submits that costs should be left to lie where they fall.

[7] Although the Court will not make an award of costs, the effect of which is to drive a person into, or further into, penury, Mr Jopson's work record disclosed by evidence in the case is that he is a capable, enthusiastic and committed employee who this Court is confident will be able to work for reasonable remuneration before too long. In these circumstances the plaintiff should not be deprived of costs altogether. The fairest course is to make an order that can be paid off by Mr Jopson as and when he regains remunerative employment. The amount of this order should, however, be commensurate also with his ability to pay in those circumstances.

[8] Accordingly, I make an order that the plaintiff is entitled to a contribution towards its costs and disbursements of this litigation in the sum of \$5,000 payable at the rate of \$50 per week commencing one month after Mr Jopson gains full-time remunerative employment.

GL Colgan
Chief Judge

Judgment signed at 9 am on Wednesday 31 March 2010