IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 53
WRC 6/10

IN THE MATTER OF	an application for injunction
AND IN THE MATTER OF	an application for costs
BETWEEN	MARS NEW ZEALAND LIMITED Plaintiff
AND	MANUFACTURING AND CONSTRUCTION WORKERS UNION INC First Defendant
AND	SIMON BOOTH AND OTHERS Second Defendants

Hearing: by memoranda of submissions filed on 14 and 28 April 2010

Judgment: 11 May 2010

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] On 25 February 2010 the plaintiff applied to the Court for an urgent hearing of its application for interlocutory injunction to restrain an allegedly unlawful strike threatened by the defendants. The grounds of alleged illegality were that the intended strike related to a dispute and that bargaining had not been initiated properly. Before issuing proceedings, the plaintiff attempted to obtain the defendants' undertaking that they would not strike but failed to achieve this.

[2] In the course of a telephone conference call with the Court on 26 February 2010 the defendants' representative advised that they would not undertake strike action but wished instead to get bargaining under way. The matter was postponed to allow the parties to confer and on the same day, 26 February 2010, the plaintiff

wrote to the defendants proposing a methodology to begin bargaining and seeking their agreement that they would not strike before the hearing of the injunction application which the Court had set down for 29 March 2010.

[3] Three days later, on 29 February 2010, a representative of the union advised the plaintiff in writing that the Court had declined to grant any order for injunctive relief and did not agree to the plaintiff's proposals for the commencement of bargaining. In these circumstances the plaintiff applied again to the Court on 1 March 2010 for an urgent hearing of its application for interim injunction and that was set down at short notice. The application did not, however, proceed with further discussion between the parties being facilitated which resulted in an interim solution being reached pending a substantive hearing. These arrangements were recorded in the form of undertakings set out in the Court's oral judgment of 1 March 2010.[1]

[4] The defendants claim $2,000 towards costs, being 16 hours of executive time for three separate union officers at the rate of $120 per hour plus stationery, telephone and travel allowances of $80.

[5] In these circumstances the plaintiff says that the defendants did not defend successfully the proceedings for injunction so they are not entitled to costs and, indeed, that the plaintiff was itself the successful party and if costs are awarded, these should be in its favour having obtained undertakings which prevented threatened strike action.

[6] The defendants' claim for costs is for executive time because they were not legally represented. The plaintiff says that these costs would have been incurred in any event and that an hourly rate of $120 for union executive time is excessive. The plaintiff challenges the defendants' claims for disbursements saying that these are not individually itemised and should not therefore be awarded. The plaintiff says that the statement of defence filed at the hearing was in the nature of a "pro forma" defence which would have required minimal time and that the defendants did not prepare or call any evidence. To complete the picture, the substantive hearing scheduled for 29 March 2010 was discontinued by the plaintiff before the defendants

[1] [2010] NZEMPC 14.

had commenced preparation for hearing. The plaintiff says that costs should lie where they fall in these circumstances.

[7] The defendants, through their advocate, say that they were put to unnecessary expense by having to respond to the plaintiff's proceedings concerning matters that ought to have been the subject of discussion and interchange between the parties rather than being raised for the first time in litigation.

[8] I do not propose to direct any contributions towards costs. That is for the following reasons. No party has established a sufficient claim to righteousness in the proceedings that it is clear where costs should lie. Indeed, the litigation appears to have been about positioning for bargaining which has subsequently been progressed. Even if the defendants had established a sufficient base for an award of costs, I am doubtful that the particulars supporting that claim would have survived in any event. Although certainly not to be encouraged inappropriately, such events are not infrequently the sort of skirmishing that goes on before collective bargaining and I would hazard a guess that the plaintiff's costs of professional representation in this proceeding are significantly more than the defendants' were to get bargaining under way.

[9] For the foregoing reasons I decline to make any order for costs.

GL Colgan
Chief Judge

Judgment signed at 9.45 am on Tuesday 11 May 2010