IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 56
ARC 9/09

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION INC First Plaintiff
AND	JIM MOENGAROA AND OTHERS Second Plaintiffs
AND	CARTER HOLT HARVEY LIMITED Defendant

Hearing: By memoranda of submissions filed on 9 February, 12 March and 6 April 2010

Judgment: 18 May 2010

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

---

[1] The successful defendant (CHH) is entitled to a contribution to its costs of litigation in this proceeding in which it was successful.

[2] The statutory provision by which the Court can order costs is cl 19 of Schedule 3 to the Employment Relations Act 2000 (the Act). The Court has a very broad discretion (although exercisable within constraints imposed by the Court of Appeal[1]) and the Court's equity and good conscience jurisdiction also applies.

[1] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305; *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438; *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.

[3] Following the guidance of this Court in *Smith v Air New Zealand Ltd*,[2] counsel for the defendant invites the Court to consider by analogy what might be the costs payable had this been a proceeding in the High Court. This is said to produce a notional award of $13,760 although some of the attendances included by analogy were in the Employment Relations Authority in which a different costs regime operates. Indeed, the defendant says that the High Court scale would not be appropriate in this case, I infer by producing a figure for costs that is significantly more modest than the defendant claims.

[4] As was said in *Maritime Union of New Zealand Inc v TLNZ Ltd*,[3] so too can it be said in this:

> This case is in the nature of a generalised dispute applicable not to a single employee but to a workforce generally and with broader implications also for employers, at least those in the same field. Unlike personal grievances or breach of contract claims at common law, it cannot be said that there are distinct winners and losers or even in such cases that the parties share stark elements of victory or defeat. In cases such as this, the position in law is examined and determined for the future reference of all parties so that individual and repeated litigation might be avoided or at least minimised. Not only the immediate parties but, arguably, employers, unions and employees … may benefit from the judgment. In such cases, a Court ruling is a proactive rather than a reactive approach to a potential problem allowing the dispute to be resolved at an early stage, giving a measure of certainty and clarity to the parties in the application of the policy in practice, and attempting to resolve future disputes.

[5] Although counsel for the defendant sought to distinguish the foregoing comments in the *TLNZ* case I conclude that many of the features identified in that passage are applicable also to this case.

[6] Although this case is of secondary importance generally following, as it did, the judgment of the full Court in *Norske Skog Tasman Limited v Manufacturing & Construction Workers Union Inc & Anor*,[4] it is arguably the first application in practice of the principles set down by the full Court and therefore of broader interest than simply to the immediate parties.

---

[2] AC17/01, 19 March 2001.
[3] [2008] ERNZ 91 at [23].
[4] (2010) 9 NZELC 93,446, (2009) 7 NZELR 70.

[7] I do not consider it significant on the question of costs that the plaintiffs declined what was described as "urgent private adjudication" of their dispute in January 2009. Unlike mediation, which is a statutory requirement in all but exceptional circumstances, the Act establishes employment dispute resolution mechanisms which neither include nor even recognise what is, in effect, private arbitration. The plaintiffs were entitled to bring their dispute to the specialist employment institutions (the Employment Relations Authority and the Employment Court) with attendant rights of appeal, public hearings, and other elements that would not have been possible with private arbitration.

[8] The defendant submits, correctly, that all of the plaintiffs' claims were dismissed.[5]

[9] The defendant says that its actual costs of litigation from the date when the proceedings were first filed in the Employment Relations Authority[6] to the issue of the Court's second judgment on 9 December 2009, amount to $55,229.63. The first question to be determined is the reasonableness of these costs which I accept must be assessed in view of the nature of the litigation including unique if not complex issues of law relating to the ratification of collective agreements and the issue of compliance with Part 6A of the Act. As counsel for the defendant points out, preparatory work on its behalf appears to have been performed by solicitors of appropriate seniority and therefore cost to the relevant issues at particular times. These hourly rates were, respectively, $450 for the most senior solicitor, $350 for an intermediate solicitor, and $200 for a junior solicitor. As the Court has commented in another recent costs case,[7] such delegations are appropriate and will be taken into account by the Court in assessing the reasonableness of legal costs against the complexity and importance of particular work undertaken.

[10] The defendant says, in these circumstances, that the *Binnie* starting point of 66 per cent of actual and reasonable costs would be $36,451.56. However, in this

[5] See *Eastern Bay Independent Industrial Workers Union Inc v Carter Holt Harvey Ltd* (2009) 6 NZELR 552 at [35] and *Eastern Bay Independent Industrial Workers Union Inc v Carter Holt Harvey Ltd (No 2)* (2010) 9 NZELC 93,470, (2009) 7 NZELR 63 at [23].
[6] 9 February 2009.
[7] *Singh v Eric James & Associates Ltd* [2010] NZEmpC 25.

case, the defendant submits that there should be an uplift from this starting point. That is said to be for the following reasons.

[11] First, in opening submissions on 18 May 2009, the plaintiff's advocate, Mr Yukich, introduced for the first time a significant argument that had not been pleaded concerning compliance with s 69OJ of the Act. There was no prior warning of the plaintiffs' intention to take this point and its timing is said to have put the defendant to considerable further expense of preparation of written submissions.

[12] Next, CHH points out that during the litigation the plaintiffs' advocate filed a number of memoranda and other documents raising erroneous arguments about admissibility of evidence including seeking further disclosure of documents after the Court's first judgment. The defendant says that in each instance it was put to additional and unnecessary expense to answer the arguments raised but which the Court concluded had no merit.

[13] In these circumstances the defendant seeks an uplift to 80 per cent of actual and reasonable costs being the sum of $44,180.70. The defendant also claims disbursements of $303.95. These include photocopying charges, toll call costs, "office sundries", and courier charges.

[14] The plaintiffs are now represented by counsel although they were not at any substantive stage of the proceeding. Ms Beck for the plaintiffs submits that there should be no order for costs either way for several reasons including that both parties were partially successful having regard to the background to, and the reason for, the proceedings because this was in the nature of a test case and because the application was "brought in the interests of proactive dispute resolution." Alternatively, the plaintiffs submit that if the defendant is to have costs, it should be at a substantially lower level than has been sought.

[15] The defendant points out that the union and the defendant had been bargaining for a collective agreement since May 2008 and during that period the company advised it that it was considering restructuring its business and contracting out the functions of the saw doctors, the second plaintiffs. The plaintiffs say that

CHH advised that if it did so, there would be no opportunity for the second plaintiffs to initiate or transfer their employment to a new employer. This advice is said to have impacted on the bargaining between the parties with the union saying that it wanted to focus on the negotiation of an employee protection provision (EPP). The plaintiffs say that the company refused to resume bargaining on this point. This led, in turn, to the second plaintiffs taking lawful strike action on 5 December 2008. Following this, there was an interim solution negotiated between the parties by which the second plaintiffs would return to work and CHH would not progress its restructuring any further than initial consultation until the issue of whether there were statutorily compliant EPPs was resolved. In addition, the plaintiffs would apply to the Employment Relations Authority to determine questions whether their collective agreement contain a valid EPP, and whether this was a necessary prerequisite to contracting out by CHH. The parties applied jointly to the Employment Relations Authority for the removal of these questions directly to the Court.

[16] The plaintiffs say that they were partially successful in the litigation in that their contention that the purported EPP did not comply with the Act was confirmed. The Court, however, found for the defendant that there was no requirement for a valid EPP before the company could progress its proposal to contract out.

[17] The defendant submits that this was not a "test case" following the definition of that phrase in *Service and Food Workers Inc v Vice-Chancellor of the University of Otago*[8] citing *NZ Labourers etc IUOW and Ors v Fletcher Challenge Ltd and Ors.*[9] That definition, which I agree defines the nature of some test cases, is:

> … one in which the parties agreed or intended to apply to other similar circumstances involving other parties; or which concerned the practice or procedure of the Court or some generalised ruling affecting many parties.

[18] But a test case can sometimes be more than this. It can include a case where there is simply no precedent giving the parties or the Court sufficient guidance as to how a new statutory provision is to be interpreted and applied. In such cases only

---

[8] [2003] 2 ERNZ 707 at [9].

[9] [1990] 1 NZILR 557, (1990) ERNZ Sel Cas 644.

the immediate parties may be affected. The case is nevertheless one that tests the new law so that the judgment is useful, not only to the immediate parties in the resolution of their dispute but to others. In this sense the parties take on, albeit involuntarily, a burden of responsibility for others in employment relations to blaze a trail that others can not only follow but, knowing of its path, can order their affairs to avoid or minimise the need for future litigation. That is what has happened here and so the case is, in that sense, a test case.

[19] The defendant accepts that in the course of the Court's No. 2 judgment in this case it set out general guidance about the requirements of s 69OJ of the Act. The defendant says, however, that because this was in the context of a particular set of facts which had immediate significance only to a small group of employees, only a proportion of the costs in the case that might be allocated notionally to this part of it should be left to lie where they fall. Even then, the defendant says, this factor should not be decisive of the amount of any costs award which remains an issue for the Court's discretion. Correctly, also, counsel for the defendant draws the Court's attention to the statement in *South Tranz Ltd v Strait Freight Ltd*[10] that the fact that a case is a test case will not necessarily result in costs lying where they fall.

[20] I have concluded that this was a test case but nevertheless one in which the plaintiffs should make a contribution towards the defendant's costs to reflect what I accept were the technical and ultimately meritless interlocutory applications made, and objections taken, by the plaintiffs in the course of the case. This can only really be assessed in a broad brush way and I have concluded that the interests of justice will be served by requiring the plaintiffs to pay to the defendant the total sum of $5,000 as a contribution to its costs.

GL Colgan
Chief Judge

Judgment signed at 9 am on Tuesday 18 May 2010

[10] CC3/08, 8 April 2008.