

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2010] NZEMPC 57
WRC 26/06**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN DEAN SHAUN SMITH
Plaintiff

AND ATTORNEY-GENERAL FOR AND
ON BEHALF OF COMMISSIONER
OF POLICE
Defendant

Judgment: 17 May 2010

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The defendant seeks costs and disbursements totalling \$71,034.18 in respect of this case. These are made up of a contribution to his actual legal costs in this Court of \$55,858, being 66 per cent of \$84,633.60, a contribution of \$9,000 towards his actual costs of \$17,000 in the Employment Relations Authority, and full recovery of disbursements of \$6,176.18.

[2] Dean Smith claimed that he had been dismissed unjustifiably by the Commissioner of Police and sought remedies including reinstatement in employment as a constable. His case was removed to the Court from the Employment Relations Authority for hearing at first instance. For the reasons set out in the judgment delivered on 24 December 2009,¹ Mr Smith's personal grievances were not upheld.

¹ WC29/09.

[3] Following the principles for determining costs in this jurisdiction established by the Court of Appeal,² the first question is to determine the reasonableness of costs incurred followed by a consideration of what would be a reasonable contribution in all the circumstances to those reasonably incurred costs. The Court retains a broad discretion under cl 19 of Schedule 3 to the Employment Relations Act 2000 (the Act).

[4] I accept that it was reasonable for the defendant to be represented by two counsel at the hearing. This enabled preparatory work to be undertaken by Ms Russell as associate Crown counsel, thus reducing the defendant's legal costs overall but still ensuring a continuity of representation of the defendant at the hearing. I accept that the hourly rates of Ms Holden as Crown counsel (\$210 to \$275 plus GST) and of Ms Russell as associate Crown counsel (\$175 plus GST) were reasonable and appropriate to litigation of this type. Indeed, when compared to rates charged by counsel in the private sector for similar work undertaken by lawyers of similar skill and experience, these rates are significantly less than most seen by this Court.

[5] The substantive proceeding was removed to the Court by the Employment Relations Authority so that much of the preparatory work was for a first instance trial and there was no opportunity to economise by building on a prior foundation. The defendant also makes the point that he bore the burden of preparing an agreed bundle of documents notwithstanding that responsibility for preparing and filing this was directed to be the plaintiff's. The defendant likewise prepared the agreed chronology. In addition to the hearing itself which occupied four days, there were three telephone conferences between counsel and the Court and, at the plaintiff's request, he provided additional disclosure of documents relating to the plaintiff's argument that he had been the subject of disparate treatment when compared to other police officers in similar situations. As the defendant points out, these documents were not referred to by the plaintiff during the hearing. However, as the Court's judgment of 24 December 2009 confirms, reference was made to them in the preparation of that judgment.

² *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305; *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438; *Health Waikato Limited v Elmsly* [2004] 1 ERNZ 172.

[6] In these circumstances I accept that the defendant's legal costs of \$84,633.60 were incurred reasonably.

[7] Moving to the second question of determining a reasonable contribution to those costs, the starting point is generally 66 per cent of them although adjustable upwards or downwards to reflect particular circumstances of the case. Here, the defendant asks the Court to award that 66 per cent, reflecting that only two of the five general grounds of challenge to the justification for dismissal were found to have raised serious issues for consideration by the Court. The defendant says that two witnesses (Inspector Michael Coulter and Kate Feltham) had to be briefed and called to counter unmeritorious grounds of challenge and that significant and unnecessary fees were incurred in doing so. The defendant estimates that the duration of the hearing was extended by one day to deal with the evidence of these two witnesses.

[8] The defendant makes the point that, ultimately, none of the grounds of challenge to the Commissioner's decision was successful and although there was a finding that the Commissioner erred in refusing to consider broadly comparable cases when deciding on appropriate disciplinary action, this should not form the basis of a reduction of the contribution to costs. That is said to be because the Court found that there was no disparity of treatment in practice and that any criticism of the Commissioner's practice relates to a now defunct disciplinary process under repealed legislation.

[9] Addressing Mr Smith's ability to pay costs, which is a relevant consideration, the defendant says that he understands that the Police Association Inc supported and represented the plaintiff throughout the case and, in these circumstances, there is an entity with the capacity to pay a contribution towards costs at the level sought even if this may be beyond Mr Smith's means.

[10] Turning to his claim for costs in the Authority, the defendant points that as long ago as 11 March 2004,³ the Authority declined Mr Smith's application to remove the proceedings, dealing with and during the Commissioner's disciplinary

³ WA30/04.

process, to the Court and then, on 1 April 2004,⁴ further determined the Commissioner's application for a stay of proceedings. Although the Authority reserved costs on both of these investigations, they have not subsequently been determined by it. In respect of these aspects of the case, the defendant seeks costs on a notional daily tariff of \$3,000. On the basis that one and a half days was spent in the Authority on each of these applications, a contribution of \$9,000 towards the costs in that body is claimed.

[11] I will not make an award of costs in respect of the proceedings in the Authority. That is for the following reasons. First, although related to the case heard in this Court, the proceedings in the Authority dealt with the Commissioner's disciplinary process before any decisions were made that were the subject of the proceeding before me. Although costs for an equivalent of three days in the Authority are claimed, the two determinations of the Authority produced seem to indicate that there was no investigation meeting at the Authority but, rather, the applications were dealt with by it on the papers. Two day-and-a-half investigations in the Employment Relations Authority is not an insignificant case as is reflected in the costs claimed. I would not be prepared to make an order without more information. Finally, the Commissioner's legal costs in the Authority appear on their face to be extraordinarily high. I should emphasise that the Commissioner was not then represented by the Crown Law Office. Rather, his lawyers were a firm in private practice. Their bills of costs have been revealed. Significant amounts of time and, therefore, cost have been allocated to undertaking research into what must have been, for a firm specialising in employment law as it did, relatively well established jurisprudence. Without commenting on the propriety of expecting a client to pay at high hourly rates for familiarisation with legal principles, I am sure that it would not be just to expect Mr Smith to contribute to these costs.

[12] If the defendant wishes to recover costs against Mr Smith in respect of the Employment Relations Authority proceedings, I consider that he should do so in that forum. For these reasons I do not require Mr Smith to contribute to those elements of the defendant's legal costs.

⁴ WA30A/04.

[13] In his submissions, counsel for Mr Smith reminds me that at paragraph [88] of my judgment of 24 December 2009, I noted that the Commissioner's error in failing or refusing to take account of other relevant cases in determining the sanction for Mr Smith's misconduct might be an important issue for future disciplinary investigations. I do not agree with the submission of the defendant's counsel that this is an issue of academic interest only because of the significant changes to employment law in practice affecting police officers that have occurred since the events in Mr Smith's case. The necessity, in appropriate circumstances, for the Commissioner to take such issues into account in determining sanctions for misconduct will continue to apply in future and the necessity to identify this issue should be marked in costs.

[14] Whilst accepting the now well established legal principles applicable to costs in this Court, Mr Sainsbury for Mr Smith makes the additional general point about the desirability of proportionality in costs awards in cases such as this to avoid the situation that the costs and risks of litigation become so prohibitive that persons are discouraged from exercising their legal rights. Second, the plaintiff submits that the Court's discretion on costs must be exercised according to what is reasonable and just to both parties and, in particular, in light of the Court's equity and good conscience jurisdiction.

[15] The plaintiff proposes that the appropriate methodology of the calculation of costs is to multiply by 2 (being a factor for days of preparation as compared to hearing time) the actual hearing time of 3.5 days, producing a notional figure of 10.5 days. The plaintiff proposes multiplying this by between \$2,000 and \$2,500 per day, producing what counsel submits would be a reasonable figure of between \$21,000 and \$26,500. From that should be deducted a portion to reflect Mr Smith's success and his ability to pay. Mr Sainsbury submits that these downward adjustments should be significant, bringing the final figure for costs to one between \$15,000 and \$20,000.

[16] Mr Sainsbury did not explain completely the involvement of the Police Association in supporting, including financially, Mr Smith's case. In his submissions he has said that the Association has "taken a sympathetic interest in Mr

Smith's struggle for reinstatement." Counsel further submitted: "Even with assistance from the Police Association a modest order for costs will be very difficult for him to meet, without causing real hardship to his family."

[17] Mr Sainsbury invites me to conclude that his client's claim cannot be described as speculative or meritless, nor is it a claim that could have been resolved in any other way, more particularly as reinstatement was the ultimate remedy sought. Counsel submits that any costs order should be modest and, together with disbursements, fall within the region of \$10,000 to \$15,000.

[18] Mr Smith's current financial circumstances are important and are in evidence. He currently holds a position earning \$59,000 per year and is the sole income earner for his family which includes his wife, who has not worked full time since being made redundant in January 2008, and two young children. The family receives some assistance of approximately \$100 per week from the Family Support programme. Following his dismissal six years ago, Mr Smith's annual salaries in alternative employment have consistently been less than he earned as a police officer and it is only in the last nine months or so that his earnings have now returned to and exceed slightly that previous level. Mr Smith's only asset which he owns jointly with his wife is a family home in which their equity is uncertain but would appear to fall within the range between \$200,000 and \$300,000.

[19] Mr Smith confirms that the Police Association has supported him throughout the case and has met his legal costs. He says that the position is that the Association will not underwrite an award of costs against him but will consider providing further assistance to help him meet an award that the Court might make. Mr Smith is concerned, however, that Association assistance might at best be no more than 50 per cent of the costs awarded and even these will need the approval of the Association's board. He says that in reality he will be responsible for the payment of any costs awarded against him and any contribution he may recover from the Association will be a bonus.

[20] Mr Smith regards the Commissioner's legal costs as "extraordinary", noting that his own lawyer charged the Police Association \$16,425 for representation in this

Court. I can understand Mr Smith's view but accept also that the Crown Law Office's charges are substantially less than those of a number of private law firms which represent the Crown in proceedings in this jurisdiction. It is perhaps fortunate for Mr Smith, as well as for the Commissioner, that the defendant was represented by the Crown Law Office.

[21] I reiterate my conclusion that the defendant's costs of representation in the Employment Court are reasonable. In the circumstances I consider that a reduction from the level of 66 per cent of these is warranted to reflect the factors referred to above and fix the amount that the plaintiff is required to contribute to the defendant's costs at \$30,000. Added to this the plaintiff is to reimburse the defendant the sum of \$4,000 towards his disbursements. As already noted, I decline to make any award of costs in respect of the Authority proceedings.

GL Colgan
Chief Judge

Judgment signed at 9am on 17 May 2010