IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 71
WRC 27/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGERS TRANSPORT EMPLOYEES' UNION INC Plaintiff
AND	WELLINGTON CITY TRANSPORT LIMITED Defendant

Hearing: by memoranda of submissions filed on 30 April and 3 June 2010

Judgment: 9 June 2010

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The plaintiff was successful in its substantive proceeding that challenged a determination of the Employment Relations Authority interpreting a collective agreement. The union seeks costs, the parties having been unable to settle these between themselves as was suggested to them.

[2] The union's costs and disbursements (excluding GST) amounted to $7,120 of which all but $248.75 were legal costs and the balance disbursements. These represent the union's costs of representation in both the Authority and the Court. As the plaintiff points out, the parties co-operated in providing the Court with an agreed statement of facts, thus minimising the hearing time and, therefore, unnecessary expenditure. The hearing occupied a half sitting day of legal argument. The plaintiff submits that its costs of representation were reasonable and that a reasonable

contribution towards those costs, being 66 per cent of them, would be an award of $4,700.

[3] The defendant submits that each party should be left to meet its own costs. It reiterates that the case involved the interpretation and application of what the Court described as "an inelegantly expressed" provision of a collective agreement. The company, although successful in the Authority, did not seek costs in that forum because it considered that this was a "test case". It says, in these circumstances, that such a categorisation of the proceeding should mean that no costs are awarded.

[4] The defendant relies on the judgment of the full Court in *NZ Tramways and Public Passenger Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd*[1] and another case between the same parties in this case, *New Zealand Tramways Union (Wellington Branch) v Wellington City Transport Ltd (t/a Stagecoach New Zealand).*[2]

[5] The full Court in the *Transportation Auckland* case emphasised the important consideration in test cases of their broader application to employer and employee groups. Also in that case the Court had to deal not only with construction of a collective agreement but the effect of statutory overlay on its interpretation. The case, of course, involved amendments to the Holidays Act 2003 which were shortly to come into force. In particular, it related to the prospective increase in annual holidays to a minimum of four weeks per year. It was the first case to come before the Court involving a consideration of that statutory amendment. The full Court considers its interpretation would assist others in drafting and constructing employment agreements generally. In these circumstances the case was dealt with as a test case and no costs were ordered. Few, if any, of those features appear in the case now before me.

[6] In the *Wellington City Transport* case the Judge, on a challenge to a determination of the Employment Relations Authority, stated:

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[1] AC9/07, 23 February 2007.
[2] [2002] 2 ERNZ 435, 454-455.

> [73] In relation to the hearing before the Authority, it seems questionable whether the Authority should ever award costs when asked to assist parties by investigating the meaning of a collective instrument or by determining its proper application and operation.

[7] As the jurisprudence under the legislation has developed, it is difficult to discern the application in practice of such a strict injunction. Although there will be many cases in which just such an approach is appropriate, experience in this field is that one should "never say never" (or its equivalent "should ever"). Although in that case the Judge also considered that the parties had benefited from an authoritative construction by the Court of the contested clauses and would benefit from the Court's reconsideration of the matter, there is an additional factor in this case. Here, an individual employee was held out of a remedy to which he was entitled and for the recovery of which proceedings had to be brought by his union, albeit that the case turned on the interpretation of the collective agreement. That is an additional factor which differentiates the *Wellington City Transport* case.

[8] Both cases are, therefore, distinguishable. The first was a true test case in which a full bench sat. Neither the fact that provisions in a collective agreement may genuinely be in dispute between the parties, nor that the Court has adopted a different interpretation to that of the Employment Relations Authority, means that the case is thereby a test case. Although the Court will often be more cautious about awarding costs in a case such as this in which a collective provision is interpreted, each case will turn on its particular merits.

[9] As a fall back argument, the defendant says that if costs are to be awarded against it, these should be less than those sought by the plaintiff. It points out that the agreed statement of facts occupied only two pages and the hearing lasted no more than two hours. It says that the matter should, therefore, be one for costs based on about six hours' preparation and hearing time at most. This, it says, would give a reasonable fee of $2,100 (at the rate of $350 per hour), two-thirds of which would be about $1,300. Even then, the defendant says, the plaintiff should receive significantly less than two-thirds of reasonable costs to reflect the test case nature of the matter.

[10] The defendant says that the questions in issue were simple and narrow, not requiring the work of a law clerk as much of the preparation time appears to have been attributed to. On the other hand, the Court accepts and endorses, in appropriate cases, elements of preparation being undertaken by lawyers or law clerks of appropriate experience and skill and, therefore, cost. I consider that even if the hours claimed may seem excessive, the principle of involving a law clerk in the preparation of this case by the plaintiff's solicitors was appropriate and should be allowed for in costs.

[11] In these circumstances the plaintiff is entitled to costs and disbursements in both the Employment Relations Authority and in this Court on the challenge of $4,000.

GL Colgan
Chief Judge

Judgment signed at 9 am on Wednesday 9 June 2010