IN THE EMPLOYMENT COURT
AUCKLAND

[2910] NZEMPC 75
ARC 109/09

IN THE MATTER OF	an application for compliance
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 First Defendant
AND	KEVIN MACKENZIE Second Defendant

Hearing: by memoranda of submissions filed on 22 April and 9 June 2010

Judgment: 15 September 2010

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The defendants in proceedings for urgent interlocutory relief but withdrawn before hearing, have applied for costs. The plaintiffs oppose the application.

[2] On 11 December 2009 the plaintiffs applied for an urgent hearing of their application for an interlocutory injunction restraining the first defendant from dismissing the second plaintiffs who were then its employees. An amended statement of claim was filed a week later on 21 December 2009 including a fresh cause of action and reiterating the plaintiffs' claim for urgent interlocutory relief in reliance on affidavits filed in support. The Court set down these applications for

hearing on 23 December 2009 but they were withdrawn formally by notice on the morning of the scheduled hearing. The defendants' counsel had been advised of this intention on the previous day, 22 December 2009.

[3] The defendants say that although there are, and from the outset have been, parallel proceedings dealing with the same essential questions before the Employment Relations Authority, the plaintiffs have not advised the Registrar of the Court of the progress of those matters and their effect on the court file, despite several requests of counsel to do so.

[4] The defendants highlight the following factors which they say support their claim for costs. First, they note that the original proceedings filed for the plaintiffs were prepared by an advocate (not the plaintiffs' present counsel) and contained a number of technical deficiencies as was pointed out to Mr Yukich during a telephone conference call on 14 December 2009. Next, the defendants say that notwithstanding an extension to the timetable for filing and serving amended pleadings and supporting affidavits, these were not filed within time and only came to the defendants in the early evening of Friday 18 December 2009.

[5] By the time informal advice was received on 22 December 2009 that the proceeding was to be withdrawn, the defendants' urgent preparations were well advanced including the drafting of affidavit evidence and preparation of legal submissions.

[6] The defendants say that their legal expenses totalled $26,660.25 and submit that these costs were incurred reasonably in view of the urgency with which documents had to be prepared.

[7] The defendants claim two-thirds of these costs being $17,773.50. Also sought are disbursements amounting to either $132.40 or $303.95, these different figures appearing at paragraphs 4.6 and 5.1 of the written submissions.

[8] Opposing the defendants' claims, the plaintiffs submit first that "costs in respect of this matter" should be decided in the Employment Relations Authority

where the substantive issues between the parties were heard. Alternatively, the plaintiffs say that if costs are to be awarded, they should be significantly less than claimed in all the circumstances. The defendants make the following particular points about the proceeding in this Court which arose from a dispute between Carter Holt Harvey Limited (CHH) on one side and the first plaintiff union and its second plaintiff members on the other. The defendants emphasise the background to the proceeding being that the employer and the union had been in bargaining for a collective agreement since May 2008, during which time the company advised the plaintiffs that it was considering restructuring its business and contracting out the function of the in-house saw doctors, the second plaintiffs.

[9] The plaintiffs say that the defendants' advice was that if it did so, there would be no opportunity for the saw doctors to negotiate for or to transfer their employment to any new contractor employer. In these circumstances the plaintiffs say that they turned their attention to bargaining for an employee protection provision, an "EPP". The plaintiffs say that the first defendant refused to resume active bargaining on this point, resulting in lawful strike action by the saw doctors in furtherance of their bargaining claim in early December 2008. The plaintiffs say that there was a resolution of the strike which included a condition that they would apply to the Employment Relations Authority to determine whether there was a valid EPP and whether a valid EPP was a prerequisite to contracting out. This claim was brought and the parties applied jointly for its removal to the Court.

[10] That proceeding was determined by two judgments of the Employment Court given on 27 May 2009[1] and 9 December 2009.[2] The plaintiffs say that both sides were partially successful, that is that the plaintiffs were correct that the then current EPP was not compliant with the Act and, for the defendants, that this did not preclude the company from contracting out the saw doctor function.

[11] The plaintiffs say that, coincidentally (remarkably coincidentally it might be said), unaware of the Court's judgment which had been issued on 10 December 2009, the second plaintiffs resolved to go on strike with effect from 11 December

[1] AC22/09.
[2] AC22A/09.

2009 to further their claims in bargaining. In any event, the first defendant elected to proceed with its restructuring in reliance on the Court's judgment of 9 December 2009 and immediately upon its receipt of that judgment. That advice was said to have been conveyed to two of the second plaintiffs at 4 pm on 10 December 2009 together with advice that the employees' services were no longer required and that the second plaintiffs were locked out. The plaintiffs now accept that the defendants later explained that they intended to mean that the second plaintiffs were not required to work out any period of notice. This, also, seems on its face to have been a surprising confusion of expression by a substantial employer advised by its own in-house employment relations experts.

[12] The plaintiffs say that immediately following this announcement by the first defendant, contractors were brought in to undertake the work usually done by the saw doctors.

[13] The plaintiffs say that in these circumstances and in an effort to preserve the second plaintiffs' position and employment, and also to address what the plaintiffs said were breaches of Part 5 and s 97 of the Employment Relations Act 2000 (the Act), the application for urgent injunctive relief was made on 11 December 2010.

[14] The plaintiffs say that following the Court's suggestion, they instructed legal counsel resulting in the amendment to the pleadings that was filed on 21 December 2009 and the contemporaneously lodged statement of problem in the Employment Relations Authority. The plaintiffs say that the defendants were not required to file any documents or pleadings in answer to the application for interim injunctive relief.

[15] The substantive proceedings were formally withdrawn on about 16 April 2010 before the defendants had filed any other documents in court.

[16] The plaintiffs advised the Court that the Employment Relations Authority has heard and determined the second plaintiffs' applications for interim reinstatement in employment and has investigated but not yet determined the substantive proceedings.

[17] The plaintiffs emphasise the defendants' provocative and inappropriate use of the term "lockout" to the second plaintiffs which was in substantial part the incentive for seeking the relief. The use of this term is said to have been explained in the investigation meeting held by the Authority to have referred to the deactivation of the saw doctors' site access cards rather than in the usual industrial meaning of the phrase.

[18] The plaintiffs say that such work as was undertaken by the defendants in preparation for the application in this Court would not have been wasted but would, rather, have been relevant to the company's preparation for its defence in the Employment Relations Authority. In these circumstances the plaintiffs say that the Court should not make any award of costs.

[19] Alternatively, the plaintiffs say that if an award is to be made, the amount incurred was not reasonable in all the circumstances. In this regard the plaintiffs say that, despite the defendants' assurances to the contrary, the bills of costs supporting the claim cover, inextricably, other matters relating to the substantive proceedings between the same parties finalised with the judgment of 9 December 2009 and the Authority proceedings in which costs may be claimed in that forum.

[20] The plaintiffs also emphasise that this case arose out of a genuine dispute and legal uncertainty about new legislation which only a judgment of the Court could have resolved.

[21] They further point out that the union is a small organisation with limited resources which provides advocacy services on a voluntary basis. The second plaintiffs are all former saw doctors who have recently been made redundant.

[22] An award of costs in this Court is governed by cl 19 of Schedule 3 to the Act. The Court has a broad discretion which must be exercised according to principle. The facts and circumstances of any particular case will determine the justice of an award.

[23] I have decided to decline the defendants' application for the following reasons.

[24] First, the relevant background to the filing and prosecution of the plaintiffs' proceedings was a genuine dispute about new legislation and was an issue in the bargaining for a new collective agreement. The plaintiffs were justified in testing the meaning of an application of that new legislation in this Court. The defendants cannot reasonably complain that this delayed CHH's planned restructuring and to justify it in moving immediately to dismiss the second plaintiffs.

[25] Second, only hours after receiving the Court's 9 December 2009 judgment, the first defendant moved with unseemly alacrity not only to contract out its saw doctoring functions, which the Court had said it was entitled to do in law, but, more importantly, to dismiss peremptorily its saw doctors and to prevent their return to their workplaces. That treatment, although not perhaps so intended, must have been perceived by them as equal, if not inferior to, that which might have been afforded to dishonest scoundrels and not the loyal and vulnerable employees that they were.

[26] Third, advice to the saw doctors that they were being "locked out", even if made mistakenly, was provocative and led unsurprisingly to applications for urgent relief from what would have been an unlawful lockout had this been what CHH had meant.

[27] In these circumstances the most just course is to let costs lie where they fall.

[28] Even if the defendants had been entitled to costs, I consider that the claim to two-thirds of more than $26,000 for relevant legal costs to be substantially more than was reasonable for contribution by the plaintiffs. Although I accept that the defendants were obliged to move promptly to begin to defend proceedings as they were entitled to, these were not reasonable costs of receiving and considering papers, taking instructions, participating in a telephone conference call, receiving and considering amended pleadings, and preliminary preparation of affidavit evidence and submissions. Even allowing for an average hourly rate of $420 as between the two lawyers engaged, it is difficult to see how more than about 20 hours' work at the

most would have been necessary for these attendances. Nor would I have been prepared to allow for disbursements given the confusion about the amounts claimed.

[29] For the foregoing reasons I decline the defendants' applications for costs.

GL Colgan
Chief Judge

Judgment signed at 9 am on Tuesday 15 June 2010