**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2010] NZEMPC93**
**ARC 77/09**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | ECOCOVER (NZ) LIMITED<br>First Plaintiff |
| AND | MURRAY LESLIE CRUICKSHANK<br>Second Plaintiff |
| AND | PHILIP LOUIS DUNN<br>Defendant |

Hearing: By memoranda of submissions filed on 1, 15 and 18 March 2010

Judgment: 21 July 2010

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**JUDGMENT OF JUDGE M E PERKINS**

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[1] This is a challenge to a costs determination of the Employment Relations Authority (the Authority). By oral judgment given on 30 November 2009, the second plaintiff was joined as a party in this proceeding for the purpose of costs. Counsel have agreed, as a matter of economy and efficiency, to the Court determining the challenge on the papers and without a hearing.

[2] Memoranda from counsel have now been filed. Mr S Barter, counsel for the plaintiffs, filed his memorandum in support of the challenge on 1 March 2010. That was accompanied by an affidavit of Mr Cruickshank sworn on 26 February 2010 and annexing most of the documentation made available to the Authority prior to its substantive determination. Mr L Ponniah, counsel for the defendant, filed his memorandum in answer on 15 March 2010. Mr Barter then filed a memorandum in reply on 18 March 2010. Mr Ponniah has taken objection to the plaintiffs placing

before the Court, the lengthy documentation attached to Mr Cruickshank's affidavit. He submits that the affidavit should not be read but that if it is to be read the defendant should have a right of reply. I have decided to read the affidavit in support but in view of my decision in this matter it is not necessary to give the defendant the opportunity to respond to it.

[3] The plaintiffs seek to increase the Authority's award of costs, saying that it did not take into account sufficiently the defendant's refusal, until the last minute, to withdraw reference to without prejudice correspondence from a brief of evidence. The increase is also sought for the fact that the defendant continued a proceeding against the second plaintiff, which had no prospect of success. Finally, the plaintiffs seek to increase the award of costs for further costs incurred by them after Mr Dunn had declined to accept an offer of settlement, which would have seen him better off than did the total rejection of his claims by the Authority.

[4] The defendant submits that the Authority was in the best position to have made an assessment of the impact on costs of the various matters raised by the plaintiffs on this challenge, having seen and heard the witnesses. In these circumstances the defendant says that the Court, although it must make its own decision, should not disregard the Authority's findings and should take these into account in determining the challenge.

[5] More particularly, the defendant says that the Authority did indeed address the late withdrawal of Mr Dunn's claims against Mr Cruickshank personally and that the inappropriateness of this was reflected in the costs order of $3,000 made against Mr Dunn. As Mr Cruickshank had been removed as a party before the investigation, the award of costs was made in favour of the first plaintiff only. This was despite the fact that the costs award encompassed the unnecessary attendances and costs incurred by Mr Cruickshank in having to deal with the claim against him and the allegations made against him.

[6] The defendant also says that it is significant, as the Authority found, that the plaintiffs made no application prior to the investigation to expurgate the offending correspondence. Further, the defendant says that the Authority did have regard to

the without prejudice offers of settlement in awarding costs but was not persuaded that the circumstances "constituted sufficient additional activity to sound in costs."

[7] Addressing more particularly the offers of settlement made in the course of the Authority proceedings, the defendant points to the Authority's criticisms of the positions of both parties on the interpretation of the letter of engagement in employment and on the terms by which Mr Dunn was to transfer employment from one entity to another.

[8] So far as the offer of settlement is concerned, Mr Dunn accepts that whilst, in hindsight, it may have been prudent to accept the offer, the way in which the parties dealt with each other informally led to confusion and suspicion including the identity of the employer.

[9] The parties are approximately $6,000 apart on the question of costs. Essentially the defendant says that the Authority was correct in all the circumstances to have applied a notional appropriate daily rate approach to fixing costs, albeit not a rigidly applied exercise in the circumstances, and that the Court should follow the same course.

[10] The plaintiffs seek to increase their award from $3,000 made by the Authority to either $9,200 or, alternatively, to $9,900. The first figure of $9,200 is claimed to represent the increased costs to the plaintiffs brought about by the defendant's refusal to withdraw without prejudice communications. The second claim to $9,900 is said to also include the costs that the plaintiffs incurred after having given the defendant an opportunity to settle but which was refused.

[11] Mr Dunn began his proceedings in the Authority in mid September 2008. The proceedings in the Authority were issued by him against the first and second plaintiffs in these proceedings before the Court. Another party, EcoCover Developments (Vanuatu) Limited was initially named in the application to the Authority but deleted. That company, however, had a part to play in the background to the dispute. A statement in reply on behalf of the first and second plaintiffs in their then position as respondents before the Authority, was filed with the Authority

on 1 October 2008. As a result of comments made during an initial telephone conference call with the Authority, the defendant filed an amended and more detailed and wide-ranging statement of problem on 22 December 2008. These claims included one to a bonus of $20,000, a penalty for allegedly withholding remuneration under the Wages Protection Act 1983, and a further penalty for breach of the good faith obligations prescribed in the Employment Relations Act 2000. The claims in total amounted to $25,000.

[12] The amended statement of problem was then pleaded to by a further amended statement in reply filed in the Authority on 23 January 2009. In its reply, the first plaintiff acknowledged that it was Mr Dunn's employer. The plaintiffs denied that the bonuses were payable by the first plaintiff but, rather, in respect of future employment, by a separate company. That was Eco Developments Limited or Eco Developments (Vanuatu) Limited. That separate company never became a party to the proceedings.

[13] In mid February 2009, the Authority directed the parties to attend mediation within 28 days. Although this occurred, it did not resolve the employment relationship problems. Accordingly, in late February 2009 the Authority arranged for the holding of an investigation meeting. This took place on 14 May 2009. Witness statements were timetabled and directed to be served in preparation for that investigation meeting.

[14] In early April 2009, the plaintiffs proposed to the defendant that the claim against Mr Cruickshank should be withdrawn as being unsupportable in law. The plaintiffs threatened to seek costs if the proceeding against Mr Cruickshank was not withdrawn. At the same time an offer of settlement was made to Mr Dunn by EcoCover Developments Limited. This offer remained open for acceptance within seven days and consisted of an immediate payment of $5,000 with a further similar payment to be made on 31 July 2009. The offer was made on a without prejudice, except as to costs basis.

[15] In April 2009, Mr Dunn filed his own witness statement. He also intended to call another witness. His witness statement referred to and annexed the letter of

2 April 2009 containing the without prejudice offer of settlement. The letter otherwise outlined attempts to settle the matter between counsel for the parties before mediation. Counsel for the plaintiffs requested promptly that the without prejudice communications be removed. Counsel threatened that if they were not removed costs would be sought and an application would be made to the Authority to exclude such evidence. This proposal was refused by the defendant. As I have indicated the plaintiffs, then being respondents before the Authority, made no application in advance of the investigation to have the references to the without prejudice communications and attempts to settle removed from the statements.

[16] In early May 2009, Mr Cruickshank filed witness statements. They were then responded to on 10 May 2009 by two further witness statements in reply from the defendant.

[17] At the outset of the Authority's investigation meeting on 14 May 2009, the defendant agreed without demur to withdraw the claims against Mr Cruickshank, to withdraw the claims to penalties under the Wages Protection Act 1983 and for breach of the good faith provisions under the Employment Relations Act 2000. Counsel for the plaintiffs applied to exclude the without prejudice correspondence from the evidence and the Authority Member agreed to this. She had seen the correspondence when preparing for the investigation meeting and expressed some reluctance to the parties about continuing with the investigation under those circumstances. However, she did so at the specific request and consent of the parties.

[18] Following the investigation meeting both parties filed written submissions on 19 May 2009. The Authority gave its substantive determination on 14 July 2009. It determined that Mr Dunn's employer was the first plaintiff, EcoCover (NZ) Limited. This had in any event been admitted by the respondents. The determination went on to hold that any bonus entitlement could only be from EcoCover Developments Limited, which was not a party. The Authority Member invited the parties to make submissions to the Authority on costs. These were filed and the Authority made its costs determination on 27 August 2009 in which the first plaintiff was awarded the sum of $3,000. Mr Cruickshank of course was no longer a party by that stage.

[19] In considering the issue of costs, the Authority dealt first with the issue of the withdrawal of the "without prejudice" correspondence. She noted the emphasis in the letter of offer on the fact that the offer was not made by the plaintiff, EcoCover (NZ) Limited, but EcoCover Developments Limited. As I have indicated that company is not a party to the proceedings. The Authority Member in her determination held that she was not persuaded that the without prejudice correspondence, being introduced in evidence and then withdrawn, constituted sufficient additional activity to sound in costs. However, she did find that the first plaintiff was entitled to costs in respect of the attendances necessitated by Mr Dunn's pursuit of his claim against Mr Cruickshank in his personal capacity and also his failure to accept the reasonable offer of settlement. If he had accepted that offer further costs in the litigation would have been saved.

[20] The plaintiffs now challenge the determination on the basis that the Authority Member erred in finding that the issue relating to the without prejudice correspondence should not sound in costs and in respect of what they allege to be inadequate quantification of the costs awarded for the other two matters.

[21] The issue of the correspondence can be disposed of relatively easily but for grounds not adopted by the Authority. The offer of settlement was made by EcoCover Developments Limited, which was not a party to the proceedings. It could not, therefore, have been made in an attempt to settle litigation against it because there was no litigation against that company. The offer could not therefore have prejudiced EcoCover (NZ) Limited. It had no rights of privilege in the correspondence. Obviously, the defendant's attempt to use the correspondence was a blatant but unsuccessful attempt to prejudice the Authority Member. If used for that reason it was irrelevant and inadmissible for that reason. Nevertheless, the plaintiffs' challenge to its admissibility and substantial attendances expended on that were not necessary. I agree with the determination that the notional daily rate for costs should not be increased on that account.

[22] The determination referred to this Court's decision in *PBO Limited (formerly Rush Security Limited) v Da Cruz*[1] and the Court's approval, subject to exception in appropriate cases, of the Authority's practice of applying a notional daily rate. The substantive finding was that Mr Dunn failed in his application for payment of a bonus. The approach of both parties to the nature of Mr Dunn's employment was held to be wrong. Mr Dunn also may have had a valid claim against EcoCover Developments Limited but as I have indicated that company was not a party to the proceedings. In addition, there was a concession by EcoCover (NZ) Limited that it was the true employer of Mr Dunn. On the basis of these matters and if the matter had rested there the Authority Member stated that she was tempted to let costs lie where they fell. However, on the basis of substantial irrelevant evidence produced at the investigation in an attempt to discredit Mr Cruickshank and Mr Dunn's refusal to accept a reasonable offer of settlement (even though it was not made by the first plaintiff), there was a determination of an award of costs against Mr Dunn.

[23] The plaintiffs challenge the finding in three respects. First, that there should be an increased award of costs to meet the attendances necessary to deal with the defendant's refusal to withdraw the without prejudice offer from the evidence. For reasons already mentioned, the objection to the admissibility of the offer was really without foundation. While the offer was produced out of wrong motives on the defendant's part, I agree with the determination that in the context of the dispute no further costs should be awarded on this ground.

[24] Secondly, it is submitted by the plaintiffs that the Authority Member erred in finding that the defendant's failure to withdraw the claim against Mr Cruickshank personally should not result in a costs award. Related to this is the submission that a greater sum should be awarded to the plaintiff for the extra costs incurred in having to deal with the irrelevant evidence designed only to impugn the second plaintiff's integrity. The Authority Member dealt with this latter aspect by including it as a basis for the award of costs. She did comment that while there was nothing wrong with withdrawing Mr Cruickshank as a party, in view of the uncertainty as to the identity of the employer the evidence suffered from its extensive reliance upon

[1] [2005] ERNZ 808.

attempts by Mr Dunn to attack Mr Cruickshank's integrity. The sum allowed for this aspect is not isolated in the overall quantum of costs awarded to the first plaintiff.

[25] The final point in the challenge relates to the "Calderbank offer". Mr Barter submits that the Authority Member "erred in finding that the Defendants refusal to accept a generous settlement offer by the First Plaintiff which would have saved significant litigation costs, *should not have factored into the costs determination*" (my emphasis). This submission is incorrect in two respects. First, it states that it was the first plaintiff, which made the offer when the facts disclose otherwise. Secondly, however, the submission is incorrect in that this was indeed an aspect, which the Authority Member held should give rise to a costs award. For the reasons she mentioned in her decision she did decide not to give it the weight she otherwise would have given it.

[26] In considering the issue of a challenge from a costs award by the Authority I have regard to *PBO (formerly Rush Security Limited) v Da Cruz* already mentioned. I accept Mr Barter's submission that in a de novo challenge the Court makes its own decision on the matter. The position the Court adopts is as set out in paragraphs 18 and 19 of the decision as follows:

> [18] The alternative position is that when considering a challenge to a costs determination of the Authority the Court should decide the case as if it were standing in the shoes of the Authority and order such costs and expenses as if it were the Authority.
>
> [19] We hold that this position is correct because of s183 of the Act. The role of the Court on a challenge to costs is to stand in the shoes of the Authority and to assess de novo the evidence relating to the costs award in that forum in order to judge what is an appropriate award in light of all considerations which are relevant to the Authority.

[27] Clearly considerable acrimony has been generated between the parties in this matter. This can be gleaned from the way the defendant behaved before the Authority and the tone of counsel submissions. Nevertheless, the matter is totally discretionary. The Authority is a lay-tribunal assigned to deal efficiently and economically with employment disputes at first instance. Generally, it will be appropriate for the Authority's costs awards following the event to be based upon a notional daily rate. There will be instances where that should be departed from but

keeping in mind nevertheless the factors I have mentioned. In this case the Authority Member decided that her options were between the notional daily rate or to let costs lie where they fell. She chose the former.

[28] If Mr Cruickshank had remained as a party to the Authority investigation then it is likely the determination would have divided the costs award between him and EcoCover (NZ) Limited as the two issues upon which the costs award was based relate separately to the first and second plaintiffs. Mr Cruickshank has now been rejoined as a party to the challenge.

[29] I agree with the determination that if matters had rested simply with the claim for bonus being made and then failing, the appropriate position on costs would have been to have let costs lie where they fell. Mr Dunn caused increased costs to the plaintiffs both in respect of the irrelevant evidence produced and his failure to accept what was clearly a generous offer of settlement and thereby avoid further litigation. It was made in circumstances where it was obvious that liability, if any, fell on an entity other than the first plaintiff (respondent before the Authority). However, from a starting point of awarding no costs at all I consider the determination dealt appropriately with these two issues by making an award of $3,000. Accordingly, the challenge does not succeed and the costs award of the Authority stands. I could attempt to apportion the award between the two plaintiffs to take account of the fact that one issue related specifically to Mr Cruickshank and the other to EcoCover (NZ) Limited. However, in view of Mr Cruickshank's position as a director of the first plaintiff I see no point in doing that.

[30] So far as costs on this challenge are concerned I consider it appropriate now that the clear acrimony between the parties be brought to an end. There shall be no order of costs of either plaintiffs or defendant and costs shall lie where they fall. I consider that appropriate having regard to the fact that the challenge has been dealt with on the papers without the need to incur further costs by requiring counsel to appear to argue the matter.

M E Perkins
JUDGE

Judgment signed at 4.00 pm on 21 July 2010