IN THE EMPLOYMENT COURT
WELLINGTON

[2011] NZEmpC 173
WRC 23/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	THE NEW ZEALAND FIRE SERVICE COMMISSION Plaintiff
AND	THE NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION First Defendant
AND	JEFFREY REGINALD MCCULLOCH Second Defendant
AND	BOYD GORDON RAINES Third Defendant

Hearing: By memoranda of submissions filed on 31 May and 27 July 2011

Appearances: Geoff Davenport, counsel for plaintiff
Peter Cranney, counsel for defendant

Judgment: 20 December 2011

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff was successful in obtaining interim injunctions against the defendants.[1] The proceedings were subsequently discontinued having achieved their end from the plaintiff's point of view.

[1] *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* WC 18/09, 6 August 2009.

[2] Costs were reserved and the plaintiff now seeks costs against the defendants. It seeks an award of $10,000 plus GST and disbursements against total fees of $15,863 plus GST. Mr Davenport's memorandum cites the three very well known costs decisions: *Victoria University of Wellington v Alton-Lee,*[2] *Binnie v Pacific Health Ltd,*[3] and *Health Waikato Ltd v Elmsly.*[4]

[3] Mr Davenport submitted that reasonable costs were incurred and the starting point of 66 percent as a contribution is appropriate.

[4] He also referred to *AC Nielsen (NZ) Ltd v Pappafloratos*,[5] where the Court held that costs should follow the event. He submitted that in that case the "event" was the successful application for an interim injunction (itself a significant piece of litigation), regardless of the outcome of the substantive hearing. He submitted that the Court had held that although, in a substantive hearing, it is possible to consider the degree of success in terms of causes of action, for the purposes of costs in regard to interim injunctions, the issue is whether or not the injunction was granted. Costs of $16,500 for a one-day hearing plus disbursements were awarded but a claim for executive time was rejected.

[5] Mr Davenport referred to my reasons for continuing the interim injunction which I issued on 12 August 2009.[6] I confirmed my earlier conclusion that the plaintiff had established a strongly arguable case and that both the balance of convenience and overall justice clearly favoured the plaintiff. I had also found that there were "issues of public safety or health and the risk of damage to property" and therefore 14 days' notice was required for the strike action to be lawful under s 86 of the Employment Relations Act 2000.[7]

[6] I then found that although the notice on its face was clear, a subsequent communication created an uncertainty as to the true nature of the ban and if the defendant union had wanted to achieve reasonable certainty, it could have used the

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[2] [2001] ERNZ 305.
[3] [2002] 1 ERNZ 438.
[4] [2004] 1 ERNZ 172.
[5] WC 17B/03, 5 September 2003.
[6] *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2009] ERNZ 134.
[7] At [22].

same wording as it had in three other notices. I therefore found that there was a strongly arguable case that the communications rendered the original notice unlawful for uncertainty.[8] Mr Davenport submitted that the costs the plaintiff incurred resulted directly from the defendants' actions in creating that uncertainty.

[7] In opposition to the application for costs, Mr Cranney submitted that two factors weighed against a substantial costs award. The first is that the plaintiff may not have been ultimately successful because the facts were "hotly disputed" and the Court has never made final factual findings. He submitted that if the plaintiff had been unsuccessful in the substantive proceedings, costs and even damages in terms of the undertaking could have been awarded against it.

[8] Second, he submitted that the plaintiff was guilty of extensive delay in relation to the matter, having waited 22 months before taking any step, despite being pressed on various occasions by court staff, in relation to the substantive proceedings. He submitted that only then did it discontinue and apply for costs.

[9] Mr Cranney submitted that it was implicit in the reservation of the costs issue that costs would be applied for within a reasonable time (and this was not done) or that they would be dealt with after a contested hearing of the substantive matter and may not have been awarded at all.

[10] He submitted that there was no successful party in the substantive sense: the substantive correctness of the interim order having never been determined. He also submitted that the defendants incurred costs in relation to the substantive proceedings and that the plaintiff's withdrawal denied the defendants any chance of substantively defending themselves.

[11] Mr Cranney noted that this is a situation which highlights the difficulty defendants face when the consequences of an interim order substantively determines proceedings. He submitted that, in that scenario, plaintiffs who would then simply discontinue after a long delay should bear at least some additional costs

[8] At [29].

consequences. He therefore submitted that costs should be moderate and the filing fee should not be awarded.

[12] Whilst I accept the force of Mr Davenport's submissions based on the *AC Nielsen* case, the delays in the eventual discontinuance have no doubt caused the defendants to incur costs which otherwise would not be able to be sought. I consider, in these circumstances therefore, that a reduction from the two-thirds sought of $10,000 (plus GST and disbursements) should be modified to a costs order of $7,000 'all in' covering both fees and disbursements and I award that sum against the defendants.

BS Travis
Judge

Judgment signed at 11.30 am on Tuesday 20 December 2011