IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 72
ARC 42/10

IN THE MATTER OF	of a challenge to a determination of the Employment Relations Authority
BETWEEN	JANSEN LIMITED Plaintiff
AND	STEVE TREE Defendant

Hearing: (By memoranda filed on 21 October 2010 and 16 November 2010)

Counsel: Andrew Swan, advocate for the plaintiff
Anthony Russell and Claire Mansell, counsel for the defendant

Judgment: 24 June 2011

COSTS JUDGMENT OF JUDGE A D FORD

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[1] Following on from the plaintiff's discontinuance of this proceeding on 18 October 2010, the defendant, applied for a "full indemnity" award of costs. The plaintiff accepts that the defendant should be entitled "to some costs" but submits that indemnity costs are not appropriate and that a nominal award should be made. I regret the delay in dealing with the matter but the Court file had been overlooked.

[2] Both counsel accepted the categories in respect of which indemnity costs may be ordered as set out by the Court of Appeal in *Bradbury v Westpac Banking Corporation*.[1] Noting specifically that the categories were not closed, the Court listed the following circumstances in which indemnity costs had been awarded:[2]

> (a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;

[1] [2009] NZCA 234, [2009] 3 NZLR 400.
[2] At [29].

(b) particular misconduct that causes loss of time to the court and to other parties;

(c) commencing or continuing proceedings for some ulterior motive;

(d) doing so in wilful disregard of known facts or clearly established law; or

(e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, ...

[3] The background to this case is that the defendant, Mr Steve Tree, was employed as a sales representative by the plaintiff from January 2008 until 3 February 2009. The plaintiff operates a business retailing sound equipment, lighting and instruments to the entertainment industry. On his return to work in February 2009 after his holiday break, Mr Tree was told that his position was to be disestablished. He subsequently raised a personal grievance on the basis that he had been unjustifiably dismissed because the redundancy was for ulterior motives rather than for a genuine commercial reason. The plaintiff denied Mr Tree's claims and also lodged a counter-claim for losses it alleged had resulted from a breach of Mr Tree's duties of good faith, fidelity and confidentiality in attempting to sell an agency it held in New Zealand over a brand of cymbals.

[4] Mr Tree was successful in his claim before the Employment Relations Authority and he was awarded appropriate remedies.[3] The plaintiff was also ordered to pay a penalty of $500 for failing to provide Mr Tree with a written employment agreement. The plaintiff's counter-claim for damages against Mr Tree for its loss said to have resulted from Mr Tree's breach of good faith was dismissed.

[5] The plaintiff subsequently filed a challenge in this Court to the Authority's determination. In a minute dated 7 September 2010, following a call-over conference, Judge Travis noted that the plaintiff's challenge was confined only to that part of the Authority's determination that dealt with its counter-claim. In other words, there was no challenge to the Authority's findings or awards in favour of Mr Tree. Judge Travis recorded that the parties had been attempting unsuccessfully, to settle the matter and so he, therefore, did not direct further mediation but he fixed a hearing date for 8 November 2010 and set a timetable for the filing of briefs of

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[3] AA 169/10, 13 April 2010.

evidence and an agreed bundle of documents. The plaintiff's briefs of evidence were to be filed by 8 October 2010 and the defendant's no later than 22 October 2010.

[6] The plaintiff discontinued the proceeding on 18 October 2010.

[7] The basis of the defendant's claim for indemnity costs are set out in a memorandum filed by Ms Mansell. In essence, it is alleged that the plaintiff put the defendant to the costs of defending an "unmeritorious claim" which was not upheld in the Authority and discontinued three weeks from the hearing in this Court. Counsel also alleged that the plaintiff's counter-claim had been raised sometime after it had informed Mr Tree by email that the matter had been resolved. Ms Mansell also referred to a letter she wrote to the plaintiff's counsel in June 2010 alleging that the counter-claim was without merit and stating that if the plaintiff proceeded then Mr Tree would be seeking full indemnity costs. Reference was also made to a *Calderbank* offer dated 3 September 2010 in which Mr Tree offered to settle the matter on the basis of the amounts awarded to Mr Tree by the Authority plus $1,500 towards his costs.

[8] Ms Mansell filed a detailed schedule of costs together with relevant invoices. The claim for actual costs up to the filing of the discontinuance, including costs incurred in drafting the memorandum for costs, totalled $3,933.68.

[9] Mr Swan, counsel for the plaintiff, submitted in his memorandum in response that the costs incurred were excessive and that, in any event, it was not an appropriate case for an award of indemnity costs. He submitted that an appropriate award would be something "just over $1,600."

[10] I agree with Mr Swan that this is not an appropriate case for an award of indemnity costs. The way the case progressed through the Authority and in this Court up to the filing of the discontinuance was unremarkable. The case does not fall within any of the categories recognised by the Court of Appeal in *Bradbury* and there are no other exceptional circumstances which would warrant an award of indemnity costs.

[11] The defendant is entitled to a reasonable award of costs. The principles relating to the assessment of such awards in this Court are well established – *Binnie v Pacific Health Ltd*,[4] and I see no reason to depart from them in this case. I do, however, take into account the *Calderbank* offer referred to in [7] above. The costs identified in the defendant's schedule of costs appear to have been reasonably incurred and, applying the two thirds rule, together with an allowance in recognition of the *Calderbank* offer, I fix the award in the sum of $2,850.

[12] Disbursements have not been separately indentified in the schedule of costs but the invoices attached to counsel's memorandum include disbursements, simply describing them as "Office Expenses (incl GST)". That description is inadequate to substantiate any claim for disbursements and I, therefore, disallow any claim under that head.

A D Ford
Judge

Judgment signed at 2.30 pm on 24 June 2011

[4] [2002] 1 ERNZ 438.