IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 77
ARC 62/09

IN THE MATTER OF	an application for costs
BETWEEN	DAVID MERCER Plaintiff
AND	MAORI TELEVISION SERVICE Defendant

Hearing: By memoranda filed on 5 and 26 November, 13 December 2010 and 2 March 2011

Judgment: 1 July 2011

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] In my judgment in favour of the plaintiff issued on 8 October 2010,[1] I reserved costs and invited the parties, if they could not agree, to file and serve memoranda. Agreement could not be reached and memoranda have been filed. The plaintiff was awarded 3 months ordinary time remuneration, less 25 percent for contributory conduct and $7,500 for humiliation, loss of dignity and injury to feelings being $10,000 also reduced by 25 percent for contribution.

[2] Counsel for the plaintiff, Ms Eden, submitted that as a starting point, costs should follow the event and should be at least two thirds of the actual and reasonable costs. The total hearing time was approximately 2.5 days, the total costs incurred by the plaintiff in the Court, including disbursements and GST, amounted to $25,154.61. The fee component of that, excluding GST, amounted to $21,946 and disbursements were said to total $1,081.38. Copies of the invoices rendered were attached to the plaintiff's memorandum.

[1] [2010] NZEmpC 133.

[3] Mr Edwards, counsel for the defendant, submitted that the plaintiff had provided insufficient information to support the submission that his costs were reasonable and his memorandum should have given the Court sufficient information to systematically assess the reasonableness of the costs he actually incurred by summarising the amount of time spent in carrying out each aspect of the work. In support of this position, Mr Edwards cited *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*[2] and *Merchant v Chief Executive of the Department of Corrections*.[3]

[4] Although the invoices that were attached were simply described as "professional services" and did not include any description of the work to which they related, the memorandum did provide the charge out rate for counsel's time. I agree with the views of Judge Couch, expressed in both cases above, that a failure to provide information necessary to support a claim for costs can imperil a client's claim for reimbursements of those costs. However, I am assisted in the present case by the fact that, as Mr Edwards accepted and the Authority's determination of costs demonstrates, the defendant incurred $24,375 for attendances between 8 October 2008 and 16 March 2009, in respect of the plaintiff's claim for interim reinstatement and the investigation of his personal grievances in the Authority, over a two full day period. The defendant in the Authority sought a total of $17,975 as a contribution towards those costs. The Authority in its determination on costs, noted that the defendant's invoices did not identify the time taken in attendances or the hourly rate and therefore the Authority was unable to assess whether the total level of actual costs of the defendant was reasonable.

[5] In the present case, taking into account the information provided of the hourly rate and comparing the total costs incurred by the plaintiff in respect of the challenge to those costs incurred by the defendant in relation to the Authority's proceedings, I conclude that a fee of $21,946 exclusive of GST and disbursements was reasonable. I reached that conclusion by assuming that junior counsel's hourly rate there being no junior counsel in the trial, was not applied towards the appearance in Court but towards the preparation for trial.

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[2] WC 9A/08, 3 October 2008.
[3] [2009] ERNZ 108.

[6] Mr Edwards invited me to use Category 2B of the High Court scale as I did in *Tian v Hollywood Bakery (Holdings) Ltd*,[4] with a daily recovery rate of $1,880 making a total of $3,760 for the hearing, plus three days preparation time of $5,640 and a starting point, therefore, of $9,400. This would be against two thirds of $21,940 which would be $14,627. Mr Edwards then submitted that there were a number of mitigating factors which should reduce the award to a maximum of $4,700. These mitigating circumstances were that the plaintiffs had abandoned reinstatement on the morning of the first day of the hearing and the defendant had been put to consequent expense in preparing to oppose reinstatement. He submitted that the plaintiff had sought lost wages of $51,000 but was awarded only $9,711 and compensation of $10,000 which was reduced to $7,500. He submitted that the plaintiff's limited success ought to be taken into account as was the case in *Health Waikato v Elmsly*.[5]

[7] Mr Edwards also observed that the plaintiff had filed an amended statement of claim on 29 March 2010, which had departed significantly from the original statement of claim and this had involved the defendant in the additional expense of drafting a statement of defence in response. He also advised that to respond to the issues raised in the original statement of claim, the defendant was in the course of arranging to have evidence led from a witness now in Las Vegas, Nevada, and that a judicial conference on 23 March 2010 had dealt with this matter. After that conference the defendant was put to the expense of making arrangements with the Ministry of Foreign Affairs to facilitate the calling of that evidence. When the amended statement of claim was received by the defendant six days later it became apparent that the witness would no longer be required to give evidence.

[8] Ms Eden submitted that the plaintiff was successful in his challenge in comparison to the rejection of his grievance by the Authority, although he did not receive an award of the full losses he claimed. She submitted that the plaintiff had shortened the potential duration of the hearing by not pursuing his claim for reinstatement. She also submitted, in reliance on the decision of the Court of Appeal

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[4] [2010] NZEmpC 24 at [30].
[5] [2004] 1 ERNZ 172 (CA).

in *White v Auckland District Health Board*,[6] that although the plaintiff's conduct had been held to have contributed to his dismissal, and therefore reduced his remedies, it should not be taken into account a second time in assessing his entitlement to costs. I accept that principle.

[9] Ms Eden submitted that, given the plaintiff's success, the duration of the hearing and the reasonable level of actual costs, this should result in an award in his favour in excess of two thirds.

[10] Mr Edwards had relied on a Calderbank offer, an offer without prejudice as to costs made on 8 March 2010, which he said totalled $14,312.50 based on the following terms:

(a) The defendant would waive its right to recover $6,500 as a consequence of the Authority's costs determination.

(b) It would pay the plaintiff a compensation payment of $5,000, without deduction, pursuant to s123(1)(c)(i) of the Employment Relations Act 2000.

(c) It would contribute $2,500 plus GST towards the plaintiff's legal costs.

[11] Mr Edwards reliance on the Calderbank offer appeared to be conditional upon the defendant's appeal to the Court of Appeal being successful and the lost remuneration award overturned. The defendant was not successful in obtaining leave to appeal, see *Maori Television Service v Mercer.*[7]

[12] Mr Edwards referred to reg 68 of the Employment Court Regulations 2000 which requires the Court to take into account offers made without prejudice as to costs. However, as Ms Eden submitted, the offer contained in the Calderbank letter was not equal to or in excess of what the plaintiff achieved at the hearing and

[6] [2008] ERNZ 635.
[7] [2011] NZCA 30, 22 February 2011.

therefore should be ignored, especially in light of the Court of Appeal's refusal to leave to appeal.

[13] In Mr Edwards response to the plaintiff's memorandum as to costs, he also sought an order staying the fixing of the costs pending the outcome of the appeal to the Court of Appeal. Ms Eden had responded at some considerable length opposing the stay that was sought. In the event, the decision of the Court of Appeal declining leave, left the way open without any further objection by the defendant to the Court fixing costs in both the Court and in the Authority.

[14] I have considered all the matters raised in the submissions and, as I have indicated, have concluded that $14,627 being two thirds of what I have held to be actual and reasonable costs, was an appropriate starting point. I consider that a deduction should be made from this amount of an allowance for wasted costs the defendant was forced to incur in opposing the plaintiff's application for reinstatement, which was abandoned without any notice on the first day of the hearing.

[15] I also make a further allowance for the wastage of costs incurred by the defendant in the arrangements it was endeavouring to make to have a witnesses called in Las Vegas. This was no longer necessary when the plaintiff amended his claim six days after the judicial conference which in part dealt with this issue.

[16] I do not consider that any other of the mitigating factors relied on by the defendant justifies a further reduction. I have also taken into account Mr Edwards submissions as to what costs may have been awarded in the High Court on a category 2B basis. However, I observe that the various attendances covered in the High Court Rules do not always reflect the attendances in preparing a case in the Employment Court. Dealing with the matter in the round, I order that the defendant pay the sum of $11,000 as a contribution to the plaintiff's legal fees.

[17] Whilst there has been no separate application for costs in relation to the opposition by the plaintiff to the defendant's application for stay, I consider that the award that I have made is sufficient to cover those attendances.

[18] Turning to the disbursements incurred by the plaintiff, I note Mr Edward's submission that the plaintiff has apparently sought reimbursement for the costs of engaging a process server when that was entirely unnecessary given that the statement of claim could have easily been served on the defendant by way of courier or post, in accordance with the Employment Court Regulations 2000. I therefore reduce the disbursements by the amount of $90 from the $1,081.38 sought and award the plaintiff the total sum of $991.38, covering filing fees, hearing fees and courier costs.

[19] I turn now to the costs in the Employment Relations Authority. I have observed that the Authority awarded the defendant $6,500 for a one and a half day investigation and a half day dealing with the interim reinstatement application. This was on the basis of a notional daily rate of $3,000 a day. I consider that it is an appropriate basis for awarding costs in favour of the plaintiff for the one and a half day investigation which would give a notional rate of $4,500.

[20] As to the half day interim reinstatement hearing, it is difficult to assess whether the plaintiff should receive any contribution towards costs on his unsuccessful application in view of the withdrawal of the reinstatement application before the Court. I consider that for that half day in the Authority that costs should lie where they fell.

[21] The defendant received another $500 for the time wasted on the plaintiff's allegations that the defendant had relevant security camera footage which had been produced for the investigation when the plaintiff knew from 16 June 2008 that there was no such footage. In all the circumstances I consider that an award of $4,500 in favour of the plaintiff as a contribution towards his costs in the Authority would be appropriate. To this I add the disbursements of $220 for the filing fee and the investigation meeting, making a total of $4,720.

Summary

[22] As a contribution towards the plaintiff's costs and disbursements in the Employment Court I award him the total of $11,991.38.

[23] As a contribution towards his costs and disbursements in the Employment Relations Authority I award the plaintiff the total of $4,720.

B S Travis
Judge

Judgment signed at 4.30pm on 1 July 2011