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

**[2011] NZEmpC 85**
**ARC 18/10**

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| IN THE MATTER OF | an application for costs |
| BETWEEN | LYNETTE MELVILLE<br>Plaintiff |
| AND | AIR NEW ZEALAND LIMITED<br>Defendant |

Hearing: By submissions filed on 22 December 2010 and 2 February 2011

Judgment: 12 July 2011

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**COSTS JUDGMENT OF JUDGE B S TRAVIS**

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[1] In my judgment[1] of 8 July 2010, I reserved costs and sought memoranda if agreement could not be reached. Costs have not been agreed. Memoranda have now been filed.

[2] Mr Cleary, counsel for the defendant, has submitted that an award of costs should follow the principles set out in the well known trio of cases *Binnie v Pacific Health Limited,*[2] *Victoria University of Wellington v Alton-Lee,*[3] and *Health Waikato Ltd v Elmsly.*[4] Mr Cleary submitted that as the defendant was successful in defending the plaintiff's claim, costs should follow the event for a half day defended hearing which involved three affidavits filed by the plaintiff and two causes of actions identified in the plaintiff's statement of claim.

[3] The defendant has incurred legal costs, exclusive of GST, of 32.3 hours at $330 per hour, totalling $10,659. Disbursements of $79.40 for printing and

[1] [2010] NZEmpC 87.
[2] [2002] 1 ERNZ 438 (CA).
[3] [2001] ERNZ 305 (CA).
[4] [2004] 1 ERNZ 172 (CA).

photocopying were also claimed. Mr Cleary submitted that the costs were reasonably incurred by the defendant because the issue at stake, although preliminary in nature, was potentially final as to the plaintiff's claim for unjustified dismissal which included claims for lost wages, compensation of $14,000 and reinstatement. Mr Cleary attached the tax invoice for the work carried out, which shows in considerable detail the various attendances up to and including the hearing. He observed that although the factual and legal issues were relatively discrete, they encompassed legal matters of some import, sufficient for the plaintiff to seek leave to appeal the Employment Court's judgment.

[4] Mr Cleary submitted that there were no particularly significant factors which might increase or decrease the usual starting point of two thirds of the actual and reasonable costs and therefore $7,000 was sought together with the disbursements of $79.40. Finally, Mr Cleary observed that it was the defendant's understanding that, as the plaintiff was represented by her union, it was the union's practice to pay the costs of unsuccessful litigants and therefore her financial ability to pay was not relevant to the question of costs.

[5] Mr Lloyd, counsel for the plaintiff, submitted that any costs award should be very much at the lower end of the scale for the following reasons:

- The matter concerned only a preliminary issue.
- The legal issues involved were straightforward and by no means complex.
- There was little, if any, dispute over the facts.
- The defendant called no witnesses of its own.
- The hearing only occupied half a day.
- The defendant's case was in all material respects the same as had been presented in the Employment Relations Authority and therefore much of the work would have already been done.
- The defendant's claim for costs was limited only to the costs associated with the Court proceedings.

[6] As Mr Lloyd pointed out, the matter concerned whether or not a personal grievance had been raised within 90 days and, if it had not, whether the exceptional circumstances described in s 115(b) of the Employment Relations Act 2000 applied. He observed that the facts were not in dispute.

[7] Mr Lloyd submitted that the costs sought were manifestly unreasonable and inconsistent with the approach adopted by the Employment Court towards the level of costs routinely awarded. He observed that the purpose of a costs award is not to punish or express disapproval, but to compensate by way of contribution, rather than indemnity, the successful party put to expense, citing *Reid v New Zealand Fire Service Commission.*[5] Mr Lloyd then submitted strongly that the costs incurred were not reasonable for the purpose of the usual starting point of two thirds contribution. He made no criticism of the fees charged by Mr Cleary to his client or of the defendant's decision to engage his services, especially given its size and wealth. However, he submitted that the case was not of a sufficiently complex or special nature that it was necessary to engage a barrister with a billable rate of $330 an hour and that the plaintiff should not be required to foot that bill.

[8] Mr Lloyd also submitted that a useful comparison could be made with the High Court Rules, although he accepted that the Employment Court is not bound by them. He submitted this would be a category 1 case where proceedings were of a straightforward nature, able to be conducted by counsel considered junior in the High Court, that the daily recovery rate for such a case would be $1,250 and this matter only occupied half a day.

[9] Mr Lloyd then cited from *Transmissions & Diesels Ltd v Matheson*[6] at para 28 where the Court of Appeal stated:

> In short, as a matter of proportionality, litigation in this field should not become so expensive as to unreasonably deter parties in employment disputes from exercising their rights.

[10] Mr Lloyd also submitted that the defendant's claim was well outside the range of costs awarded by the Employment Court, citing *Richardson v Board of*

[5] [1995] 2 ERNZ 38.
[6] [2002] 1 ERNZ 22 (CA).

*Governors of Wesley College*[7] where I had analysed the range of awards awarded in the Employment Court and, with one exception, they were between $3,800 to $6,400 dollars per day. He submitted that approach had been approved by the Court of Appeal in *Transmissions & Diesels Ltd* which held in substance that costs of $9,285 per hearing day were unreasonable and reduced them to $40,000 being approximately $5,700 per day for a seven day hearing. He submitted that the *Transmissions & Diesels* case was significantly more complex than the present matter which only occupied half a day.

[11] Mr Lloyd then addressed in some detail the submissions of the defendant. He submitted there was no connection between the defendant's claim as to the reasonableness of its costs and the remedies sought by the plaintiff in her substantive claim and the fact that the outcome was final in nature. He also submitted that the scope of the hearing was substantially the same as that in the Authority and that the facts and legal issues remained unchanged. He submitted that the fact that the plaintiff had chosen to seek leave to appeal, because she considered the Court was wrong in its judgment, was irrelevant to the issue of costs. He accepted that the proceedings were conducted in a relatively straightforward fashion but did not accept that the financial status of the plaintiff was irrelevant. He submitted that any arrangements that the plaintiff might have with the union for the purposes of costs were irrelevant. The plaintiff was employed on a modest income, whereas, he contended, the defendant is one of the largest corporate entities in New Zealand, recording a nett profit of $82 million in 2010.

[12] Mr Lloyd submitted that, objectively, a reasonable contribution towards costs would be no more than $1,500 plus disbursements.

## Discussion and conclusion

[13] I first note that, contrary to the submission that Mr Lloyd made my decision in *Richardson* was not expressly approved by the Court of Appeal in *Transmissions & Diesels Ltd*, but merely cited. In the *Richardson* case I was examining the costs decision by the Employment Tribunal of $130,000 plus $3,500 disbursements as a

[7] [1999] 2 ERNZ 199 at 229-230.

contribution towards actual costs and disbursements of $217,392. This covered an unsuccessful application for removal to the Court and an adjudication which ran for 12 days. I compared that with some first instance cases in the Employment Court concerning substantial litigation involving extensive application of resources, where awards of costs of $50,000 or more were made and, with one exception of a daily rate of $9,375, the others fell between $3,800 and $6,400 per day. The Tribunal's award in *Richardson* equated to a rate of $11,666 per day gross and was the highest ever award under the Employment Contracts Act 1991. It was set aside in any event as a result of the appellant's successful appeal and therefore my comments were in the nature of obiter. Since the time of that decision some 12 years ago costs awards have inflated. It may not be a reliable guide to the current range of costs awards in the Court and there have been other Court decisions on the range of costs in the Employment Relations Authority.

[14] I also do not accept Mr Lloyd's submission that the analogy with the High Court costs should be to category 1 proceedings of a straightforward nature, able to be conducted by counsel considered junior in the High Court. I consider the current proceedings would, by analogy be category 2 as they were of average complexity requiring counsel with skill and experience considered average in the Employment Court. This would only raise the daily recover rate to $1,880. I accept the force of Mr Lloyd's submission that this is still a considerable distance from the $7,000 the defendant is seeking for a half day hearing.

[15] I also accept Mr Lloyd's submission that there would have been some duplication as it does appear the defendant had presented a similar argument to the Employment Relations Authority.

[16] Against this is that the award sought covers all attendances on the challenge and the half day hearing did dispose of the plaintiff's claim in its entirety. Further, although I am invited by Mr Lloyd to ignore the fact that the plaintiff was represented by her union, in a very real sense it was the failure of the union to have raised the grievance in the first place which led to the plaintiff's difficulties and I infer that it is unlikely that she will have to bear the burden of any costs awarded that I make.

[17] In all the circumstances I award $3,000 as a contribution towards the defendant's costs, inclusive of the disbursements for printing and photocopying which I regard as part of office overheads.

B S Travis
Judge

Judgment signed at 2.30pm on 12 July 2011