

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2012] NZEmpC 113  
ARC 101/11**

IN THE MATTER OF                      a challenge to a determination of the  
Employment Relations Authority

AND IN THE MATTER OF costs

BETWEEN                                TRUDY BUTTERWORTH  
Plaintiff

AND                                        TBA COMMUNICATIONS LIMITED  
Defendant

Hearing:            By submissions filed on 24 April and 16 May and 31 May 2012

Counsel:           Mr M Ryan, counsel for plaintiff  
                     Ms G Stone, counsel for defendant

Judgment:        18 July 2012

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**COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS**

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[1]     The plaintiff brought a de novo challenge against a compliance order issued by the Employment Relations Authority in respect of an earlier costs award made against her. The original costs determination had followed a personal grievance brought by the plaintiff against the defendant. No time limit was set by the Authority for payment of costs and nor was there any express requirement that the amount be paid in a lump sum. The plaintiff failed to pay costs in full, although she had made some payments towards the outstanding amount. The defendant filed an application with the Authority for a compliance order, which was granted. The essential basis of the challenge was that the Authority had no jurisdiction, in the circumstances, to issue a compliance order.

[2] The challenge was dismissed, for reasons set out in a judgment dated 17 February 2012.<sup>1</sup> Costs were reserved. The parties were invited to seek agreement as to costs. That has not been possible. Accordingly, the matter has come back before the Court for determination.

[3] The defendant seeks a contribution towards its costs in the sum of \$2,500, having incurred total costs of \$4,187.50 (GST exclusive).

[4] The plaintiff submits that the costs said to have been incurred by the defendant are not reasonable and that, in the circumstances, costs ought to lie where they fall. It is said that the challenge related to a technical legal point and that the Court's judgment cleared up a degree of confusion in respect of compliance orders issued in circumstances similar to the plaintiff. Mr Ryan, counsel for the plaintiff, makes the point that the plaintiff has, at no stage, contended that she does not owe the defendant the costs ordered against her.

[5] The Court has a broad discretion to award costs. That discretion is to be exercised in accordance with principle. It is well established that the usual starting point for assessing costs in this Court in ordinary cases is 66 percent of actual and reasonable costs. From that starting point, factors that justify either an increase or a decrease are assessed.<sup>2</sup>

[6] Counsel for the defendant, Ms Stone, has filed a memorandum setting out the actual costs said to have been incurred by the defendant in relation to proceedings in this Court (being \$4,187.50, GST exclusive). The memorandum details the attendances involved and refers to an hourly charge out rate of \$300.

[7] Mr Ryan does not take issue with the actual nature of the legal costs incurred, rather his focus is on whether they are reasonable or not. In the circumstances, I accept that the defendant incurred actual legal costs of \$4,187.50.

[8] The hearing occupied half a day. Mr Ryan submits that costs ought to have been reduced, because no written submissions were filed and because there were no

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<sup>1</sup> [2012] NZEmpC 24.

<sup>2</sup> *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

previous authorities directly on point. While that it so, there was a need to carry out research and analysis of the legal position, particularly given that it had not previously arisen for judicial consideration. I do not consider that the costs incurred by the defendant in preparing for, and attending, the hearing (of \$1,650.00) were unreasonable in the circumstances. Rather, they were relatively modest. Nor do I consider that the other costs incurred, including in considering the grounds of challenge, preparing a statement of defence, and preparing an affidavit were unreasonable.

[9] I do not accept that the sundry expense referred to (namely gown hire) is properly claimable.

[10] Having regard to the nature of the proceedings, the scope of the challenge, and the factors relevant to it, I consider that the costs actually incurred (minus \$17.50 for sundry expenses) were reasonable.

[11] Counsel for the defendant submits that the contribution to costs ought to be adjusted upwards to reflect the way in which the case was conducted by the plaintiff. In this regard reference is made to the “outright” dismissal of the plaintiff’s challenge and a submission that the plaintiff ought to have applied to the Authority for a variation under cl 15(2) of Schedule 2 of the Employment Relations Act 2000 rather than pursuing the challenge. It is also submitted that the plaintiff did not fully disclose her financial position, that she had the means to pay the Authority’s costs award and that she was simply seeking the Court’s assistance to obtain an interest free loan from the defendant.

[12] Counsel for the plaintiff submits that to impose a further costs award on the plaintiff, in the circumstances of this case, could be seen as penalising the plaintiff for testing a legal point.

[13] I accept that, as Mr Ryan says, the challenge brought before the Court involved determination of a narrow legal point, however, I do not consider that this weighs in favour of the overarching submission he advances that costs should lie where they fall. The plaintiff had other options available to her, including an

application for variation before the Authority. While she was entitled to test the legal position in the Court, that does not mean that she could do so with costs immunity. There may be some general utility in a judgment on the points raised by the challenge, but this case fell well short of being in the nature of a test case. I do not consider it appropriate for the defendant to essentially bear the costs burden arising out of the litigation choices made by the plaintiff.

[14] While a party's conduct before the Court may be relevant to a determination of what an appropriate contribution towards costs might be, I do not consider that the issues raised on behalf of the defendant justify an increase in costs. The plaintiff was entitled to challenge the basis for the Authority's compliance order (despite her financial position) and, while unsuccessful, the arguments advanced on her behalf were not completely devoid of merit.

[15] In the circumstances, and having regard to the relevant factors identified, I consider that an award of the amount sought by the defendant (namely \$2,500) is appropriate.

[16] The plaintiff must accordingly pay the defendant \$2,500 by way of a contribution to its costs. No disbursements were sought and accordingly none are ordered.

Christina Inglis  
Judge

Judgment signed at 3.15pm on 18 July 2012