IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 10
CRC 10/10

IN THE MATTER OF	proceedings removed from Employment Relations Authority
BETWEEN	BARRY EDWARD BRUNTON Plaintiff
AND	GARDEN CITY HELICOPTERS LIMITED Defendant

Hearing: By memoranda filed on 11 July, 10 August and 26 August 2011

Judgment: 1 February 2012

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] In my judgment[1] in favour of the defendant, which found that the plaintiff was not an employee, I reserved costs. As the parties have been unable to agree those costs memoranda have been filed. The defendant seeks an order for costs in its favour both in this Court and in the Employment Relations Authority.

[2] In relation to costs in the Authority, Mr McPhail, the advocate for the defendant, submits that the principles are those set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.[2] He submits that the conduct of the plaintiff, then the applicant, increased the defendant's costs. Detailed tax invoices were attached to the defendant's memorandum showing the hourly rates charged and the attendances involved.

[1] [2011] NZEmpC 29.
[2] [2005] ERNZ 808.

[3] The plaintiff had lodged a statement of problem on 3 November 2009 in which he sought an order for interim reinstatement pending the hearing of his personal grievance. Urgency was assigned to the matter. Mediation occurred but did not resolve the issue. The defendant applied for removal of the matter to the Employment Court to have the preliminary matter as to the plaintiff's status determined before the hearing of the interim reinstatement application. That application for removal was successfully opposed by the plaintiff and refused.[3] On 23 November 2009 the plaintiff withdrew his application seeking interim relief and Mr McPhail sought costs.

[4] The plaintiff then applied for removal of the proceedings to the Employment Court and the defendant opposed that application. The matter was duly removed to the Employment Court over the defendant's objections.[4] The issue of the costs in relation to the withdrawal of the interim reinstatement application was also removed to the Court.

[5] Mr McPhail submitted that the defendant, having unsuccessfully applied for an initial determination on the jurisdiction issue and to have the matters removed to the Court, was put to additional expense because the plaintiff withdrew his application for interim reinstatement and then applied for removal. Mr McPhail advised that this was opposed because the defendant considered the Authority was then prepared to deal with the threshold jurisdiction issue. Mr McPhail accepts that the plaintiff was successful in his bid for the removal of the proceedings but submitted the plaintiff had merely achieved what the defendant had sought all along, which was to have the preliminary jurisdiction issue determined before the substantive. Mr McPhail submitted that the entire set of interlocutory proceedings could have been avoided by more prudent use of the more appropriate judicial process of the plaintiff seeking a declaration pursuant to s 6(5) of the Employment Relations Act 2000, (the Act) citing *Lowe v New Zealand Post Ltd.*[5] This process, Mr McPhail submitted, would have avoided all of the costs incurred in the Authority.

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[3] CA 200/09, 19 November 2009.
[4] CA 54/10, 9 March 2010.
[5] [2003] 2 ERNZ 172.

[6] On this basis Mr McPhail submitted that the defendant was entitled to a greater sum than the normal contribution towards its costs in the Authority. Alternatively, in these unusual circumstances, he submitted that the defendant's lack of success in the interlocutory matters in the Authority should not reduce the amount of costs awarded to it.

[7] The defendant also sought costs for having to attend mediation in relation to the interim reinstatement proceedings which were abandoned by the plaintiff.

[8] Mr McPhail did not indicate precisely what contribution towards the defendant's costs in the Authority the plaintiff was seeking, although I note from the invoices that, with GST, the costs incurred by the defendant in the Authority exceeded $25,000.

[9] As to the costs in the Employment Court, Mr McPhail referred to the triumvirate of Court of Appeal decisions on costs: *Victoria University of Wellington v Alton-Lee,*[6] *Binnie v Pacific Health Ltd*[7] and *Health Waikato Ltd v Elmsly.*[8] He observed that the process of document disclosure covered documents created over nearly 14 years and this had involved a considerable amount of time on his part, the defendant's management and instructing counsel. It had produced bundles of documents exceeding 1,650 pages filling four Eastlight folders.

[10] Mr McPhail advised that the defendant's costs in the Court, excluding GST, totalled $66,596.46 and of this disclosure had accounted for approximately $15,900. In addition Mr McPhail sought reimbursement of the expenses incurred for management time, citing *Forbes v Beca Simons Ltd,*[9] where executive time was awarded.

[11] After observing that the matter was complex, discovery was protracted and unnecessarily extensive because of the plaintiff's requests, Mr McPhail submitted that it was highly relevant that the plaintiff was content with the contractual

[6] [2001] ERNZ 305.
[7] [2002] 1 ERNZ 438.
[8] [2004] ERNZ 172.
[9] AC 61/01, 5 September 2001.

relationship through his company with the defendant over an extended period of time and he had not taken up opportunities to become an employee. Mr McPhail cited *Otene v A G Walters & Sons Ltd*,[10] where Chief Judge Colgan stated at paragraph [4]:

> … Where speculative claims or ones without merit are pursued, a party might be considered to have incurred unnecessarily costs to the other party, pointing to a higher proportion of costs to be awarded. …

[12] On this basis Mr McPhail submitted that the defendant should be entitled to a greater than normal contribution to the significant costs it had incurred.

[13] Mr Moran, counsel for the plaintiff, filed a memorandum in response submitting that each party should bear its own costs while the proceedings were before the Authority and that an award of $20,000 in favour of the defendant would represent a reasonable contribution towards its costs for the proceedings before the Court.

[14] Mr Moran submitted that in the Authority it was the plaintiff, to a very large degree who was unsuccessful on four occasions in respect of interlocutory matters and that this should be taken into account in the usual way. He pointed out that the Authority had even declined to deal with the defendant's application for costs on the withdrawn interim reinstatement application, as costs were reserved by the Authority for the Court.

[15] Mr Moran advised that notice of the plaintiff's intention not to pursue his reinstatement application was given on the morning of Monday, 23 November 2009, the investigation hearing having been scheduled for 27 November 2009. He submitted that the withdrawal was made on the basis of the affidavits filed by the defendant. These, he advised, had for the first time, raised allegations concerning the plaintiff's competency and integrity which, if reinstatement had been ordered, would have entailed more than the usual discomfort of reinstatement before the substantive allegations were dealt with.

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[10] AC 42A/07, 30 July 2007.

[16] Mr Moran contended that the plaintiff was entitled to apply, in the first instance in the Authority, by way of a personal grievance and his approach had not been erratic, as alleged by Mr McPhail. Mr Moran submitted that it was the defendant that had taken every point, largely unsuccessfully, in the Authority. The plaintiff's costs before the Authority totalled just under $16,000 inclusive of GST and disbursements. Mr Moran observed that the defendant's costs were over 50 percent higher. Mr Moran submitted that the current daily tariff in respect of costs for a successful party for a one day hearing before the Authority was $3,000. He also submitted that mediation costs should not be awarded as it was a proper course for the parties to have taken.

[17] Mr Moran observed that the defendant had engaged both a specialist employment advocate and also used its solicitors in defence of the plaintiff's claim, which Mr Moran submitted would have increased costs. In summary, Mr Moran submitted that it was the plaintiff who was the successful party in the Authority and therefore would have been entitled to have applied for costs but that the appropriate award was that each party should bear its own costs.

[18] As to the costs in the Employment Court, Mr Moran submitted that the level being sought was unreasonable in the context of a three day hearing. Mr Moran submitted that actual and reasonable costs should not have exceeded $50,000 and applying the 66 percent nominal starting point this would yield a costs amount of $33,333.

[19] Mr Moran submitted that support for this could be found by assessing costs on the basis of Schedules 2 and 3 of the High Court Rules on a 2B basis which would result in total costs of a little under $28,000.

[20] Mr Moran accepted that the plaintiff's evidence was extensive and that the agreed bundle of documents was lengthy, but submitted that this was necessary to deal with a 14 year relationship. Some of the documents, he submitted, were generic, including draft and final versions of flight rosters, invoices and other lengthy documents which were included at the request of the defendant including the entire operations manual of 160 pages and pilot log book extracts of 111 pages.

[21] Mr Moran noted that the defendant had filed two slightly different amended statements of defence and filed them both on the same day. Mr Moran also opposed the making of any order to recompense executive time and submitted that the amount being claimed was excessive.

[22] Mr Moran invited the Court to take into account the circumstances that gave rise to the plaintiff's claim, namely the termination of an employment relationship without any forewarning. He observed that an unusual feature of this case was the defendant's permission for the plaintiff to take paid leave on terms that were virtually identical to the annual leave taken by formally acknowledged employees of the defendant.

[23] Mr Moran also invited the Court, under its equity and good conscience jurisdiction, contained in s 189 of the Act, to take into account the plaintiff's ability to meet any costs awards, referring to *Shepherd v Scan Audio New Zealand Ltd.*[11] Mr Moran submitted that the termination of the relationship has had a significant negative impact on the plaintiff's financial situation and his income since that time had been very limited. Mr Moran submitted that the plaintiff had difficulty obtaining work as a pilot and that his reputation has been damaged. Mr Moran advised that the plaintiff and his wife had purchased a small textile business which had struggled and been affected by the Christchurch earthquake. He purported to summarise the plaintiff's asset position which was subject to mortgages and contrasted this with the position of the defendant which he stated was a very lucrative family owned business with assets of many millions of dollars in value.

[24] Mr Moran submitted that, in all the circumstances, a reasonable contribution towards what he submitted would have been reasonable costs of approximately $50,000 would be $20,000.

[25] Mr Moran then submitted that this was a case where, under the Court's equity and good conscience jurisdiction, it should allow an equitable set off of the amount of the final invoice issued by the plaintiff's company, Carbine Services Ltd, a copy of which Mr Moran attached to his costs memorandum. It is dated 4 December 2009

[11] [1999] 2 ERNZ 374 at 379.

and purports to total the sum of $33,300 inclusive of GST. As an alternative, Mr Moran, while acknowledging that the Court might have reservations with regard to adopting the proposed approach as the plaintiff and his company were separate legal entities, sought to have enforcement of any costs order stayed until further order of the Court.

[26] Mr McPhail filed a reply to the plaintiff's submissions. He contended that had the matter been dealt with speedily in the Authority, this would have been cost effective for both parties and noted the statement of the Authority in its removal determination that the plaintiff could have applied directly to the Court to have his status determined. As to the question of multiple representation, Mr McPhail advised that the defendant's commercial lawyers were involved in giving instructions and supervising the discovery process and that there was no unreasonable inflation of costs as a result.

[27] Turning to the plaintiff's ability to pay, Mr McPhail observed that there has been no evidence to that effect by way of any affidavits filed. As to the equitable set off sought by the plaintiff, Mr McPhail submitted that there is no employment relationship and therefore the Court does not have the jurisdiction to make such an order. Finally, Mr McPhail observed that the plaintiff has not identified any ground for a stay of enforcement of any costs order.

[28] Dealing first with costs in the Authority, I accept Mr Moran's submission that costs should lie where they fall. Whilst I accept Mr McPhail's submission that costs were wasted in relation to the withdrawn interim application, these were more than offset by the defendant's four unsuccessful results in the interlocutory applications. I agree with Mr Moran that, with hindsight, the matter could have been approached more effectively by both sides.

[29] Turning to the costs incurred in the Court, I accept the force of Mr Moran's submission that the two thirds approach endorsed by the Court of Appeal depends first on an assessment of what the reasonable costs incurred were, as opposed to the actual costs incurred. This was a three day hearing and, although there was extensive disclosure, a figure in the range of $50,000 to $60,000 would be what I

consider to be a reasonable amount of costs in all the circumstances. Two thirds of the higher end of that figure would be $40,000. That also provides a larger than usual allowance towards disclosure costs. I consider that $40,000 would be a reasonable contribution towards the costs incurred by the defendant, including executive time involved in the disclosure process.

[30] I have insufficient evidence before me to show that the plaintiff has any lack of ability to pay and therefore do not intend to reduce the amount. The plaintiff is therefore ordered to pay the sum of $40,000 as a contribution towards the defendant's costs.

[31] I agree with Mr McPhail that this Court has no jurisdiction to order a set off in favour of a contracting company in a personal grievance setting. Finally, there is no material before the Court to justify a stay of the costs order I have made.

B S Travis
Judge

Judgment signed at 4pm on 1 February 2012