

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2012] NZEmpC 126  
ARC 62/08**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION Plaintiff
AND	NORSKE SKOG TASMAN LIMITED Defendant

Hearing: By submissions filed by the plaintiff on 18 April, 2 July 2012  
and by the defendant on 16 May and 2 July 2012

Counsel: L J Yukich, advocate for plaintiff  
Kylie Dunn and June Hardacre, counsel for defendant

Judgment: 1 August 2012

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**COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS**

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[1] The plaintiff pursued a successful challenge<sup>1</sup> against a determination of the Employment Relations Authority. Costs were reserved. The parties have been unable to agree costs and accordingly the matter has come back before the Court.

[2] The proceedings related to a dispute about the interpretation and application of provisions in a collective agreement between the parties relating to holiday pay. The Authority dismissed the plaintiff's claim, for reasons set out in its determination, and awarded the defendant costs of \$750, together with disbursements of \$467.50.<sup>2</sup> The defendant accepts that those sums will be reimbursed to the plaintiff.

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<sup>1</sup> [2012] NZEmpC 56.

<sup>2</sup> AA 251A/08, 24 September 2008.

[3] The plaintiff seeks costs in relation to the Authority's investigation (of \$3,937.50 including the amount to be reimbursed) and on its challenge before the Court (of \$3,654.80), both totals including disbursements. The defendant submits that there is no basis for any costs award, as no costs have been incurred. It is submitted that if the Court finds that costs are payable, then an award of \$750 should be ordered in relation to the Authority's investigation, and an award not exceeding \$1,188.00 in this Court. In addition, the defendant also agreed the plaintiff was entitled to some of the claimed disbursements.

[4] The general principle is that costs should follow the event.<sup>3</sup> The Authority has a discretion as to whether costs should be awarded and the quantum of any award: *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.<sup>4</sup> In *Wackrow v Fonterra Co-operative Group Ltd*, Judge Shaw noted the difficulty for the Court in setting costs for an investigation hearing and held that the realistic way to assess costs is to base it on a notional daily rate.<sup>5</sup>

[5] Clause 19, Schedule 3, of the Employment Relations Act 2000 confers a broad discretion on the Court in determining costs. It provides that:

- (1) The court in any proceedings may order any party to pay to any other party such costs and expenses ... as the court thinks reasonable.

[6] The discretion to award costs, while broad, is to be exercised in accordance with principle. The usual starting point in ordinary cases is 66 percent of actual and reasonable costs. From that starting point, factors that justify either an increase or decrease are assessed.<sup>6</sup>

[7] While the approach to assessing costs in the Authority and the Court differs in material respects, the requirement that an applicant establish that costs have actually been incurred has equal application.

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<sup>3</sup> *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

<sup>4</sup> [2005] ERNZ 808.

<sup>5</sup> [2006] ERNZ 375 at [25]. See too *PBO*, where the Court adopted a notional daily rate of \$2,000.00 (at [59]).

<sup>6</sup> *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

[8] Mr Yukich has confirmed that he is a volunteer worker for the Electrical Union Inc, and does not receive any remuneration in that role. He says that a notional charge out rate (of \$80 per hour) is applied in relation to the advocacy services provided to various unions (including the plaintiff), and that the Electrical Union Inc has been invoiced for the advocacy services in this case. An opportunity was provided for a copy of the invoice to be filed, together with confirmation that it had been paid. In the event, no further material has been made available and the plaintiff has not been in a position to confirm that any costs have been paid (and hence incurred). In these circumstances, I am not prepared to make an order as to costs against the defendant. I am not satisfied, on the basis of the material before the Court, that the plaintiff actually incurred costs in either the Court or the Authority.

[9] The defendant accepts that it should meet the plaintiff's reasonable disbursements, but disputes the extent to which disbursements are claimed.

[10] The plaintiff claims the following disbursements in relation to the Authority's investigation – filing fee (\$70); office expenses (\$50); and expenses in relation to travel (\$600), which are sought by way of special damages. In relation to the proceedings in this Court, the plaintiff seeks disbursements of \$1,254.80, comprising \$200 (filing fee); \$50 (office expenses) and travel expenses of \$1,004.80.

[11] The defendant does not take issue with the plaintiff's claim for reimbursement of the filing fee, in both the Authority and the Court. It does, however, contend that disbursements for general office expenses should not be ordered and submits that the plaintiff's claim in relation to travel costs is excessive, and ought to be regarded as a disbursement (rather than treated as special damages). It submits that mileage for one round trip between Tokoroa and Rotorua is payable in relation to the Authority's investigation, and that this should be calculated at a rate of 70 cents per kilometre (the applicable Inland Revenue Department mileage rate at the time). In relation to the Employment Court proceedings, it is submitted that mileage for two return trips between Tokoroa and Auckland, based on the latest Inland Revenue Department rates (of 74 cents per kilometre), should apply.

[12] Mr Yukich seeks mileage at 80 cents per kilometre, and for three return trips between Tokoroa and Kawerau and one return trip from Tokoroa to Rotorua (totalling 750 km) in relation to the Authority investigation. He also seeks mileage for two return trips from Tokoroa to Kawerau and two return trips to Auckland from Tokoroa (totalling 1,256 km) for Court appearances. It is submitted that the trips to Kawerau were necessary to enable preparation of documents, research on historical instruments to be undertaken and for the preparation of affidavits. I accept that these trips were related to the conduct of the proceedings and that they were reasonably undertaken in light of the matters at issue in these proceedings. It is however unclear what the claim for 80 cents per kilometre is based on. In the circumstances, I consider it appropriate to adopt the applicable Inland Revenue Department rates. I also accept counsel for the defendant's submission that these expenses are properly characterised as disbursements rather than special damages.<sup>7</sup>

[13] This leads to a figure of \$1,454.44 for mileage.

[14] I do not consider that ordinary office costs ought to be recoverable: *Oldco PTI New Zealand Ltd v Houston*,<sup>8</sup> and decline to make any orders in relation to the sums sought.

## **Result**

[15] The defendant is to pay the plaintiff \$1,724.44 by way of disbursements for mileage and filing fees in this Court and the Authority. I make no order as to costs. This amount is payable immediately upon judgment.<sup>9</sup>

Christina Inglis  
Judge

Judgment signed at 12.40pm on 1 August 2012

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<sup>7</sup> See *Binnie* at [17].

<sup>8</sup> AC 18A/06, 6 June 2006.

<sup>9</sup> *Butterworth v TBA Communications Ltd* [2012] NZEmpC 24 at [19].

