IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC13
ARC 37/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	MARITIME UNION OF NEW ZEALAND Plaintiff
AND	C3 LIMITED Defendant

Hearing: By submissions filed by the defendant on 7 September and 20 December 2011 and the plaintiff on 26 September 2011

Judgment: 2 February 2012

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] The defendant has applied to the Court for an order that the plaintiff make a reasonable contribution towards its legal costs incurred in legal proceedings which were withdrawn by the plaintiff on 17 August 2011, approximately 18 months after the initial Employment Court hearing but before the issue of judgment.

[2] This, in substance, is the opening paragraph of the defendant's memorandum as to costs dated 7 September 2011 but the memorandum goes on to seek an award of indemnity costs of $69,881.10, excluding GST and disbursements, although again later in the memorandum, disbursements of $945.54 are sought.

[3] The indemnity costs are sought by analogy with two decisions of the Court which awarded full indemnity costs where the plaintiff had withdrawn a claim at the "eleventh hour": see *Pars Transport Ltd v Lardelli*[1] and *Eden v Rutherford & Bond*

[1] WC 25/06, 13 December 2006.

Toyota Ltd.[2] Counsel for the defendant also observed that this Court has granted full reimbursement of disbursements where they have been properly incurred, citing *Wackrow v Fonterra Co-operative Group Ltd*.[3]

[4] In the alternative and applying the 66 percent starting point referred to by the Court of Appeal in *Binnie v Pacific Health Ltd*,[4] counsel for the defendant submits that the defendant would be entitled to the reimbursement of its costs in the sum of $46,121.53 plus disbursements of $945.54 to cover photocopying, printing and courier charges.

[5] Counsel for the plaintiff, Mr Mitchell, opposes the application for costs and submits that costs should lie where they fall. Both counsel have referred extensively to their views concerning the merits of the case, the circumstances in which it was withdrawn and the relevant authorities.

[6] Mr Mitchell referred to the memorandum of counsel for the defendant, filed on 7 September 2011, which attached tax invoices totalling the indemnity sum sought but each of which simply stated "our fee" without further detail of the attendances. Mr Mitchell cited *Merchant v Department of Corrections*,[5] *Eastern Bay Independent Industrial Workers Union Inc v Pedersen Industries Ltd*[6] and *Maritime Union of New Zealand Inc v TLNZ Inc*[7] as authority for the practice of applicants for costs to disclose not only what had actually been incurred but also to provide sufficient information to enable the Court to determine what part of the costs had been reasonably incurred.

[7] In the *Merchant* case, the Court stated there was no indication of how much time or effort was devoted to particular aspects of the matter or how the fees charged were formulated.[8] Mr Mitchell cited from the *Merchant* case to the effect that the failure by counsel to provide such detail is at their client's peril.[9] It would, he

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[2] [2010] NZEmpC 43.
[3] [2006] ERNZ 375.
[4] [2002] 1 ERNZ 438 at [14].
[5] [2009] ERNZ 108.
[6] AC 11A/09, 27 April 2009.
[7] [2008] ERNZ 91.
[8] At [7].
[9] At [11].

submitted, be open to the Court to simply make no order for costs, as the Chief Judge did in the *Pedersen Industries* case. Mr Mitchell also relied upon *Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)*[10] in which the Court compared a bare total of costs claimed with the scale of costs under the High Court Rules, applying a notional category and band.[11]

[8] On 30 September 2011, counsel for the defendant filed a memorandum in reply to the plaintiff's costs submissions, submitting that the plaintiff had provided details of the steps taken on the defendant's behalf. The Court was further advised that 237 hours were spent working on the challenge in the period from August 2009 until August 2010 and the relevant hourly rates for a partner, senior associate, solicitor and law clerk in both 2009 and 2010 were provided. Counsel for the defendant advised that, in addition to the usual steps taken in respect of any challenge, including the filing of the statement of defence and preparing submissions and evidence, this case required extensive research as to the way in which jurisdictions overseas dealt with the issue of the lifting of the "corporate veil".

[9] The memorandum also addressed counsel for plaintiff's submission that there was no longer a live issue by annexing the first and last pages of a current collective employment agreement between the defendant's subsidiary, TLNZ Ltd, and the plaintiff, which does not expire until 30 June 2012.

[10] Mr Mitchell took objection to the filing of this memorandum and counsel for the defendant sought leave from the Court for its filing. The matter was addressed by way of a telephone conference and, after hearing submissions, I granted leave to the defendant to file the memorandum and reserved leave to the plaintiff to reply. That reply was filed on 20 December 2011.

[11] Counsel for the defendant objected to the filing of those submissions contending that they should have been filed by 21 October. After hearing counsel by way of a further telephone conference call, I noted that no such time limit had been imposed and granted the plaintiff leave to file the memorandum of 20 December.

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[10] [2008] ERNZ 73.
[11] At [29].

Background

[12] The background to this challenge, as Mr Mitchell submitted, was in the nature of a dispute as to whether a collective agreement was applicable to employees of the defendant. Mr Mitchell submitted that the defendant must take responsibility for the confusion that had arisen as to the actual employer at the wharf at Tauranga because of the following: the branding of the operation was in the name of the defendant; the payslips referred to the defendant and the defendant's name was used on letters dismissing employees. He also observed that the collective agreement in place at that time in the Port of Auckland was between the plaintiff and the defendant and not the subsidiary TLNZ Ltd, which was claimed to employ labour in Auckland. Until the issue of the identity of the employer was resolved, the plaintiff was unable to have the underlying issue resolved.

[13] The Employment Relations Authority had found in favour of the defendant, finding that the plaintiff had entered into a collective agreement with the defendant's subsidiary in full cognisance of the corporate structure in which it stood. In the course of the hearing before the Court, it became clear that the plaintiff wished to pierce the corporate veil and obtain a ruling that the defendant was also bound by the collective agreement rather than only its subsidiary, TLNZ Ltd. The benefit of a successful outcome to that issue to the plaintiff was that if the collective agreement bound the defendant then other workers at the Port of Tauranga could be covered by the collective agreement, which on its face was due to expire on 1 March 2010.

[14] After the hearing concluded, the plaintiff made an application to amend the statement of claim. This was opposed by the defendant. After a further hearing, the plaintiff succeeded in its application.[12] By that stage, the Court had become aware that it was questionable whether there was still a live issue between the parties or whether the matter had been disposed of in subsequent negotiations by way of a new collective agreement. In the event, the Court was eventually told by Mr Mitchell that the matter was to be withdrawn as there was no longer a live issue. By a minute of 16 August 2011, I advised the parties that the plaintiff had withdrawn its

[12] [2010] NZEmpC 60.

proceedings and the Court would not issue a judgment on its merits. This led to the defendant's application for costs.

[15] Mr Mitchell confirmed that the parties had entered into a new collective agreement and that the issue of the names of the parties was a matter for bargaining and their identity has apparently been properly established.

[16] Mr Mitchell cited authorities, which I accept, which indicate that the *Binnie* principles as to costs may not be applicable to disputes. He cited, for example, the *Maritime Union* case where the Court stated:[13]

> I conclude that the costs judgments of the Court of Appeal in *Binnie* and *Elmsly* (referred to earlier) both applied to cases where the particular circumstances of an employee were dealt with at lengthy trials and in which all parties incurred [significant] legal costs. Those situations are distinguishable from the present case and others like it. This case is in the nature of a generalised dispute applicable not to a single employee but to a workforce generally and with broader implications also for employers, at least those in the same field. Unlike personal grievances or breach of contract claims at common law, it cannot be said that there are distinct winners and losers or even in such cases that the parties share stark elements of victory or defeat. In cases such as this, the position in law is examined and determined for the future reference of all parties so that individual and repeated litigation might be avoided or at leased minimised.

[17] To similar effect see *New Zealand Tramways Union (Wellington Branch) v Wellington City Transport Ltd (t/a Stagecoach New Zealand)*[14]and *Hansells (NZ) Ltd v Ma.*[15]

[18] Although the outcome in the present case was not determined by a judgment, events having overtaken this, I accept the force of Mr Mitchell's submission that there was sufficient uncertainty at the workplace at Tauranga Wharf for this matter to have been properly brought before the Court. For these reasons I also distinguish the "eleventh hour" decisions referred to by counsel for the defendant, this matter having in substance been resolved to the plaintiff's satisfaction by the new collective agreement. The withdrawal of the proceedings at that point is therefore not something for which the plaintiff should suffer the penalty of indemnity costs.

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[13] [2008] ERNZ 91 at [23].
[14] [2002] 2 ERNZ 435 at [74].
[15] AC 53A/07, 1 November 2007.

[19] I am not, however, persuaded that this is a case where the costs should lie where they fall. I consider it is a case where the defendant has been put to considerable expense without having the benefit of a resolution of the matter by judgment of the Court and is therefore entitled to a reasonable contribution toward the costs it has wasted.

[20] The hearing took 1.5 days with additional attendances in relation to the plaintiff's successful application for leave to amend the statement of claim.

[21] Mr Mitchell analysed the figures supplied by counsel for the defendant and submitted that the calculation provides for some 118 hours of time charged for each Court day which means an equivalent of approximately 15 days being charged for each Court day. He observed that, commonly, some two days are allowed for preparation for each hearing day. There is force in his submission that the defendant has taken a "Rolls Royce approach" to the defence of these proceedings, as it was perfectly entitled to do, but that the plaintiff should not be required to make a substantial contribution to that approach. It should only have to contribute to the defendant's reasonably incurred costs, in the context of a dispute.

[22] Mr Mitchell advised that should the Court be minded to award costs to the plaintiff, its costs amounted to $16,662.50 excluding the application for leave. This was not far above the High Court scale calculated by Mr Mitchell of $13,724.00 if this had been a Category 2 proceeding. Mr Mitchell submitted that the High Court scale should be further reduced to $10,000 to reflect what he submitted was the defendant's unreasonable defence of the application to amend the statement of claim.

[23] For a 1.5 day hearing, after the matter was already investigated by the Authority, I calculate that reasonably incurred fees should not have exceeded $30,000. In reaching that figure I have taken into account the plaintiff's costs. Two thirds of that figure, as the usual starting point where the matter is not a dispute, is $20,000. Taking into account the fact that this was a dispute and the defendant's unsuccessful opposition to the application to amend the statement of claim, I award the sum of $10,000, which is to include disbursements, to the defendant.

B S Travis
Judge

Judgment signed at 2.30pm on 2 February 2012