IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 140
WRC 2/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	MALCOLM FRENCH Plaintiff
AND	ACCIDENT COMPENSATION CORPORATION Defendant

Hearing: By submissions filed on 4 and 19 July 2012

Judgment: 22 August 2012

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] On 20 June 2012 this matter came before the Court for the hearing of an opposed application for adjournment by the plaintiff. At the outset of the hearing, however, counsel for the plaintiff advised the Court that no adjournment was being sought. Ultimately, I granted an adjournment after counsel for the defendant requested that I do so, and following extensive argument. I then indicated that costs in relation to the hearing should be resolved immediately and invited counsel to be heard. However, counsel for the plaintiff requested the opportunity to file written submissions. Having received submissions from both counsel, this judgment determines costs in relation to the adjournment hearing.

Background

[2] Regrettably, it is necessary to set out in some detail the background to this case. In so doing I draw on a minute issued on 4 July 2012 in which I explained my reasons for granting the adjournment.

[3] The plaintiff's claim is that he was disadvantaged during a restructuring process, and that he was unfairly dismissed. The defendant denies the allegations.

[4] The proceeding to resolve these claims was originally set down for hearing on 5-7 October 2011. The plaintiff filed an application for the adjournment of that hearing on 23 September 2011. The grounds advanced were that an amended statement of problem had been filed in the Employment Relations Authority along with an application to remove the new matters raised to the Court. Judge Couch granted the adjournment,[1] accepting that there was an obvious logic in the new claims and issues in the challenge being heard together once those matters were before the Court. Judge Couch adjourned the hearing on conditions, and ordered the plaintiff to pay costs of $1,000 to the defendant within 10 working days.

[5] The Employment Relations Authority subsequently removed the plaintiff's additional claims to this Court.[2] On 27 February 2012, Judge Ford granted the plaintiff's application to extend the time for filing a statement of claim in relation to the new matters and reserved costs.[3] A statement of claim and statement of defence were duly filed. A telephone conference was then convened before me on 17 April 2012. Counsel for the plaintiff, Ms Buckett, advised that there were outstanding discovery issues, and signalled that further applications might be advanced. For the defendant, Mr Churchman voiced concerns about the late stage at which such matters were being pursued. In the event timetabling orders were made, including in relation to disclosure. Ms Buckett later served a notice requiring disclosure on the defendant.

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[1] [2011] NZEmpC 119.
[2] [2011] NZERA Wellington 202.
[3] [2012] NZEmpC 32.

[6] Further timetabling orders were made by way of minute dated 17 May 2012. The parties were to file and serve any further interlocutory applications by 4.00pm, 24 May 2012. In the absence of any such applications being advanced, tentative hearing dates were to be confirmed and the proceeding set down for a two day hearing, commencing 2 July 2012. Leave was granted for either party to apply to the Court for further directions or orders on reasonable notice. In the event, no interlocutory application was filed by either party and the proceedings were accordingly set down for hearing.

[7] Ms Buckett filed a memorandum on 8 June 2012. A number of matters were canvassed in that memorandum, including a concern "that the matter has now been set down and timetabled for a hearing before the orderly disposal of interlocutories, in particular, discovery." She went on to observe that it "is difficult if not impossible to prepare evidence without completion of discovery." Counsel advised that third party discovery was required. She also advised that one of the plaintiff's intended witnesses (Dr Hartshorn) was unavailable on the date scheduled for the hearing.

[8] Ms Buckett filed a further memorandum of counsel on 11 June 2012, reiterating the need for third party discovery and advising that a material witness for the plaintiff would not be available (Dr Smith). She confirmed that this would likely present a major problem for the plaintiff as witness availability together with the requirement for third party discovery, meant that "the plaintiff is not in a position yet to properly present its case." Ms Buckett went on to state that the Court should exercise its discretion to vacate the current hearing, and that if this did not occur "it would result in a serious injustice to the plaintiff." She observed that there appeared to be no prejudice to the defendant in adopting such a course.

[9] The plaintiff swore an affidavit in support of the matters referred to in counsel's memoranda. He expressed the view in his affidavit (dated 11 June 2012) that the proceeding had been set down and timetabled prematurely and, from his perspective, was "not ready to proceed." He said that he intended to file a notice for third party discovery and outlined difficulties relating to the availability of Dr Smith and Dr Hartshorn. He concluded by saying: "I simply need to be given more time so

I can properly prepare my case and obtain the further information necessary to do so."

[10] Unsurprisingly, given the contents of the two memoranda filed by counsel for the plaintiff and the plaintiff's supporting affidavit, counsel for the defendant considered that the plaintiff was seeking an adjournment. A lengthy memorandum was filed setting out the grounds on which such an application was opposed.

[11] I issued a minute on 13 June 2012, referring to the matters raised by the plaintiff in relation to discovery and witness availability. I stated that it was apparent from the material filed on behalf of the plaintiff that what was being sought was an adjournment of the fixture and that this was strenuously opposed. The minute advised that a hearing was required on the opposed application and it was important that that occur without delay. Both counsel advised the Registrar of their availability for such a hearing on 20 June 2012.

[12] I also raised two other matters for the benefit of counsel. Firstly, that there was no direct evidence to support an application for an adjournment based on witness unavailability (there being only the plaintiff's affidavit, and counsel's memoranda, touching on the issue). Secondly, observing that the timeframe for filing the plaintiff's briefs of evidence had not been complied with, I directed that a will-say statement or draft brief of evidence for Dr Smith be filed and served in advance of the hearing of the application for an adjournment to assist the Court in determining the scope of the intended evidence, and to enable counsel for the defendant to assess whether or not Dr Smith would be required for cross examination or whether her evidence could be dealt with in another way.

[13] Despite this background, and the fact that a hearing was convened for the express purpose of dealing with an opposed application for an adjournment, Ms Buckett advised at the hearing that the Court and Mr Churchman had misapprehended what was being sought. When asked, it remained unclear what counsel for the plaintiff had apprehended the purpose of the hearing might otherwise have been. She suggested that it might be directed at dealing with the plaintiff's application for third party discovery. That suggestion was without merit, as the

application had been filed the evening before the hearing and could not possibly have been heard and determined the next morning, and in the absence of the party against whom orders were sought.

[14] Ms Buckett then advised that (in contrast to the concerns earlier identified in the plaintiff's sworn affidavit) the plaintiff wished to proceed to hearing on 2 July 2012. It was said that he was willing to be flexible. Ms Buckett suggested that issues that the plaintiff had raised in relation to the non-availability of a material witness (Dr Smith) could be dealt with by taking her evidence at some later date (Mr Churchman having advised that he did not require Dr Hartshorn for cross examination). Mr Churchman was not drawn to this proposal, which would require the defendant's evidence to be given before the conclusion of the plaintiff's evidence and a split hearing.

[15] Ms Buckett also submitted that issues relating to third party discovery from Catalyst Risk Management Ltd (Catalyst) could be resolved before the impending hearing, based on what she viewed as the "co-operative" stance adopted by Catalyst in its letter dated 19 June 2012. I did not share this optimism. The letter made it plain that Catalyst considered there to be a number of concerning features about the plaintiff's notice, that the 14 day timeframe for responding (which expired well after 2 July in any event) was insufficient, that issues of relevance arose, and that Catalyst required confirmation that the plaintiff would undertake to pay its actual and reasonable costs of complying with the request, which it indicated were likely to be substantial. Catalyst advised that it was taking legal advice in relation to the notice. While the letter did not suggest that Catalyst would be in any way obstructive in responding to the notice, it did not provide any level of comfort that the discovery issues that had been identified as pressing in counsel's earlier memoranda and in Mr French's affidavit would be satisfactorily resolved within a matter of days. I was unable to identify the basis for Ms Buckett's expressed confidence to the contrary.

[16] Ms Buckett was unable to explain why she had not taken the step of advising the Court and counsel for the defendant that the plaintiff was not applying for an adjournment. If there had been a misapprehension about what the plaintiff was seeking in the two memoranda of 8 and 11 June, and the plaintiff's affidavit, and in

light of the fact that it was clear that the 20 June 2012 hearing was set down for the purpose of dealing with an opposed application for an adjournment, there was ample opportunity to correct that misapprehension. Counsel for the defendant appeared on 20 June 2012 prepared to argue the matter, with detailed written submissions and authorities directed at opposing the application.

[17] Briefs of evidence were due to be filed by the plaintiff by 4pm 12 June 2012. The plaintiff's brief is dated 13 June 2012. Dr Hartshorn's brief is dated 14 June 2012. Despite counsel for the plaintiff's earlier indications that Dr Hartshorn's non-availability for hearing would present the plaintiff with difficulties, and the plaintiff's statement (in his sworn affidavit) that he required Dr Hartshorn to be present at the hearing, it is clear that he simply refers to reports he prepared. In these circumstances, Mr Churchman advised that Dr Hartshorn's evidence could be taken as read. This proposal was accepted by Ms Buckett.

[18] No brief of evidence, or will-say statement, was filed in relation to Dr Smith's intended evidence. That is plainly unsatisfactory. Counsel for the plaintiff advised that she had not had the opportunity to brief Dr Smith, and had been unable to contact her (although, as Mr Churchman pointed out, counsel had been in a position to advise the Court in the memorandum dated 8 June that Dr Smith would not be able to attend the hearing, and advised in the memorandum dated 11 June that it was "unlikely" that counsel for the defendant would accept her evidence). Ms Buckett was unable to indicate when she might be in a position to file a brief of evidence for Dr Smith, who she described as a material witness, and nor was she able to cast any light on what Dr Smith's evidence might relate to. This placed the defendant in an invidious position. The defendant had no way of knowing what the scope or intended purpose of Dr Smith's evidence might be and accordingly how it might be responded to.

[19] As a result of all of this, I agreed with Mr Churchman's summation that the proceeding was not ready for hearing. The defendant was effectively left in the position of having to seek an adjournment, in light of the belated application for third party discovery and the non compliance with the timetabling orders relating to the exchange of briefs of evidence.

[20] I granted an adjournment because, as I explained in my minute of 4 July 2012, the defendant had been placed in a difficult position – its briefs of evidence were due on 20 June, although the plaintiff had not complied with the timetabling orders for filing briefs (on the basis that one of its material witnesses had not yet been briefed). The defendant could not be expected to respond to evidence that it was unaware of. Dr Smith's availability or otherwise could not be explored, as counsel had not been in contact with her. Issues of third party discovery remained live, and I was far from satisfied that they would be resolved within the remaining few days before commencement of the hearing. The plaintiff made it clear that he regarded these documents as pivotal. In his affidavit of 18 June 2012 he described them as "essential to [his] ability to bring this matter before the Court" and that without the information being sought he would be "seriously prejudiced in the pursuit of [his] claim."

[21] Accordingly, the fixture set down for 2 July was vacated.

Submissions

[22] In his submissions as to costs, Mr Churchman seeks a contribution to the defendant's costs which recognises the serious inconvenience that the defendant suffered and which reflects the fact that this was the second adjournment at the eleventh hour. Mr Churchman submits that this case has been marked by lengthy delays by the plaintiff punctuated by last minute filings of what he describes as vaguely worded applications. Mr Churchman also submits that the defendant has suffered prejudice largely because of the potential unavailability of its witnesses for any new hearing date. Mr Churchman notes that his client incurred significant wasted cost in preparing for the opposed adjournment hearing. An award of costs in the range of $12,000-15,000 is sought. Such an award would, it is said, incorporate an uplift on the costs that would usually be awarded on a last minute adjournment of a fixture.

[23] In reply, Ms Buckett submits that it is unclear on what basis the defendant is entitled to costs as it was the defendant which sought the adjournment. She submits that no evidence of any prejudice has been adduced by the defendant to support its

claim and there is no evidence of the costs actually billed to the defendant. She contends that the $12,000-15,000 claimed is excessive and unreasonable. While acknowledging that the matter had not progressed smoothly, it is submitted that this reflects the fact that the "dimensions" of the case have changed over time. Ms Buckett submits that there has been default on both sides, and that the defendant has contributed to the delay because it did not retain documents sought by the plaintiff necessitating third party discovery at a late stage. She concludes that costs should either follow the event or lie where they fall, or alternatively, that the plaintiff should be awarded costs for inconvenience and prejudice.

Decision

[24] The general principles guiding the Court's discretion to award costs are well known. This Court has a broad discretion, as set out in cl 19 of sch 3 of the Employment Relations Act 2000:

> The court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable.

[25] However, that discretion is to be exercised judicially. As the Court of Appeal has emphasised, the "award of party and party costs should generally follow the event and amount to a reasonable contribution to costs actually and reasonably incurred."[4]

[26] The usual starting point for assessing costs in the Employment Court in ordinary cases is 66 percent of the actual and reasonable costs incurred.[5] That starting point may be adjusted up or down to reflect any effect on costs resulting from the manner in which the parties conducted their cases.

[27] I accept that in most cases an award of costs against the party seeking an adjournment will follow the granting of an adjournment. But this is an exceptional case. The proceedings were not ready for trial because of the plaintiff's default. There was a failure to pursue outstanding interlocutory applications in a timely

[4] *White v Auckland District Health Board* [2008] NZCA 451, [2008] ERNZ 635 (CA) at [45].
[5] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

manner. The plaintiff failed to comply with timetabling orders as to the filing of briefs of evidence, in advance of the dates set down for hearing. This impacted on the defendant's ability to prepare its evidence in response. The plaintiff failed to correct any misapprehension on the part of the defendant and the Court as to the nature of the hearing on 20 June 2012, one week before the trial was scheduled to commence. Even if the plaintiff did not intend to seek an adjournment in the memoranda filed, the plaintiff was aware of the nature of the 20 June hearing from at least the date of counsel for the defendant's 13 June memorandum, which clearly described the hearing as one where the plaintiff's application for an adjournment would be opposed. Neither at the hearing, nor in the costs submissions, does Ms Buckett adequately explain why she did not inform the Court and counsel for the defendant that the plaintiff was not seeking an adjournment when a hearing was scheduled for that purpose, and the plaintiff was squarely on notice that that was so.

[28] Although, in the end, it was Mr Churchman who made the successful application for an adjournment, this was only after it had become clear that the case would not be ready for hearing on July 2. That postponement was inevitable. The purpose of awarding costs against the party seeking an adjournment is to partially reimburse the other party for the inconvenience and wasted costs in preparing for the adjourned hearing. In this case, that purpose is served by an award of costs to the defendant despite the fact that it was the defendant which applied for the adjournment. In these circumstances, I am prepared to make a costs order in favour of the defendant.

[29] Ms Buckett submitted that the defendant has not presented to the Court any evidence that the defendant has actually incurred costs. She relied on the decision in *Eastern Bay Independent Industrial Workers Union Inc v Pedersen Industries Ltd*[6] in that regard. There the Chief Judge declined to make an award of costs to the successful defendant on the grounds that no information as to costs had been provided. In this case counsel has claimed between $12,000-15,000. As evidenced by counsel's attendance at the hearing, his detailed memorandum filed in advance of the hearing, and written submissions opposing the adjournment, it is abundantly

[6] AC 11A/09, 27 April 2009.

clear that the defendant has actually incurred costs relating to the adjournment hearing.

[30] This costs judgment relates solely to costs incurred in relation to the hearing on 20 June and the consequent postponement of the substantive hearing. It does not relate to the interlocutory judgment of Judge Ford (where costs were reserved) or the interlocutory judgment of Judge Couch (where the issue of costs was decided at the time, with the defendant being awarded a $1,000 contribution towards its legal costs). Nor does it relate to any other aspect of the case as it has progressed so far.

[31] Mr Churchman submits that the plaintiff's conduct has increased the costs of the defendant, and ought to be reflected in an uplift of the costs that might otherwise follow a belated application for an adjournment.

[32] Regard may be had to costs which would be awarded under the High Court Rules as one of the factors which go into the mix of the exercise of the costs discretion.[7] Assuming this proceeding to be in category 2, preparation and appearance at a half day hearing would amount to 2.6 days which results in a figure of $5,174 subject to uplift or reduction depending on the circumstances. In this case, I would consider that actual costs of around $3,500 to $4,000 would be reasonable in the circumstances.

[33] I consider that, taking into account all the circumstances, the defendant should be awarded costs in the amount of $3,000. This figure includes an uplift to take into account the plaintiff's failure to comply with timetabling directions and to pursue any outstanding interlocutory applications in a timely manner. I do not accept that the defendant's witnesses have suffered any significant prejudice in the delay but I do consider that the Court's observation in *Hamilton v Papakura District Council* that:[8] "the gearing up of counsel and witnesses and litigants' employees to deal with the case, putting the time aside and the unscrambling of all that to be geared up again at a later stage, is not a minor undertaking" is apposite.

[7] *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 92 at [42].
[8] *Hamilton v Papakura District Council* (1997) 11 PRNZ 43 (HC) at 45.

[34] I accept also that the defendant incurred costs in thoroughly preparing for an opposed adjournment application when labouring under a misapprehension caused by the plaintiff and not dispelled before the hearing despite ample opportunity for the plaintiff to have done so.

Conclusion

[35] The plaintiff is to pay the defendant $3,000 costs in relation to the adjournment within 10 working days of the date of this judgment.

Christina Inglis
Judge

Judgment signed at 9.30am on 22 August 2012