IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 154
WRC 44/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND MEAT WORKERS UNION Plaintiff
AND	AFFCO NEW ZEALAND LIMITED Defendant

Hearing: (on the papers by way of submissions dated 5 September 2011 and 5 July 2012 and 8, 10, 15 August 2012)

Counsel: Simon Mitchell, counsel for the plaintiff
Graeme Malone, counsel for the defendant

Judgment: 6 September 2012

COSTS JUDGMENT OF JUDGE A D FORD

Introduction

[1] On 8 August 2012 I issued a costs judgment[1] in this proceeding in favour of the defendant. In my substantive judgment dated 15 August 2011[2], I had rejected an application by the plaintiff for a declaration relating to the conditions of employment of beef process workers at the defendant's Wairoa plant. I had awarded costs in favour of the defendant and I directed that if the parties could not reach agreement on such costs then counsel were to file memoranda within prescribed time limits. No agreement was reached and Mr Malone, counsel for the defendant, duly filed a memorandum seeking costs.

[1] [2012] NZEmpC 133.
[2] [2011] NZEmpC 106.

[2] My costs judgment of 8 August 2012 proceeded on the basis that although the Court had received submissions from the defendant seeking costs, no submissions in response had ever been received from the plaintiff, despite reminders from the Registry. Initially there was some explanation in that the plaintiff had sought leave to appeal my substantive judgment but in January 2012 the Acting Registrar received advice that the Court of Appeal had dismissed the plaintiff's application for leave to appeal. There were then some other extenuating circumstances which I had noted in my initial costs judgment but I also noted that the plaintiff had had ample opportunity subsequently in which to file submissions in response but, for some reason, had failed to do so.

[3] On the afternoon of 8 August 2012, the Court received a memorandum from Mr Mitchell, counsel for the plaintiff, apologising for the situation that had arisen and explaining the reasons for the oversight in his failure to file submissions in response. There is no need for me to detail the explanation provided. Suffice it to say that it was accepted by the Court and also by counsel for the defendant. By consent, I recalled my judgment of 8 August 2012 and this judgment now stands in its place. Mr Mitchell has filed his submissions in response and the Court has also received further submissions it invited from Mr Malone in reply. I turn now to deal with the issue of costs.

Costs in the Authority

[4] In his initial submissions, Mr Malone sought costs and disbursements on behalf of the defendant in respect of the proceedings before the Employment Relations Authority (the Authority) in the sum of $8,772.25 and costs and disbursements in relation to the proceedings before this Court in the sum of $8,846.79. There is no dispute that this Court has jurisdiction to order costs in respect of proceedings before the Authority although I accept the submission made by Mr Mitchell that on occasions it can be a difficult exercise for the Court to undertake when it is unaware of how the Authority investigation proceeded. In general terms, however, costs in the Authority are determined on the basis of a notional daily rate, applied in a reasonably flexible manner allowing, if necessary, for adjustments in a principled way either up or down as the justice of the case may require.

[5] Mr Malone claimed that the Authority investigation was conducted over a two-day period, initially on 9 March 2010 at Gisborne and then adjourned and completed on 25 November 2010 at Napier. On that basis, the defendant sought costs of $6,000 based on a notional daily tariff of $3,000. In response Mr Mitchell said that although the parties travelled to Gisborne for the investigation meeting on 9 March 2010, the meeting was then adjourned by consent to enable the parties to have further discussions about a site agreement. A site agreement was not concluded and the scheduled investigation meeting was reconvened in Napier on 25 November 2010. Mr Mitchell submitted that costs in the Authority should, therefore, be assessed on the basis of a one-day investigation only. He further submitted that costs should be awarded, "at the lower end of the scale, given the proceedings being in the nature of a dispute, with an appropriate award being $1,500."

[6] The point Mr Mitchell made about "the proceedings being in the nature of a dispute" was elaborated on in his submissions:

> 14. However, it is important to note that this matter was essentially one of a dispute between parties in an ongoing employment relationship, as to the actual terms of a collective agreement.
>
> 15. This was not a personal grievance, or a claim by a party for a financial remedy. In effect, this matter was a dispute as to the ongoing terms of employment, to govern the meat processing operation at Wairoa.

[7] I will need to return to this issue because it is also relevant to the defendant's claim for an award of costs in respect of the proceedings in this Court.

[8] In relation to disbursements, originally Mr Malone claimed a figure of $2,772.25 for disbursements relating to the Authority investigation made up of travel expenses to Gisborne ($1,378.28) and travel expenses to Napier ($1,393.97). Receipts were provided. Mr Mitchell submitted that only the claim for the Napier expenses should be allowed but he contended that the figure claimed of $1,393.97 should be reduced by 50 per cent for the reasons stated in [6] above. In other words, Mr Mitchell's submission was that an appropriate figure to allow in respect of proceedings before the Authority was $2,196.99 made up of costs $1,500 and disbursements $696.99.

[9] In his submissions in reply, Mr Malone acknowledged that the investigation scheduled for Gisborne had been adjourned by consent and that accordingly the hearing should be treated as a one-day hearing. He submitted, however, that no further reduction in costs was warranted and he seeks an award of $4,393.97 made up of costs of $3,000 and disbursements of $1,393.97.

Costs in the Court

[10] The principles relating to costs awards in this Court are well established. They are based on the Court of Appeal judgments in *Victoria University of Wellington v Alton-Lee,*[3] *Binnie v Pacific Health Ltd*[4] and *Health Waikato Ltd v Elmsly.*[5] The Court has a broad discretion in making costs awards which must be exercised judicially and in accordance with the recognised principles. The usual approach is to determine whether the costs actually incurred by the successful party were reasonably incurred and once that step has been taken the Court must then decide, after an appraisal of all relevant factors, at what level it is reasonable for the unsuccessful party to contribute towards those costs. A figure of 66 per cent of the reasonably incurred costs is generally regarded as an appropriate starting point and that figure is then to be adjusted upward or down, if necessary, depending upon relevant considerations.

[11] The hearing in this case took place in Wairoa over the course of two days, namely, 10 and 11 May 2011. It incorporated evidence which two of the witnesses were giving in respect on another case involving the same counsel which was heard on 12 May 2011 - *Tuapawa v AFFCO New Zealand Ltd*.[6] The defendant's actual costs in respect of the proceedings before the Court amounted to $11,578.04 made up of legal fees of $8,193.75 and disbursements of $3,384.29. Details of counsel's hourly rate ($250 an hour plus GST) and full particulars of the disbursements claimed were provided. Although not directly relevant, Mr Malone noted that in the High Court the amount likely to be awarded under a 2B scale would be $17,672 plus disbursements and he submitted that the actual costs incurred should "be seen as relatively modest." Applying the two thirds rule referred to in [10] above counsel

[3] [2001] ERNZ 305.
[4] [2002] 1 ERNZ 438.
[5] [2004] 1 ERNZ 172.
[6] [2011] NZEmpC 114.

sought a total award of $8,846.79 made up of $5,462.50 being two thirds of the actual costs plus disbursements of $3,384.29.

[12] In response, Mr Mitchell accepted that the costs incurred by the defendant were reasonable but he submitted that the two thirds approach to costs in *Binnie* should not be applied but the Court should adopt the more flexible approach applied by this Court in *Maritime Union of New Zealand Inc v TLNZ Ltd*,[7] taking into account the following factors:

> 18.1. That the Plaintiff took the proceedings to resolve questions as to the terms of the Collective Agreement in place;
>
> 18.2. That the Plaintiff is obliged to consider such a proceeding under its good faith obligation to members;
>
> 18.3. That in assessing costs, the Court needs to consider the ongoing relationship between the parties (***MUNZ***, para 28);
>
> 18.4. That in assessing costs, the Court must avoid unions becoming reluctant to be involved in litigation due to the risk of high costs awards (***MUNZ***, para 29).

[13] Taking those factors into account and recognising "the reasonable nature of the costs incurred by the Defendant" Mr Mitchell submitted that an appropriate award of costs for the two-day hearing in this Court would be $5,000.

[14] In relation to the defendant's claim for disbursements associated with the Court hearing, Mr Mitchell made the point that travel disbursements should be halved because they were incurred in connection with both this case and the Tuapawa hearing. Mr Malone appeared to accept that there was merit in that submission and in his memorandum in reply the claim for disbursements was reformulated taking into account the duplication with the Tuapawa case but also making allowance for the fact that the disbursements incurred by one of the defendant's witnesses, Mr Cox, were incurred solely in relation to the present proceedings. I agree that the reformulation was appropriate. The defendant's amended claim for disbursements in connection with the proceedings before the Court totalled $2,206.69.

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[7] [2008] ERNZ 91.

[15] Mr Mitchell submitted that the resulting disbursement figure should then be halved again "due to the matter being a dispute".

Submissions

[16] It will be seen from the foregoing that the real issue between the parties is whether, as Mr Malone submits, it is appropriate to apply the *Binnie* two thirds approach to costs in this case or, as Mr Mitchell contends, the approach suggested in the *MUNZ* case "where costs have been awarded following disputes", which recognises a distinction between disputes applicable to a workforce generally and cases involving individual employees.

[17] Mr Mitchell sought to rely on the following passage from *MUNZ*: [8]

> 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 may be avoided or at least minimised.

[18] Mr Malone submitted that there should be no departure from the *Binnie* approach and, in support, he cited the following paragraphs from the recent judgment of Judge Inglis in *Postal Workers Union of Aotearoa v New Zealand Post Ltd*:[9]

> [6] Some doubt has been cast on whether these principles apply to disputes relating to the interpretation, application, and operation of collective agreements. In *Maritime Union of New Zealand v C3 Ltd*,[10] Judge Travis accepted that the principles expressed in *Binnie v Pacific Health Ltd* may not be applicable to disputes. And in *Maritime Union of New Zealand Inc v TLNZ Ltd*,[11] the Chief Judge drew a distinction between the cases involving an individual employee and ones in the nature of a generalised dispute applicable to a workforce generally.

[8] At [23].
[9] [2012] NZEmpC 68.
[10] [2012] NZEmpC 13 at [16].
[11] [2008] ERNZ 91 at [23].

> [7] I prefer to approach the issue of costs in this case in accordance with the general approach endorsed by the Court of Appeal in cases such as *Binnie*, and to have regard to factors such as the benefit both parties will obtain from the proceedings and the nature of the claim, in assessing the extent to which the starting point of 66 percent of the actual and reasonable costs incurred by the successful party might be affected. That is because it is consistent with the principles applying to costs awards in all courts, that party and party costs should generally follow the event and amount to a reasonable contribution to costs actually and reasonably incurred by the successful party.
>
> [8] While a challenge involving a dispute as to the interpretation of a collective agreement raises different issues to a case involving (for example) a personal grievance by an employee, it is not otherwise unusual or out of the ordinary. There is nothing to suggest that in referring to the usual approach to be adopted in "ordinary"[12] cases, the Court of Appeal in *Binnie* was intending to limit that approach to a particular class of case (namely personal grievances).

[19] Mr Malone went on to submit that the present case:

> ... was not framed as a dispute but as an application for a compliance order of an earlier agreement, the union arguing that employees had never agreed to any change. In that sense and unlike a dispute, the proceedings were more in the nature of normal proceedings in the sense, at least from the company's perspective, that it faced either a distinct victory or defeat with significant consequential financial impact.

Discussion

[20] I do not intend to traverse again the issues involved at the substantive hearing. Suffice it to say that the dispute revolved around the terms and conditions of employment for beef process workers at the defendant's Wairoa plant when the plant reopened for the 2008/2009 season on 3 November 2008. The Union maintained that they were the terms and conditions of a trial agreement that had applied during the 2007/2008 season at a time of major reconstruction and modernisation of the plant. AFFCO contended that the trial agreement had expired at the end of the 2007/2008 season and that new terms and conditions had been negotiated and agreed to when the plant reopened on 3 November 2008. I accepted AFFCO's submissions.

[21] Although I have carefully considered Mr Mitchell's submissions, I have not been persuaded that it is appropriate in the circumstances of this case to adopt a

[12] At [14].

different position in relation to costs than that outlined in *Binnie*. In this regard I note that in dismissing the plaintiff's application for leave to appeal, the Court of Appeal made no special allowance for costs but made an award based on a standard band A basis. I also agree with Judge Inglis that the Court of Appeal in *Binnie* did not appear to restrict its observations to any particular class of employment case. Apart from the two thirds starting point the subsequent adjustment exercise provided for in *Binnie*, which takes into account all relevant considerations, in my view provides the flexibility necessary to produce a just result in the present case. On the facts, however, I see no need to depart from the 66 per cent starting point.

[22] Applying the *Binnie* approach, I accept Mr Malone's claim for costs in connection with the proceedings in this Court in the sum of $5,462.50. In fact, I find the difference between the figure sought and the $5,000 figure suggested by Mr Mitchell as de minimis.

[23] Mr Mitchell cited no authority in support of his contention for a 50 per cent reduction in the disbursements and his submission runs contrary to the Court of Appeal statement in *Alton-Lee* at [60] that: "It is conventional where costs are fixed for the award to include a 100-percent recovery in relation to disbursements reasonably incurred." I see no reason why in this case the properly incurred and proven disbursements should not be allowed in full.

Summary

[24] I award costs and disbursements in favour of the defendant in the total sum of $13,240.76 made up as follows:

(i)	Costs in the Authority	$3,000.00
(ii)	Disbursements	$1,393.97
(iii)	Costs in this Court	$5,462.00
(iv)	Disbursements in Court proceedings	$3,384.29
	TOTAL:	$13,240.26

A D Ford
Judge

Judgment signed at 2.30 pm on 6 September 2012