IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 157
ARC 33/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	JANET POTTINGER First Plaintiff
AND	NINE DOT CONSULTING LTD Second Plaintiff
AND	KIRI CAREW Third Plaintiff
AND	KELLY SERVICES (NEW ZEALAND) LIMITED Defendant

Hearing: By submissions filed on 27 July and 27 August 2012

Counsel: Richard Harrison, counsel for plaintiffs
Tim McGinn, counsel for defendant

Judgment: 17 September 2012

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The plaintiffs pursued an unsuccessful challenge[1] against a determination of the Employment Relations Authority. I indicated at the conclusion of my judgment that the defendant was entitled to a contribution to its costs, and invited the parties to agree costs if possible. They have been unable to do so, and counsel have filed memoranda in relation to the issue.

[1] [2012] NZEmpC 101.

[2] The proceedings involved a challenge to a determination of the Authority granting interim orders in favour of the defendant in respect of the enforceability of restraint provisions in the first and third plaintiffs' individual employment agreements.

[3] The defendant seeks costs in relation to the challenge of $11,352 (being 80% of actual and reasonable costs plus $660 for preparation of costs submissions) and disbursements of $149.30. The plaintiffs submit that costs should lie where they fall or, alternatively, should be in the range of $1,000 and $2,000. The plaintiffs contend that the actual costs incurred by the defendant are unreasonably high, and that there are a number of factors which warrant a decrease in the quantum of any award in the defendant's favour.

General principles

[4] Clause 19(1), Sch 3, of the Employment Relations Act 2000 (the Act) confers a broad discretion as to costs. It provides that:

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

[5] The discretion to award costs, while broad, is to be exercised in accordance with principle. The primary principle is that costs follow the event.[2] 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.[3]

[6] Mr McGinn, counsel for the defendant, submits that the usual approach should apply in the present case. Mr Harrison, counsel for the plaintiffs, suggests that such an approach may not be appropriate, noting that doubts have been cast on whether the two-thirds approach ought to be applied in cases involving disputes and interim applications. He referred to *Davis v Bank of New Zealand*[4] by way of example. There the Court expressed the view, in a brief judgment, that:[5]

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[2] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
[3] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
[4] WC 4/05, 18 February 2005.
[5] At [6].

> While the principles in *Binnie* are well established and routinely form the basis for costs decisions on challenges, I do not consider that they automatically apply to challenges to interlocutory matters which involve neither evidence nor the appearance of counsel.

[7] The obvious distinguishing feature of the present case is that the challenge, while of an interlocutory nature, involved both evidence and the appearance of counsel. Issues about whether the usual principles relating to costs apply to cases involving disputes have been considered in *Maritime Union of New Zealand v C3 Ltd*[6] and *Maritime Union of New Zealand Inc v TLNZ Ltd.*[7] In *Postal Workers Union of Aotearoa v New Zealand Post Ltd*,[8] I expressed a preference for approaching the issue of costs 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.[9] And as Judge Ford has recently commented, the adjustment exercise provided for in *Binnie* provides the necessary flexibility to produce a just costs result.[10]

[8] I approach the issue of costs in the present case on the usual basis.

Actual costs

[9] I am satisfied that the defendant has incurred actual legal costs relating to the challenge of $13,365 plus GST, together with disbursements of $149.30 (relating to taxi costs). Mr Harrison did not seek to contend otherwise. Rather, he focussed his submissions on whether the actual costs incurred by the defendant were reasonable in the circumstances. He submitted that they were not.

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[6] [2012] NZEmpC 13 at [16]-[17].
[7] [2008] ERNZ 91 at [23].
[8] [2012] NZEmpC 68 at [7].
[9] *Binnie* at [7].
[10] *New Zealand Meat Workers Union v AFFCO New Zealand Ltd* [2012] NZEmpC 154 at [21].

Reasonable costs

[10] The hearing took nearly a full day (concluding at 3.35pm). The costs incurred by the defendant included those relating to consideration of the statement of claim and preparation of a statement of defence, perusal of the plaintiffs' affidavits and drafting four affidavits in opposition, drafting submissions, and appearances at a telephone conference and at the Court hearing. The defendant's costs were based on 40.5 hours of attendances, at a charge out rate of $330 per hour.

[11] I accept Mr McGinn's submission that the challenge did not amount to a simple "re-run" of the Authority's investigation. The arguments were refined, and the evidence was developed, including to meet the first plaintiff's evidence about her response to notification of her immediate termination and in relation to the customer identity issue. I also accept that the plaintiffs' evidence included much material that was relevant to the substantive issues between the parties, rather than the issues arising on the interim orders challenge. Mr Harrison said that such an approach was efficient, in the sense that it meant that the affidavits did not need to be recast prior to the substantive hearing. That may be so, but such a strategy does put the opposing counsel (and the Court) to the effort of working through a greater amount of material than is strictly necessary and determining what is, and what is not, relevant. Mr Harrison pointed out that much of this evidence had, in any event, been before the Authority. If that is so, I accept that it could not have added materially to the preparation time in relation to the challenge.

[12] Mr McGinn submits that the costs incurred by the defendant were reasonable when regard is had to comparable costs according to the High Court scale, which he submits would amount to $13,330 (intended to represent two thirds of actual reasonable costs).

[13] Mr Harrison submits that the actual costs incurred by the defendant are unreasonable, including by way of reference to the costs incurred by his clients - namely $2,653.63. The fees invoiced to the plaintiffs are modest, given the work involved in preparing for the hearing and the legal submissions advanced on their

behalf. However, I do not consider that they provide a particularly useful benchmark for assessing the extent to which the defendant's costs were reasonably incurred.

[14] Counsel for the plaintiffs relies on the approach adopted in *Richardson v Board of Governors of Wesley College*[11] and *Graham v Crestline Pty Ltd*.[12] In *Richardson* Judge Travis found a notional daily rate range (with one exception) of between $3,800 and $6,400 had been recently applied.[13] In *Graham*, the Chief Judge observed that a useful measure to apply in assessing reasonableness is what the scale costs under the High Court Rules would provide (in that case approximately $4,000).[14] Mr Harrison submits that a reasonable fee in the present case should not exceed the range for a day's hearing as identified by the Court in *Richardson* and *Graham*, and that a reasonable fee (having regard to the length of the hearing) would be between the defendant's costs and the *Graham* figure of approximately $4,000.

[15] I accept that it may be helpful to have regard to the sort of costs that might be awarded under the High Court scale, in terms of assessing the reasonableness of costs incurred, while acknowledging that they do not provide a direct comparison given the distinguishing features of litigation in this jurisdiction.[15] I do not consider that the daily rate range identified in *Richardson*, is of material assistance in determining what is, or is not, reasonable in the present case more than a decade later.

[16] Standing back and considering each of the steps that the defendant was required to take to meet the challenge, I conclude that the fees actually incurred by the defendant are reasonable.

Other factors

[17] Mr McGinn submitted that there ought to be an increase in the costs awarded in his client's favour to reflect the way in which the plaintiffs conducted the challenge. In particular, it is submitted that the plaintiffs pursued a number of

[11] [1999] 2 ERNZ 199.
[12] AC 53A/06, 21 November 2006.
[13] At 229-230.
[14] At [9].
[15] *Shortland v Alexander Construction Company Ltd* [2010] NZEmpC 126 at [12].

arguments that lacked merit. It was also submitted that the plaintiffs included material in their affidavits that was irrelevant to the matters at issue on the challenge and which increased the costs of preparation and constituted a waste of judicial time. Mr McGinn submits that an increase of $660 is appropriate to reflect counsel's time in preparing the costs submissions and notes that counsel for the plaintiffs did not respond to correspondence seeking to agree costs. This leads to a total contribution of $11,352, plus disbursements, being sought by the defendant.

[18] Mr Harrison submits that costs ought to be discounted for three reasons. Firstly, because one of the arguments advanced by the plaintiffs was in the nature of a test case (the fundamental breach argument). Secondly, because the plaintiffs enjoyed a measure of success (in the sense that the judgment has been of assistance to the plaintiffs in reducing the scope of the client organisations that the plaintiffs were prevented from contacting). Thirdly, having regard to the financial position of the plaintiffs.

[19] One of the plaintiffs' primary arguments on the challenge was that the defendant fundamentally breached their employment agreements and that this amounted to a repudiation rendering the restraints unenforceable. This issue was not one that had been decisively considered by the Court before. In the event, I accepted Mr Harrison's argument that justification for termination could be challenged under s 103A in any personal grievance claim under s 114, but held that while it was arguable that an established repudiation would result in a finding that the restraints contained within the plaintiffs' employment agreements were void (following *General Billposting Company Ltd v Atkinson*,[16] a House of Lords decision relied on by the plaintiffs) that argument was weak. It was not, however, devoid of merit and Mr Harrison was able to draw on the threads of a number of New Zealand authorities to support the arguments he advanced. While the fundamental breach argument that Mr Harrison pursued has not previously been squarely dealt with, I do not consider that it was in the nature of a test case warranting a reduction in the costs that might otherwise be awarded in the defendant's favour.

[16] [1909] AC 118 (HL).

[20] Mr Harrison also submits that the judgment was helpful for the plaintiffs, including by narrowing down the definition of customer. That may be so, but this issue was peripheral to the Court's determination, and subsequently came before the Authority. The reality is that each of the arguments advanced by the plaintiffs was found to lack strength.

[21] I have already referred to Mr McGinn's submission that the plaintiffs' affidavits contained material that was irrelevant to the matters at issue on the challenge. I am not satisfied that, in the circumstances, it would have substantially added to the costs incurred by the defendant in this Court or that it otherwise warrants an increase in costs.

[22] No issue has been taken with the defendant's request for costs on its application. I deal with that request separately.

[23] Mr Harrison submits that the plaintiffs' financial circumstances are relevant. Reference is made to a profit and loss summary for the second plaintiff (Nine Dot Consulting Limited) dated 20 August 2012, and which shows a net loss of $15,585.17 for the period 1 April 2012 to 31 July 2012. Mr Harrison submits that the first plaintiff has not received any drawings/salary since she left the defendant company and the third plaintiff has received salary at an equivalent level to that received while employed by the defendant. It is also submitted that the plaintiffs are facing ongoing legal costs, in terms of meeting the allegations made against them in the defendant's statement of problem,[17] and that the plaintiffs will contend that their current financial position is a consequence of the defendant's immediate termination of the first and third plaintiffs' employment and being shut out of a significant proportion of the recruitment market, which the defendant wrongly claimed was subject to the restraint.

[24] A party's ability to pay costs is relevant. If payment would cause the party concerned undue hardship that may be a ground to reduce the award made. This usually requires evidence of the unsuccessful party's current assets, liabilities,

[17] The substantive investigative meeting was scheduled for 5 and 6 September 2012.

income and expenditure.[18] I accept that the second plaintiff is in a difficult financial position and that an award of costs of the quantum sought by the defendant would likely present problems for it. I am not satisfied, based on the information before the Court, that the third plaintiff is facing financial difficulties given the indication that she has been receiving a salary at an equivalent level to that received while employed by the defendant. It appears that the first plaintiff is not drawing any takings/salary from the second plaintiff business. There is no additional information, such as material relating to the plaintiffs' assets and liabilities, which might otherwise support a submission of financial hardship on behalf of the first and third plaintiffs. The plaintiffs are jointly liable. I allow a discount to reflect the plaintiffs' financial position, as far as that can be determined, in assessing the appropriate contribution to be awarded in this case.

Conclusion

[25] In the circumstances, I consider that a contribution towards the defendant's costs of $7,750 is appropriate. The plaintiffs are to pay the defendant $7,750 costs, and must also reimburse the defendant the sum of $149.30 by way of disbursements.

[26] I also award the defendant $300 costs on this application.

Christina Inglis
Judge

Judgment signed at 2.40pm on 17 September 2012

[18] This was an issue that Mr McGinn expressly identified in his submissions on costs dated 27 July, by way of reference to *Virgin Australia (NZ) Employment and Crewing Ltd v B* [2012] NZEmpC 65 at [3].