IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 184
CRC 14/11
CRC 15/11

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
BETWEEN	VINE-TECH CONTRACTING LIMITED Plaintiff
AND	CONAL ROYCE WATTAM AND INGER PAULINE CULLING Defendants

Hearing: memoranda received 13 March, 5 April, 11 May and 25 May 2012

Judgment: 23 October 2012

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] These matters were heard together. In my substantive judgment,[1] I sustained the conclusions reached by the Employment Relations Authority and granted much the same remedies. I encouraged counsel to agree costs but set a timetable for the provision of memoranda if they could not do so. They were unable to agree and memoranda were filed.

[2] The plaintiff must be regarded as unsuccessful in its challenges. Although I did reduce the order for reimbursement of lost wages to Mr Wattam by $1,500 to take account of his earnings after dismissal, I awarded interest on lost earnings to both defendants.

[3] 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*

[1] [2012] NZEmpC 22.

Wellington v Alton-Lee[2], *Binnie v Pacific Health Ltd*[3] and *Health Waikato Ltd v Elmsly.*[4] 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 what costs were actually incurred by the successful party and the extent to which they were reasonably incurred. 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 may then be adjusted up or down, if necessary, depending upon relevant considerations. The unsuccessful party's ability to pay without undue hardship may also be a relevant factor.

[4] In his memorandum, Mr Tohill provided copies of the invoices rendered to the defendants to establish the amount of costs they actually incurred. Mr Wattam was invoiced for costs of $8,193.75, including GST, and for disbursements of $322.25. Ms Culling had costs of $5,494.70, including GST and disbursements of $408.92.

[5] The information provided showed that a similar amount of time was spent preparing and presenting the case for each of the defendants and the only reason for the considerable difference in the costs they incurred is that Ms Culling was legally aided whereas Mr Wattam was not. Taking the same approach as I did in *Goodfellow v Building Connexion Ltd t/a ITM Building Centre*,[5] however, I find that this does not alter the application of the principles enunciated by the Court of Appeal summarised above.

[6] The information provided by Mr Tohill showed that each of the defendants had been charged for 35 hours of counsel's time. Mr Wattam was said to have been charged at the rate of $350 plus GST per hour. The work for Ms Culling was done at legal aid rates of $134 plus GST per hour. Mr Tohill submitted that both the time spent and these rates were reasonable in each case.

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[2] [2001] ERNZ 305.
[3] [2002] 1 ERNZ 438.
[4] [2004] 1 ERNZ 172.
[5] [2010] NZEmpC 153 at [6].

[7] While the figures for costs incurred by Ms Culling are consistent, there is an obvious arithmetic mismatch in those for Mr Wattam. If he was charged for 35 hours' work at $350 plus GST per hour, that would be a total of $14,087.50. Looked at from the other direction, if Mr Wattam was actually charged $7,125 plus GST and that reflected 35 hours work as the invoice records, the hourly rate was a little over $200 per hour plus GST. I proceed on the basis that Mr Wattam's actual costs were those for which he was invoiced, that is $7,125 plus GST which is $8,193.75. On this basis, the hourly rates charged were reasonable in relation to both defendants.

[8] For the plaintiff, Ms Brazil submitted that the level of detail in the defendants' submissions as to how these costs were incurred did not enable the Court to properly assess the extent to which they were reasonable. In particular, she submitted:

> (i) A total of 35 hours has been claimed in respect of each matter, with no breakdown of how these hours have been accrued. Given that both matters were heard in one hearing there would appear to be a duplication of time allocated.
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> (ii) Mediation time (again not specified) has been included in the total. Counsel for appearing in court did not attend at the mediation, and accordingly without further information as to the rate for the counsel who did attend, further analysis is not possible.

[9] There is force in the first of these submissions. The two proceedings were heard together and much of the evidence related to them both. Similarly, the submissions made related in large part to both matters. As I understand it, the further mediation which I directed the parties to undertake was also conducted in a single meeting. Had these two proceedings been based on entirely different events and heard separately, I would have considered 35 hours of counsel's time to be at the very upper end of what was reasonable. Allowing for the very considerable overlap between them, I conclude that no more than 25 hours per matter was reasonable. Given that each defendant was invoiced on the basis of 35 hours' work having been done, it follows that only five sevenths of the amount charged can be said to be reasonable.

[10] Ms Brazil's second point raises an issue which Mr Tohill ought to have dealt with in his memorandum but did not do so. The clear impression given by Mr Tohill

is that he personally did all of the work particularised in the invoices rendered to the defendants. If that was not correct, he ought to have said so. I note that Ms Brazil's submission is supported by some of the correspondence between counsel attached to the memoranda which shows that an associate of Mr Tohill's firm, Mary Flannery, was also involved in the matter. I accept this submission but, given that the rates actually charged for the work were modest even for counsel less experienced than Mr Tohill, I make no further reduction from what I have previously assessed as reasonable..

[11] I find that the amount of costs actually and reasonably incurred by Mr Wattam was $5,852, including GST. The comparable amount for Ms Culling was $3,925, including GST.

[12] On behalf of the defendants, Mr Tohill sought full reimbursement of the costs they incurred or, in the alternative, 80% of the those costs. He submitted:

> The Applicants produced no further evidence at the Employment Court than was available for determination at the Authority. The de novo challenge was unsuccessful and the Authority decision was upheld. Therefore...the application for a de novo hearing was without merit and caused significant further costs to the Respondents.

[13] In support of this submission, Mr Tohill referred me to *Reid v New Zealand Fire Service Commission (No 2)*[6] where former Chief Judge Goddard expressed the view that an award of solicitor and client costs might be appropriate "where the plaintiff brings proceedings that cannot possibly succeed and after that is drawn to his, her, or its attention persists in them."

[14] The circumstances in which the Employment Court might order indemnity costs were recently discussed by Judge Travis in *Snowdon v Radio New Zealand Limited.*[7] Having regard to the authorities referred to there, I find there is no case for an award of indemnity costs in this case. The plaintiff's case was weak but not impossible and there was no evidence that the shortcomings in it were drawn to the plaintiff's attention other than by the Authority in its determinations which were, of course, the subject of the challenges.

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[6] [1998] 3 ERNZ 1237 at 1260.
[7] [2012] NZEmpC 165.

[15] In assessing the extent to which the unsuccessful party should contribute to the successful party's costs, the Court will usually consider the manner in which the parties conducted their cases and, in particular, whether that conduct unreasonably increased the other party's costs. Neither party made any such submissions in this case.

[16] On the other hand, counsel for both parties invited me to take into account several attempts at settlement which were made prior to trial. The greatest offer made by the plaintiff in respect of Ms Culling was $4,000 and, in respect of Mr Wattam, was $6,000. These both fell short of the remedies actually awarded. Mr Tohill urged me to have regard to two counter offers made of $11,334.98 in respect of Ms Culling and $16,910.48 in respect of Mr Wattam which were rejected. These both exceeded the value of remedies finally awarded. In all cases, it was reasonable to reject these offers and I give them no weight.

[17] I am not persuaded that there is any good reason to depart either way from the 66 per cent starting point for contribution.

Disbursements

[18] As decisions of this Court have frequently emphasised, reimbursement will only be ordered for true disbursements, that is payments made to third parties for goods or services necessary to conduct the case. The claims here include "forms & postage", "file opening fee", "printing" and "tolls". These are normal operating expenses of a legal practice and will not be reimbursed.

[19] Photocopying can be a different matter. If such work is done by a business outside the office of the representative involved and the claim for it is accompanied by a copy of the invoice from that business, it will be a proper disbursement and the successful party ought to be reimbursed for it. In this case, Ms Culling was charged $191.66 for photocopying and Mr Wattam $178.85. Those figures were not supported by invoices or otherwise explained. The volume of copied material provided to the Court on behalf of the defendants was not great and I am left with no

basis on which I could conclude that the charge was warranted. I allow only $50 for photocopying for each defendant.

[20] Each defendant was also charged $41.60 for travelling expenses and reimbursement of these sums is sought. There is no explanation in counsel's memorandum of the reason for travel but I infer from the invoices that it was travel from Alexandra to Cromwell for further mediation. The basis of calculation ought to have been provided but, in the circumstances of this case, I am prepared to order that it be reimbursed. Similarly, I am prepared to order reimbursement of the LINZ search and registration fees for which Ms Culling was charged. I infer that these were necessary to register a charge in favour of the Legal Services Agency.

Summary

[21] The plaintiff is to pay Mr Wattam $5,852 for costs and $91.60 for disbursements.

[22] The plaintiff is to pay Ms Culling $3,925 for costs and $186.60 for disbursements.

AA Couch
Judge

Judgment signed at 12.45pm on 23 October 2012