IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 5
CRC 1/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND	
IN THE MATTER OF	an application for costs
BETWEEN	RONALD EDWARD BISHOP & MARGARET ELLEN BISHOP Plaintiffs
AND	CHRISTINE FLORENCE BENNET Defendant

Hearing: on the papers - submissions received 28 October, 7 November and 2 December 2011. Affidavits received 5 and 16 December 2011.

Judgment: 20 January 2012

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] I gave my substantive judgment in this matter on 6 October 2011.[1] The plaintiffs' challenge was unsuccessful. I concluded by saying:

> [66] Costs are reserved. Unless there is some factor of which I am unaware, Ms Bennet is entitled to a reasonable contribution to the costs she has incurred in resisting the challenge. In the first instance, I invite the parties to agree on costs if possible. If they are unable to do so, a memorandum on behalf of Ms Bennet should be filed and served within 20 working days after the date of this judgment. Mr and Mrs Bishop will then have a further 20 working days in which to file and serve a memorandum in response.

[2] There was correspondence between the parties regarding costs but no agreement was reached. Accordingly, a memorandum was filed on behalf of Ms Bennet seeking an order for costs. Mr Bishop responded in a memorandum which

[1] [2011] NZEmpC 127.

focussed on the plaintiffs' ability to pay any costs which might be ordered. As that submission was unsupported by evidence or detail, however, I could give it little weight. In the interests of making a just decision, I gave the plaintiffs a further opportunity to provide evidence of their means. They did this in the form of a joint affidavit filed on 16 December 2011. In the meantime, counsel for Ms Bennet filed a further memorandum containing submissions on the significance of the ability to pay together with an affidavit evidencing the plaintiffs' ownership of real property.

[3] The principles applicable to awards of costs in the Court are settled and well known. I set out a convenient summary in my decision in *Merchant v Department of Corrections*:[2]

> [2] Clause 19(1) of Schedule 3 to the Employment Relations Act 2000 confers on the Court a broad discretion to make orders as to costs but, as with all such discretions, it must be exercised judicially and in accordance with principle. The key principles applicable to the Court's discretion to award costs have been set out by the Court of Appeal in three very well known decisions: *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305, *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.
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> [3] The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel or an advocate. A useful starting point is two-thirds of the costs actually and reasonably incurred by that party but that proportion may be adjusted up or down according to the circumstances of the case and the manner in which it was conducted. Ability to pay is also a factor to be taken into account.

[4] In applying these principles, the first step is to establish the costs of representation actually incurred by the successful party. The Court must then assess the extent to which those costs were reasonably incurred in the proceedings before the Court. From a starting point of two thirds of that amount, the Court must then consider whether to award more or less as a result of the manner in which the case was conducted. The result may lie anywhere in the range from no award to full indemnity. Where the unsuccessful party has limited means to pay, the Court must also consider the extent to which that party can pay without undue hardship.

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[2] [2009] ERNZ 108.

[5] In his submissions, Mr Lovely says that Ms Bennet incurred costs in relation to the Court proceedings of $24,038.23 and submits that those costs were reasonably incurred in their entirety. This submission is supported by two invoices to Ms Bennet from her solicitors, the first for $9,383.13 and the second for $14,555.10. With respect to the second invoice, a copy of time records on which the invoice was based has also been provided. I am satisfied from the invoices that Ms Bennet actually incurred costs of $23,038.23 but whether those costs were reasonably incurred is quite a different matter.

[6] In the proceedings before the Court, Ms Bennet was represented by Ms van den Bergh and the costs incurred were almost entirely for work done by her. Ms van den Bergh's time was charged at a rate of $250 plus GST per hour. Whether that was reasonable must be assessed by reference to the level of skill and experience required for the work involved. This case turned on findings of fact. There were no contentious or difficult issues of law involved. Drawing on the terminology used in the High Court Rules,[3] the proceedings were largely of a straightforward nature, able to be conducted by counsel considered junior in the Employment Court. The only factor requiring some additional skill or experience was that Mr Bishop was appearing in person but, when this gave rise to difficulties, they were usually resolved by directions from the Court.

[7] I find that $250 plus GST per hour was reasonable for the nature of the work required in this case but that it was at the top end of the range of what was reasonable.

[8] In this case, it appears that the costs incurred by Ms Bennet were based entirely on time spent by counsel. Whether such costs are reasonable will usually involve a trade off between the rate charged and the amount of time devoted to the matter. While an inexperienced practitioner may take longer than an experienced one to complete certain work, this may be reasonable if the rate charged for the time spent is modest. Where the rate charged is at the top of the range, it is reasonable to expect that the work will be done more efficiently and therefore take less time.

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[3] Rule 14.3.

[9] In total, Ms Bennet was charged for 82.3 hours of Ms van den Bergh's time. The hearing itself occupied one and a half days and attendance at the hearing was fairly recorded as ten and a half hours. It follows that Ms van den Bergh devoted nearly 72 hours to interlocutory matters and preparation for hearing. On the face of it, that is a great deal of time for a relatively straightforward case which is the subject of a hearing de novo. In such circumstances, the onus lies on the party seeking costs to establish that the costs incurred were reasonable to the extent claimed.

[10] The first invoice was for $9,483.13, apparently representing more than 33 hours of work. It was rendered on 31 May 2010, before any preparation for a hearing had been done and before the second pre-hearing conference. The only information about the work charged for is the narration on the invoice itself:

- Reviewing statement of claim and witness statement and taking your instructions in relation to the same;
- Drafting and filing statement of defence and cross challenge and serving the same on Mr and Mrs Bishop;
- Preparation for and attendance at Employment Court callover by way of teleconference on 28 April and reporting back to you;
- Various emails and correspondence from Mr Bishop;
- Liaising with Employment Court regarding disclosure;
- Preparing and filing interlocutory application for an Order staying or dismissing the proceeding, and all other matters incidental thereto

[11] In the absence of any explanation, I can only assess the reasonableness of this invoice on the basis of my knowledge of the proceedings, including the content of the various documents filed. Even being generous, the work required on behalf of Ms Bennet up to 31 May 2010 and described in the invoice should not have occupied more than 15 hours of counsel's time at the rates charged for Ms van den Bergh's work.

[12] Mr Lovely submits that additional time was required to respond to certain aspects of Mr Bishop's conduct and refers to five specific events:

(a) A complaint about Ms Bennet to Inland Revenue.

(b) A newsletter to Timaru business people asserting that Ms Bennet was dishonest and which was otherwise critical of her.

(c) A campaign to change employment law.

(d) Emails sent to Ms Bennet regarding the proceedings.

(e) An attempt to expand the proceedings to include public issues and numerous other defendants.

[13] The first three of these matters were not directly related to the proceedings before the Court. While Ms Bennet may have chosen to seek advice about them, the costs involved in doing so are not properly costs of the proceedings. I note also that the first two matters were initially the subject of the cross challenge which Ms van den Bergh accepted was outside the Court's jurisdiction and withdrew.

[14] In responding to the other two matters, Ms Bennet may have incurred costs in the proceedings but I note that Mr Lovely makes no attempt to quantify what those costs were. As to the further amended statement of claim Mr Bishop attempted to file in April 2010, this was referred to me by the Registrar and dealt with largely without the need for input on behalf of Ms Bennet.

[15] The second invoice for $14,555.10 was explained by time records. The narration on the invoice and those records show that this invoice covered most of the work required to prepare and present Ms Bennet's case at trial. This included more than 15 hours for briefing evidence and 13 hours on preparation for hearing.

[16] It is significant that the proceeding before the Court was a hearing de novo. All of the issues before the Court had already been fully explored before the Authority. Analysis of those issues and preparation of a detailed brief of evidence for Ms Bennet were done for the investigation meeting. This is effectively confirmed in the Authority's costs determination,[4] where it is recorded that costs incurred by Ms Bennet to that point included $7,654 for preparation and attendance

[4] CA 35/10.

at the investigation meeting. While Ms Bennet's original brief may have required updating and some other revision for use in the Court, this should have been a relatively straightforward and economical exercise. An additional brief was prepared for Mr Travaille but that was little more than a page in length. That being so, I do not accept that it was reasonable for more than 15 hours of Ms van den Bergh's time to be devoted to preparation of briefs as the documents record. To a lesser extent, I question also the 13 hours spent on immediate preparation for what was a relatively straightforward case with which Ms van den Bergh must, by then, have been very familiar.

[17] Mr Lovely submits that, because the Court hearing was nearly a year after the investigation meeting, "a completely re-prepared case was required." I do not accept that submission. The events in question and the issues arising out of those events had not changed. If the case was properly prepared in the first instance, which I infer from the Authority's determination and the amount charged that it was, the materials used in the investigation meeting should have been readily adaptable for use in the Court.

[18] I regard the rest of the time charged for in the second invoice as reasonable. An unusual factor in this case was the number of interlocutory hearings; three by telephone conference and one in chambers in Timaru. Each hearing necessarily involved Ms van den Bergh in preparation and attendance. Mr Bishop's reluctance to comply with directions for disclosure of documents and the unsatisfactory nature of his brief of evidence also required Ms van den Bergh to spend more time dealing with those aspects of the matter than would normally be the case.

[19] Overall, I find that no more than 50 hours of work were reasonably required by counsel charging $250 plus GST per hour to represent Ms Bennet in the proceedings before the Court. Applying that conclusion to the parameters of the case and rounding the figures off, I find that the extent of the costs actually and reasonably incurred by Ms Bennet was $14,000. That suggests a starting point for an award of costs of $9,333.

[20] I must now consider whether there are any factors, including the manner in which the case was conducted, which warrant a departure from that two thirds starting point.

[21] On behalf of Ms Bennet, Mr Lovely seeks indemnity costs, that is 100 percent of the costs actually and reasonably incurred. He relies on the observations of the Court of Appeal in *Binnie:* [5]

> [21] The level of contribution is of course the second step of the two step approach earlier identified. We shall deal with the first step after noting a submission made by Mr Taylor on the full indemnity point. He relied on the decision of Chief Judge Goddard in *Counties Manukau Health Ltd (t/a South Auckland Health) v Pack* unreported, Goddard CJ, 25 October 2000, AC72A/00. There the Chief Judge suggested that full indemnity costs should ordinarily be reserved for a case in which the losing party's case was wholly lacking in merit and its stance had been pursued in a way that could be described as reprehensible. With respect, we consider this to be rather too narrow an approach to whether the discretion to award full indemnity costs should be exercised. We recognise that the Chief Judge introduced his proposition with the word "ordinarily" but even on that basis his two criteria are too limiting. Certainly, if these two criteria can be shown to exist, a strong case for full indemnity costs would be present but they should not be regarded as mandatory considerations requiring some special reason to depart from them. For example, the losing party's conduct will be relevant overall, not just in the way the case was pursued. The nature of the conduct which entitles the winning party to relief can be relevant to the level at which costs should be awarded.

[22] Presumably relying specifically on the final two sentences in the passage above, Mr Lovely notes three points in my substantive judgment where I was strongly critical of the conclusions reached by Mr Bishop or his attitude in the course of deciding to dismiss Ms Bennet. He also refers to my conclusion that, upon proper investigation in the trial process, the concerns Mr and Mrs Bishop had about Ms Bennet's conduct had "little or no foundation." Finally, Mr Lovely refers to a comment I made regarding Mr Bishop's public criticism of Ms Bennet.

[23] The Court must be very careful indeed about allowing the conduct of a party which gave rise to the proceedings to affect a subsequent award of costs. The wrongs done to Ms Bennet in the course of her employment, and more particularly in her dismissal, have already been recognised in the remedies awarded to her. It is not the purpose of an award of costs to punish the unsuccessful party. Rather it is to

[5] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 at [21].

compensate the successful party for the expense of litigation. In my view, the only circumstances in which the conduct at issue in the proceedings would be relevant to costs is where that conduct was so egregious and so notorious that a party's claims were obviously hopeless and amounted to an abuse of process. Otherwise, the level of contribution to costs should only be affected by the manner in which the parties have conducted the litigation.

[24] Although I was critical of Mr Bishop's judgment and attitude as Ms Bennet's employer and I found that his conduct fell well short of what a fair and reasonable employer would have done, those conclusions do not warrant an award of indemnity costs.

[25] I turn then to the manner in which the parties conducted the litigation before the Court. As the purpose of an award of costs is to compensate a party for the actual costs of litigation, however, it will only be conduct which has unnecessarily increased the costs of the other party which will be relevant in this context.

[26] In general, the Court allows a measure of latitude to parties who appear in person. In fairness to other parties who may be represented, however, any such indulgence must be strictly limited. As I expressly pointed out to Mr Bishop at an early stage in this litigation, it is the responsibility of persons representing themselves to become aware of the relevant rules and to abide by them. What will always be required is that parties comply with specific directions given by the Court.

[27] In this case, the plaintiffs failed to comply with several directions I gave in conferences and recorded in minutes. I have already mentioned Mr Bishop's reluctance to comply with a direction for disclosure of documents and the unsatisfactory manner in which he provided a brief of his evidence. He also failed to comply with clear directions to limit his brief to relevant evidence and with a direction regarding a common bundle of documents. All of this conduct unnecessarily added to the costs incurred by Ms Bennet in having counsel deal with it. To Mr Bishop's credit, however, he conducted himself well in the course of the hearing and I had reason to compliment him at the end of it.

[28] In taking the plaintiffs' conduct of the litigation into account, I must be careful not to do so twice. I have already made allowance for additional time being required by counsel to deal with these matters. To produce a just result requires only a small further uplift from the two thirds starting point to $10,000.

[29] A factor which must be considered in the overall exercise of my discretion to award costs is the ability of the plaintiffs to pay. The established principle is that a party ought not to be ordered to pay costs to the extent that doing so would cause undue hardship. What this principle allows for is that payment of any substantial sum will cause a measure of hardship to some litigants, particularly individuals. That is to be expected and is considered to be an acceptable consequence of unsuccessfully engaging in litigation. It also recognises that the primary focus of an award of costs should be on compensation of the successful party. It is only when payment of an award which achieves the purpose of justly compensating the successful party would cause a degree of hardship which is excessive or disproportionate that the interests of the unsuccessful party must be recognised by reducing the award which would otherwise be appropriate.

[30] The starting point is that a party is presumed to be able to pay any award of costs the Court might make and it is for that party to raise any issue of hardship. When it is raised, a claim that undue hardship would result must be supported by acceptable and sufficient evidence. Assessment of the ability to pay requires consideration of the total financial position of the party concerned including both assets and liabilities and income and necessary expenditure.

[31] In their joint affidavit, Mr and Mrs Bishop say that they have assets valued at $280,800 and that their liabilities total $58,820; a net capital position of $221,980. I regard this as a conservative figure as it includes more than $40,000 of what appear to be potential future liabilities such as "funeral provisions", hearing aids" and "shoulder operation." No explanation has been provided why such items are shown as current liabilities. On the other hand, the plaintiffs have not included in their liabilities the amounts they have been ordered to pay to Ms Bennet. They currently total about $18,000.

[32] The plaintiffs' income is said to be just over $500 per week, derived principally from national superannuation. There is also included, however, income of $15.38 per week from "interest and dividends." That equates to about $800 per year. To produce that return in the current economic environment would require investment of between $15,000 and $20,000 but the plaintiffs have declared no bank accounts and shares valued at only $500 in their schedule of assets. This discrepancy is unexplained.

[33] The plaintiffs' weekly expenses are said to be $497.10. I note, however, that this includes an amount of $35 per week for rates when rates have also been shown as a capital liability. On the other hand, the plaintiffs say they are paying only $5 per week on a mortgage of $14,000 which suggests an unlikely interest rate of less than two percent.

[34] What this analysis shows is that the information provided by the plaintiffs does not make their financial position entirely clear. As they have been given ample opportunity to provide me with the information and submissions on which they wish to rely, I must make a decision on what is currently before me.

[35] While I find that payment of $10,000 would cause a measure of hardship to the plaintiffs, it would not cause them undue hardship. It follows that ability to pay is not a factor which ought to affect the exercise of my discretion in fixing costs.

[36] Mr and Mrs Bishop are ordered to pay Ms Bennet $10,000 for costs.

A A Couch
Judge

Signed at 2.00pm on 20 January 2012.