IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 62
WRC 41/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	QUAN ENTERPRISES LIMITED Plaintiff
AND	ZHAOQIN FAIR Defendant

Hearing:	(by way of written submissions dated 27 February 2012 and 12 March 2012
Counsel:	Jennifer Wickes, counsel for the plaintiff Julie Olds, counsel for the defendant
Judgment:	23 April 2012

COSTS JUDGMENT OF JUDGE A D FORD

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[1] On 15 February 2012 the plaintiff filed a formal notice pursuant to cl 18 of sch 3 of the Employment Relations Act 2000 (the Act) withdrawing this proceeding. Counsel for the defendant, Ms Olds, subsequently filed application seeking an award of costs and Ms Wickes has filed a memorandum in response on behalf of the plaintiff. The defendant claims $5,600 on account of costs and $65 on account of disbursements. The costs sought are said to be 80 per cent of the actual legal costs incurred.

[2] The plaintiff claims that some of the items identified in the defendant's costs claim are "not of a nature that would normally be recoverable by an award of court costs" but, with one exception, I do not accept that submission. I do not need to identify the particular items in question. Suffice it to say, I accept that they were all

matters reasonably incidental to the successful defence of the plaintiff's claim. The exception I refer to is a claim of $1,504 for costs on account of a mediation. I will need to come back to this issue. The plaintiff also challenges the 80 per cent figure and claims that the appropriate percentage figure should be no more than the accepted starting point for costs awards recognised by the Court of Appeal in *Binnie v Pacific Health Ltd*,[1] namely 66 per cent of the actual costs incurred. Finally, the plaintiff claims that it should not be responsible for costs of $1,128 which relate to the defendant's application for leave to file a statement of defence out of time. The plaintiff also disputes the disbursement claim.

[3] By way of background, the defendant, Mrs Fair, was the successful applicant in a claim before the Employment Relations Authority (the Authority). In a determination[2] dated 15 December 2010, the Authority held that she had been unjustifiably dismissed by the plaintiff and she was awarded a total of $15,459.15 on account of wage arrears, holiday pay and loss of wages resulting from her dismissal together with $1,000 on account of her non-economic loss.

[4] On 23 December 2010, the plaintiff filed its statement of claim challenging the whole of the Authority's determination and seeking a hearing de novo.

[5] Difficulties were then encountered by the plaintiff in having the statement of claim served on Mrs Fair. The reasons for these difficulties were fully canvassed in an interlocutory judgment[3] I delivered in the proceeding on 1 August 2011. In essence, Mrs Fair and her husband were employed by Sanford Ltd on a deep sea fishing trawler and the statement of claim was not served on her until she collected her mail following the vessel's return to port on 1 March 2011. As noted in my judgment,[4] Mrs Fair should then have filed her defence by 4 April 2011 but, for reasons which were not fully explained, this was not done and seven days later, on 11 April 2011, her counsel sought leave to file a statement of defence out of time. That application was heard on the papers and leave was duly granted. Costs on the application were reserved.

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[1] [2002] 1 ERNZ 438 at [14].
[2] WA 199/10.
[3] [2011] NZEmpC 97.
[4] At [11].

[6] Following delivery of my interlocutory judgment, a telephone conference was convened and the matter was referred to mediation. The mediation which was held on 28 September 2011 was unsuccessful. The proceeding was then set down for a hearing in the Employment Court at Wellington commencing on 29 February 2012 and a timetabling order was made for filing of briefs of evidence. The matter was eventually settled between the parties on 3 February 2012 but the settlement did not deal with the issue of costs.

[7] The defendant's costs claim is based on two invoices dated 25 May 2011 and 17 February 2012 respectively. The first is for a fee of $2,500 plus GST of $375; the second is for a fee of $4,500 plus GST of $675. In the first invoice, details of the attendances are set out in the body of the account. Details of attendances covered by the second invoice are set out in a covering letter. The covering letter addressed to Mrs Fair records: "As discussed with you, we have reduced our account to $4,500.00 plus GST."

[8] Turning first to the costs claimed on account of the mediation, it is not clear from the particulars provided in respect of each invoice whether the figure referred to above of $1,504 is, in fact, the actual amount claimed by the defendant. The schedule of costs attached to counsel's memorandum is rather confusing in this regard. I suspect that the figure is cited simply to enable the Court to make a comparison, should it so desire, with what the equivalent figure would be if a similar costs claim was made and allowed under the High Court scale of costs on a 2B basis. In any event, essentially for the reasons I canvassed in *Naturex Ltd v Rodgers*,[5] I am not prepared to allow any contribution towards costs in respect of the unsuccessful mediation.

[9] In the recent case of *RHB Chartered Accountants Ltd, Kenneth Brown and Steven Wilkins v Rawcliffe*,[6] Judge Inglis helpfully carried out a comprehensive review of the authorities dealing with what she referred to as "the vexed issue of the recoverability or otherwise of the costs associated with the preparation for, and attendance at, mediation". In that case the Court was prepared to make a modest

[5] [2011] NZEmpC 9.
[6] [2012] NZEmpC 31.

costs award of $1,000 which appears to have included a contribution towards attendances in respect of an unsuccessful mediation. That case was unusual, however, in that the plaintiffs were not the defendant's employers and the Court appeared to accept that there may have been substance in a submission from counsel for the plaintiffs to the effect that the defendant had pursued his grievance against the plaintiffs, "to extract a pragmatic settlement from them despite knowing that they were not the correct plaintiffs".

[10] In the present case, there is no question that the proper parties participated in the unsuccessful mediation. The Court is not privy, however, and is not entitled to be privy to any information regarding the mediation itself which, as the Court of Appeal confirmed in *Just Hotel Ltd v Jesudhass*,[7] is "conducted on a confidential basis, with the parties encouraged to 'lay bare their souls' for the purpose of facilitating a conciliation and resolution of the dispute". Against that background, any award of costs to one party or the other in respect of the unsuccessful mediation in the present case could well result in an injustice in the sense that the Court could end up rewarding a party whose intransigence or unreasonableness had resulted in a failure to reach a mediated settlement.

[11] As with the claim on account of the mediation, it is not clear from the schedule attached to counsel's memorandum whether the figure mentioned of $1,128 for costs in relation to the application for leave to file the statement of defence out of time is the specific amount claimed in this case or whether that figure is cited simply to enable the Court to make a comparison with a similar costs claim under the High Court scale of costs on a 2B basis. I suspect that the figure is cited for comparison purposes only. In any event, I reject the plaintiff's objection to this part of the claim. The defendant was successful in her application for leave and the merits were all in her favour.

[12] I uphold the plaintiff's objection to the disbursement claim. The claim for $65 is said to be for "Office disbursements" which are described in these terms: "Covers all or any of the following expenses: file opening expenses, postage, photocopying, tolls and cellphone charges". I find the formulation of this category

[7] [2007] ERNZ 817, [2008] 2 NZLR 210 at [35].

of expense prefaced by the words "all or any" to be unnecessarily vague and, in any event, they appear to be ordinary office overheads.

[13] The costs calculation as summarised in counsel's memorandum does not appear to include any contribution on account of GST. In other words, the $5,600 figure mentioned in the summary is made up of 80 per cent of the total legal fees of $7,000 excluding any reference to the additional GST figure totalling $1,050. In *Binnie v Pacific Health Ltd*, the Court of Appeal allowed Dr Binnie's claim for legal fees including GST in the significant sum of $21,712.50. I see no reason why GST should not also be taken into account in the present case.

[14] The principles relating to costs awards in this Court are well established and need not be reiterated at any length. They were set out by the Court of Appeal in *Binnie v Pacific Health Ltd*, *Victoria University of Wellington v Alton-Lee*[8] and *Health Waikato Ltd v Elmsley*.[9] Clause 91(1) of sch 3 to the Act 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 the recognised principles. The Court is first required to determine whether the costs incurred by the successful party were reasonably incurred and once that step has been taken the Court must decide, after an appraisal of all relevant factors, at what level it is reasonable for the unsuccessful party to contribute towards those costs. A starting point at 66 per cent of the reasonably incurred costs is generally regarded as an appropriate starting point to be increased or decreased depending upon the circumstances of the particular case.

[15] As noted above, the defendant seeks a contribution level of 80 per cent. The explanation for seeking such an increase in the usual two-thirds starting point is said to be that "significant billable time has been written off". In this regard reference was made by Ms Olds to the Court of Appeal decision in *Victoria University of Wellington v Alton-Lee*[10] where the Court recognised that one of the factors why the award of costs by the Employment Court was not unreasonable was that significant unbilled time, totalling $52,000, had been written off. In the present case, no information has been provided as to how much time has been written off or what that

[8] [2001] ERNZ 305.
[9] [2004] 1 ERNZ 172.
[10] At [62].

time related to. In any event, the significance of the billable time write-off in the *Alton-Lee* case was that it was one of the factors the Court of Appeal cited as justification for the two-thirds contribution fixed by the Employment Court. In other words, the Court of Appeal did not see fit to increase the contribution level to 80 per cent because of the significant unbilled time which had been written off. I see no reason in the present case to depart from the commonly accepted 66 per cent starting point in fixing the contribution level.

[16] In conclusion, after making a reduction of $1,250, which is my realistic estimate of the defendant's claim for costs in respect to the mediation, I am prepared to accept that the costs reasonably incurred by the defendant totalled $6,800. Applying the two-thirds rule and rounding off the figures, the costs award I make in favour of the defendant is fixed in the sum of $4,500 with no allowance for disbursements.

A D Ford
Judge

Judgment signed at 2.30 pm on 23 April 2012