IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 65
CRC 35/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND	
IN THE MATTER OF	an application for costs
BETWEEN	VIRGIN AUSTRALIA (NZ) EMPLOYMENT AND CREWING LIMITED (formerly PACIFIC BLUE EMPLOYMENT AND CREWING LIMITED) Plaintiff
AND	B Defendant

Hearing: On the papers - submissions received 15 March and 19 April 2012

Judgment: 24 April 2012

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] The defendant was dismissed by the plaintiff on 25 May 2010. He promptly raised a personal grievance and applied to the Employment Relations Authority for interim reinstatement. The Authority granted that application on 26 July 2010 by ordering that the defendant be reinstated on "garden leave". The plaintiff challenged that determination and the matter came before me by way of a hearing de novo on 20 August 2010. I gave an oral judgment[1] allowing the challenge and setting aside the Authority's order for reinstatement.

[2] In that judgment, I reserved costs for consideration after completion of the substantive proceedings which were then before the Authority. At that time, it was

[1] [2010] NZEmpC 112

anticipated that the Authority's investigation meeting would commence on 18 October 2010. For a variety of reasons, it was not conducted until early February 2011. The effects of the Christchurch earthquakes then delayed the Authority's determination, which was given on 12 January 2012. The defendant has challenged that determination but the parties are agreed that it is now appropriate to fix costs on the first challenge, heard in August 2010. Counsel have both filed memoranda.

[3] The principles applicable to the fixing of costs in this jurisdiction are settled and well known. An appropriate and convenient starting point is two thirds of the costs actually and reasonably incurred by the successful party. That amount may be adjusted up or down to reflect the effect on the parties' costs of the manner in which the case was conducted and the unsuccessful party's ability to pay.

[4] For the plaintiff, Mr Rooney sought costs of $11,822.03 and disbursements of $661.26. The claim for costs was based on the plaintiff having incurred actual costs of $17,912.16 exclusive of GST. There is no reason to challenge that figure and I accept it was the amount the plaintiff actually paid.

[5] The next step is to assess the extent to which that sum was reasonable. In support of it, Mr Rooney provided a table showing the approximate time spent by counsel on each of five categories of work said to have been required to prepare and present the plaintiff's case. These totalled 87.3 hours. Mr Rooney also said that the time spent on the matter was charged to the plaintiff at the rate of $590 per hour for senior counsel and either $300 or $180 per hour for staff solicitors. These rates were said to be exclusive of GST.

[6] Mr Rooney submitted that the plaintiff's costs were increased by the conduct of the defendant in the following three respects:

(a) That the defendant "determined the scope of the proceedings in his initial application for reinstatement" which was extensive and relied on numerous exhibits. The plaintiff was "obliged to respond in kind to ensure that all inaccuracies were addressed".

(b) The defendant sought interim reinstatement in the knowledge that he was unable to immediately resume flying duties.

(c) The defendant made allegations of collusion between the plaintiff and the Civil Aviation Authority which were "entirely unsubstantiated in the Authority".

[7] Mr Rooney also noted that the defendant subsequently abandoned his claim for permanent reinstatement and submitted that this meant the plaintiff had been put to unnecessary expense resisting his claim to interim reinstatement.

[8] For the defendant, Mr McGinn made a number of well founded submissions in response. The first was that the information provided by the defendant did not allow a proper assessment of the reasonableness of the costs actually incurred. He correctly noted that, although various hourly rates were mentioned, it was not recorded how much time was charged at each rate. He also submitted that an hourly rate of $590 plus GST per hour was unreasonable per se. In the context of this litigation, I agree. The maximum rate provided for in the High Court Rules[2] equates to an hourly rate of about $450 plus GST. This proceeding required a good deal of skill and experience but not quite to that level and for only some of the work involved. In my view, no more than $400 plus GST was reasonable for any of the work and then only for that work requiring senior counsel.

[9] Having said that, a simple calculation shows that the average rate charged for all of the work done on behalf of the plaintiff was about $205 plus GST per hour. Overall, that is an eminently reasonable rate and significantly less than the rate at which the defendant was charged for Mr McGinn's work.

[10] Turning to the amount of time for which the plaintiff was charged, Mr McGinn submitted that it was "grossly excessive", reflecting a "'Rolls Royce' approach to litigation funded by a large corporation." I agree that it is hard to see how so much time was required. The plaintiff's case was fully prepared for the Authority's hearing of the interim reinstatement application. Mr Rooney confirms as

[2] Category 3 proceedings being "proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court".

much in his submission that the plaintiff had to prepare a comprehensive response to the case presented by the defendant in the Authority. While fresh pleadings were required for the proceeding before the Court, the affidavits would only have required refinement and updating. In the absence of any specific explanation, therefore, I cannot accept that 41 hours of work was necessary to prepare these documents.

[11] Similarly, in the absence of specific explanation, I do not accept that it was reasonable to devote more than 30 hours work to researching and preparing legal submissions. The essential principles are well known and require no research. They can be simply stated. It is also significant that the Authority is required[3] to apply the same principles as the Court when considering an application for interim reinstatement, making the submissions prepared for the Authority equally applicable to the proceedings before the Court.

[12] A further factor, as Mr McGinn observed, is that several aspects of the plaintiff's case were not accepted by the Court. These included the clearly untenable proposition that there was no arguable case for substantive reinstatement.

[13] In response to Mr Rooney's submission that the plaintiff's case was broad because the defendant's case had set the scope of the proceedings, Mr McGinn says that the proceedings before the Authority comprised the substantive case for the defendant including claims for disadvantage and breach of good faith. These did not have to be addressed in the more narrow context of the claim for interim reinstatement. Gleaning what I can from the Authority's substantive determination, that appears to be so.

[14] The thrust of Mr Rooney's second submission was that the defendant ought to have known that interim reinstatement was unlikely while he was unable to fly and that he therefore ought not to have applied for such an order. That submission goes too far. The defendant's case was not entirely without merit and persuaded the Authority. In the circumstances which prevailed at the time of the hearing before me, however, I found that the overall justice of the case did not favour the defendant.

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[3] Section 127(4) of the Employment Relations Act 2000.

[15] Mr Rooney's third submission related to an apparent allegation by the defendant of collusion between the plaintiff and the Civil Aviation Authority. Such an allegation was not pursued before the Court and, to the extent it was before the Authority, any issue of costs relating to it were for the Authority.

[16] I agree with Mr McGinn's submission that the defendant's subsequent decision to withdraw his claim for permanent reinstatement is irrelevant to the issue of costs on this proceeding. That decision was made in June 2011, ten months after the hearing in the Court and in circumstances substantially changed by the effects of the Christchurch earthquakes.

[17] Overall, I conclude that the costs actually incurred by the plaintiff were only reasonable in part and, on the limited information provided, it is not possible to make an arithmetic calculation of the extent to which those costs were reasonable. Rather, having regard to the factors discussed above, I make a global assessment that costs of $10,000 were justified. Rounding up the calculation, two thirds of that sum is $6,700. I find no good reason to adjust that sum up or down to reflect the conduct of the case by either party.

[18] Mr McGinn accepts on behalf of the defendant that the plaintiff's claim of $661.26 for disbursements is reasonable.

[19] That leaves only the issue of the defendant's ability to pay. The principle to be applied is that an award of costs should only be reduced if payment would cause undue hardship. To persuade the Court that this would occur usually requires detailed evidence of the unsuccessful party's current assets, liabilities, income and expenditure. No such evidence was provided in this case.

[20] The defendant is ordered to pay the plaintiff $6,700 for costs and $661.26 for disbursements.

A A Couch
Judge

Signed at 3.00pm on 24 April 2012.