IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 68
ARC 58/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	THE POSTAL WORKERS UNION OF AOTEAROA Plaintiff
AND	NEW ZEALAND POST LIMITED Defendant

Hearing: By submissions filed on 10 February and 12 March 2012
(Heard at Auckland)

Counsel: Paul Blair, advocate for plaintiff
Penny Swarbrick, counsel for defendant

Judgment: 30 April 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS IN RELATION TO COSTS

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[1] The plaintiff brought an unsuccessful de novo challenge[1] against a determination of the Employment Relations Authority. The challenge involved a dispute as to the interpretation, application, and operation of terms in the collective employment agreement relating to on-call postal delivery employees. The dispute essentially related to the obligations owed by New Zealand Post Ltd (the defendant) to on-call employees called in to cover for staff absences, and whether they were entitled to the same terms and conditions as those enjoyed by permanent postal workers, including the "job" provisions, in the collective agreement.

[1] *The Postal Workers Union of Aotearoa v New Zealand Post Ltd* [2011] NZEmpC 168.

[2] The question of interpretation stated by the plaintiff was answered in the negative.[2] The parties were invited to endeavour to reach agreement as to costs. This did not prove possible and memoranda were subsequently filed by the parties.

[3] The defendant seeks a contribution to its costs in the sum of $16,000, together with reimbursement of its disbursements (of $782.96). The defendant seeks a further order from the Court requiring the plaintiff to pay forthwith the outstanding costs award in the Authority proceedings of $1,500.

[4] Mr Blair, advocate for the plaintiff, submits that a contribution towards the defendant's legal costs of up to $1,000 would be appropriate and seeks an order reducing the Authority's costs determination to a "total contribution of $1,000".

Principles applying to calculation of costs

[5] The Court has a broad discretion to award costs. That discretion is to be exercised in accordance with principle. It is well established that the usual starting point for assessing costs in this Court in ordinary cases is 66 percent of actual and reasonable costs. From that starting point, factors that justify either an increase or a decrease are assessed.[3]

[6] Some doubt has been cast on whether these principles apply to disputes relating to the interpretation, application, and operation of collective agreements. In *Maritime Union of New Zealand v C3 Ltd*,[4] Judge Travis accepted that the principles expressed in *Binnie v Pacific Health Ltd* may not be applicable to disputes. And in *Maritime Union of New Zealand Inc v TLNZ Ltd*,[5] the Chief Judge drew a distinction between cases involving an individual employee and ones in the nature of a generalised dispute applicable to a workforce generally.

[7] I prefer to approach the issue of costs in this case in accordance with the general approach endorsed by the Court of Appeal in cases such as *Binnie*, and to

[2] At [53].
[3] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
[4] [2012] NZEmpC 13 at [16].
[5] [2008] ERNZ 91 at [23].

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.[6]

[8] While a challenge involving a dispute as to the interpretation of a collective agreement raises different issues to a case involving (for example) a personal grievance by an employee, it is not otherwise unusual or out of the ordinary. There is nothing to suggest that in referring to the usual approach to be adopted in "ordinary"[7] cases, the Court of Appeal in *Binnie* was intending to limit that approach to a particular class of case (namely personal grievances).

Actual and reasonable costs

[9] Ms Swarbrick submits that the defendant has incurred actual costs directly related to the litigation in excess of $28,000 plus GST and disbursements of $782.96. It is said that approximately $3,000 was a direct consequence of addressing interlocutory issues that arose. Further, it is submitted that considerable additional time was required to prepare evidence for witnesses who had not been called to give evidence at the Authority stage, but who were required to address issues relating to the claim as pleaded in this Court. While junior counsel appeared in the Court, no claim was made in relation to such attendances.

[10] I accept that the defendant incurred legal costs in excess of $28,000, and disbursements of $782.96. Mr Blair does not appear to take issue with the reasonableness of the defendant's claimed actual costs or disbursements. Rather, his submissions focused on broader considerations relating to the exercise of the Court's discretion and factors that he contends should reduce the quantum payable.

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[6] *Binnie* at [7].
[7] At [14].

[11] I accept that the actual costs cited by counsel for the defendant are reasonable, having particular regard to the length of the hearing and the number and nature of the interlocutory steps that were taken. I also accept that the disbursements claimed by the defendant in relation to the attendances of its witnesses at hearing are reasonable. Mr Blair did not suggest otherwise.

Other considerations

[12] Counsel for the defendant characterised the case as being one without merit and that this ought to support a significant award of costs. Mr Blair submitted that the challenge was properly brought and that it served to clarify the respective obligations of the parties under the collective agreement.

[13] I accept that the challenge was brought on a genuine basis, in an effort to clarify the meaning of certain provisions in the parties' collective agreement. While the challenge failed in this Court, I do not consider that it was one that was completely devoid of merit.

[14] A number of issues arose at a pre-trial stage, including issues relating to the identity of the plaintiff and the formulation of the question to be determined by the Court. I accept that these issues required the application of additional resources by the defendant.

[15] Counsel for the defendant submits that the plaintiff's conduct in relation to post trial issues also added unnecessarily to the costs incurred by the defendant, with particular reference to an application to file late submissions in reply together with a simultaneous application for leave. That application was declined, and I accept that it is relevant to the issue of costs relating to the proceedings.

[16] However, I am not drawn to a submission that the plaintiff's subsequent conduct, including sending documentation to its members regarding the outcome of the Employment Court case (which counsel for the defendant contends reflects a misunderstanding of the judgment), is relevant to the issue of costs before the Court. I accordingly put such matters to one side.

[17] I also put to one side the defendant's submission that it has incurred unquantified costs in relation to executive and management time that ought to be reflected in any award of costs against the plaintiff. While there is some authority for the proposition that such costs may in certain circumstances be recoverable, no details have been provided to support this aspect of the application.

[18] Counsel for the defendant submits that a contribution to its costs of $16,000, being approximately two thirds of its actual costs, would be appropriate. Effectively this means that, despite the fact that a number of factors are identified as being relevant to a proposed increase to the usual two thirds rule, no such increase is in fact being sought.

[19] Mr Blair submits that particular regard ought to be had to the inequality between the plaintiff's position and the defendant's position as a state owned enterprise. I do not consider that that factor, of itself, warrants a decrease in costs.

[20] 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. Mr Blair submits that costs of $16,000, as sought by the defendant, equates to approximately 16.3 percent of the gross annual membership income of the plaintiff's northern industrial region, and that that gross income is derived from a membership of approximately 650 members. I take into account the plaintiff's financial position (insofar as I am able to discern it) in determining costs.

[21] Mr Blair submits that the defendant could have reduced its costs significantly by engaging one or more of its legally qualified employees to represent it before the Employment Court, rather than engaging external legal counsel. While such a step may have had the effect of significantly reducing its legal costs, the defendant was entitled to be represented by counsel.

[22] I accept Mr Blair's submission that any award of costs cannot be made for the purposes of punishing the plaintiff.

[23] The challenge involved a dispute about the interpretation of a collective agreement. While this is not a case where the outcome of the proceedings will result in a wider benefit to the postal industry as a whole, there is an ongoing relationship between the parties. Both will derive a benefit from the outcome of the proceedings, in the sense of having an authoritative interpretation of their collective agreement. I consider that this factor weighs in favour of a decrease in the costs that might otherwise be imposed.

[24] In the circumstances, and having regard to the factors identified, I consider that an award of $7,500 is appropriate together with disbursements of $782.96.

Costs in the Authority

[25] While Mr Blair sought a reduction of the costs award in the Authority, no challenge had been advanced in relation to that. Accordingly, the Authority's costs order stands.

[26] Counsel for the defendant sought an order requiring the immediate payment of the outstanding costs award in the Authority. While the plaintiff remains liable to meet that award, recovery is not an issue for this Court in the context of this application.

Result

[27] The plaintiff is to pay the defendant costs in the sum of $7,500 in relation to costs in this Court, together with disbursements of $782.96.

Christina Inglis
Judge

Judgment signed at 12.30pm on 30 April 2012