IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 93
ARC 77/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	ADAM LESLIE MARSHMENT Plaintiff
AND	SHEPPARD INDUSTRIES LIMITED Defendant

Hearing:	By memoranda of submissions filed on 30 August, 17 and 23 September, 29 October and 8 November 2010
Counsel:	Kathryn Beck and Richard Upton, counsel for plaintiff Timothy Allan, counsel for defendant
Judgment:	14 June 2012

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

---

[1] In its substantive judgment delivered on 30 July 2010,[1] the Court concluded at [79] that Mr Marshment was entitled to his costs on the challenge. He claims a global award covering the Employment Relations Authority's investigation and determination[2] (as a result of which costs were determined in that forum) and the challenge in this Court.

[2] Included in the claim for costs is a contribution for work undertaken on behalf of Mr Marshment in preparation for substantive proceedings in the Authority that were to be heard after this Court's judgment. That proceeding was eventually concluded by the defendant discontinuing its claims in the Authority.

[1] [2010] NZEmpC 98.
[2] AA311/10, 2 July 2010.

[3] The general principles applying to awards of costs in this Court are well established. Generally a successful party will be entitled to a reasonable contribution to that party's reasonable costs of representation and disbursements.

[4] The Court has a broad discretion under cl 19 of Schedule 3 to the Employment Relations Act 2000 (the Act) but that must be exercised within the principles enunciated by the Court of Appeal in a triumvirate of cases which have subsequently been followed and applied. Those cases are *Victoria University of Wellington v Alton-Lee*,[3] *Binnie v Pacific Health Ltd*[4] and *Health Waikato Ltd v Elmsly.*[5] These principles are applicable to proceedings where interlocutory relief is an issue: *AC Nielson (NZ) Ltd v Pappafloratos.*[6]

[5] Mr Marshment seeks an award of costs reflecting the rule of thumb of two days' preparation for each hearing date for cases heard under urgency. He made what might be described roughly as a Calderbank offer to the defendant in an attempt to resolve the proceeding before hearing. Regulation 68 of the Employment Court Regulations 2000 is therefore engaged. It provides:

> **68 Discretion as to costs**
>
> (1) In exercising the court's discretion under the Act to make orders as to costs, the court may have regard to any conduct of the parties tending to increase or contain costs, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.
>
> (2) Under subclause (1), the court—
>
> (a) may have regard to an offer despite that offer being expressed to be without prejudice except as to costs; but
>
> (b) may not have regard to anything that was done in the course of the provision of mediation services.

[6] In a letter dated 15 July 2010 Mr Marshment proposed a settlement of the defendant's proceedings against him on the basis that any restrictions on his post-employment economic activity would cease to have effect at 5 pm on 20 July 2010 and that he would adhere strictly to his ongoing obligations of confidentiality. Mr Marshment proposed that these arrangements be in full and final settlement of all

---

[3] [2001] ERNZ 305.
[4] [2002] 1 ERNZ 438.
[5] [2004] 1 ERNZ 172.
[6] WC17B/03, 5 September 2003.

proceedings in both the Authority and this Court including claims of damages and costs. He proposed that the terms be recorded in the form of an order of the Authority.

[7] Next, Mr Marshment has disclosed expressly that he was indemnified for his legal costs by his new employer, Specialized Bicycle Corporation Inc (Specialized). The defendant, however, submits that Specialized's indemnity of Mr Marshment for costs means that these have not been incurred by him. Invoking the judgment in *Elmsly*, Mr Allan submits (correctly so far as it goes) that an award of costs may not exceed the actual costs incurred by a party.

[8] The important distinction in this case is that Specialized has indemnified Mr Marshment for his legal costs but has not assumed primary liability for them, irrespective of the result of the litigation. Put another way, Specialized is not paying for Mr Marshment's litigation as his proxy.

[9] When one considers the counter-factual of a claim for costs against Mr Marshment by a successful Sheppard Industries Limited (SIL), this claim would have been against Mr Marshment personally, not against Specialized. Specialized may have agreed to indemnify Mr Marshment for any liability for costs awarded against him, but that too would have been in the nature of an insurer rather than a party.

[10] Next, Mr Allan for SIL submits that although costs can be awarded against a third party "benefactor" (*Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)*),[7] the reverse position of awarding costs in favour of a so-called third party benefactor is not allowed in law.

[11] In answer to the proposition that Specialized's role is akin to that of an insurer or, more particularly in this jurisdiction, a union in respect of a member, SIL says that this is erroneous for two reasons. The first is that union representation of employees in employment litigation is an entrenched practice in New Zealand

[7] (2004) 17 PRNZ 115 (PC).

industrial relations history recognised, for example, in the current legislation. Union members pay fees in part for representation if needed.

[12] The defendant's second argument is that this is a very different case to one of a union representing a member employee in a dispute with an employer. The defendant submits that this litigation was conducted for and on behalf of Mr Marshment by Specialized.

[13] I might add, also and although it was not relied on expressly by the parties, another example of indemnification of costs in litigation is the legal aid regime. That is, of course, closely governed by legislation but the principles behind it, including indemnification of litigants for costs, are instructive and constitute an example of this practice. The analogy cannot, however, be taken further.

[14] Mr Allan submits that the Deed of Indemnity which is before the Court confirms that Specialized paid for every aspect of the litigation and indemnified Mr Marshment against any and all claims including for damages, compensation, account of profits, penalties, costs or otherwise. It also required the plaintiff to consult fully with it in all aspects of his defence and to act in accordance with its directions in relation to the proceedings.

[15] Turning to the Calderbank offer, Mr Allan for the defendant submits that in discontinuing the proceedings in the Authority, SIL did not acknowledge any absence of merit in its case but, rather, did so because there were only six weeks at most remaining under the restraint, at the end of which it was unlikely that there would have been any determination by the Authority.

[16] The defendant submits that for these reasons the Calderbank offer should not be a major consideration in determining costs. Alternatively, it says that if the Calderbank offer is to be more significant, the Court should but does not know with any degree of certainty what costs were incurred before and after the Calderbank offer was made and rejected.

[17] In summary, the defendant says that the Court should take a "particularly conservative" approach to the question of costs, suggesting that an award of $2,500 would be appropriate.

[18] Counsel for the plaintiff points to the longstanding acceptance by this Court that there may be circumstances in which litigation is funded by others than the immediate parties who will nevertheless not be disqualified for that reason from obtaining costs: see, for example, *Unkovich v Air New Zealand Ltd*[8] and *White v Auckland District Health Board.*[9]

[19] I do not accept the defendant's arguments, first, that the plaintiff is disqualified from a costs order and, second, that the amount of any order should not be affected by the offer of settlement made without prejudice except as to costs.

[20] The indemnity by Specialized of Mr Marshment's costs means that he will have to pay any award to Specialized but that is no different in principle to the position of an insured party or an employee represented by a union or even, to the extent that it is broadly analogous, a legally aided employee. Legal costs have been incurred in the prosecution of the plaintiff's challenge. If, as I am satisfied they should be, costs follow the event, then they are payable by the defendant to the plaintiff. The indemnification arrangement does not negate that entitlement.

[21] Had the plaintiff's offer to settle the proceedings, made without prejudice except as to costs, been accepted by the defendant, the plaintiff's costs of representation would have been reduced substantially. Although I accept that not all of the usual information about a Calderbank offer has been provided, there is sufficient to take it into account. I note here that the Calderbank offer is not affected by the reasoning of the very recent judgment of this Court in *Kaipara v Carter Holt Harvey Ltd.*[10]

[22] The plaintiff has declined to disclose his actual costs of representation but has, rather, proposed a formula for calculating these including elements of

[8] [1995] 1 ERNZ 336.
[9] AC10A/07, 15 October 2007.
[10] [2012] NZEmpC 92.

preparation and hearing time and an hourly attendance rate by counsel. This, he submits, is an acceptable substitute but will still enable the Court to determine what was a reasonable fee payable by the plaintiff in comparison to his actual costs.

[23] I accept counsel's advice that Mr Marshment's claim to costs does not include the elements of consultation with Specialized about these proceedings which its indemnity required him to undertake. Further, I agree with the plaintiff that reasonable costs should not extend to junior counsel. That is not a criticism of the conduct of the litigation by the plaintiff's solicitors and counsel but an acceptance that it would not be reasonable to impose such additional elements of cost on the defendant.

[24] The plaintiff claims, on the basis of costs for three days (two days' preparation and one day of hearing), the sum of $9,480, counsel's hourly rate having been $410 and, therefore, a daily rate of $3,280. In addition, the plaintiff seeks a contribution to his costs associated with the attendance at the half-day Authority hearing. He submits that what is sometimes described as the Authority's usual "tariff" should be the starting point. This is said to be a daily rate of between $3,000 and $3,500.[11] Applying the top end of that tariff, the plaintiff seeks costs of $1,750 for attendances at the urgent Authority investigation meeting.

[25] Following the requirements of the Court of Appeal, the Court must determine, on the material available to it, what would have been a reasonable fee for legal representation. I accept that the notional fee based on the aforementioned formula would have been a fair and reasonable fee in all the circumstances. That then constitutes the starting point for determining a reasonable contribution to that reasonable "notional" fee starting at two-thirds thereof. I consider that an uplift from that starting point is warranted, reflecting the offer of settlement that was rejected and the need for urgency in preparation and attendance at a priority fixture.

[26] I assess this reasonable contribution to the plaintiff's legal costs at $7,500. Added to that I agree that the plaintiff should be entitled to costs in the Authority of

[11] *Allan v Ogilvy Wellington Ltd* WA50/09, 24 April 2009.

$1,750 and to his disbursement being the $200 court filing fee. So, in total, the defendant is directed to pay to the plaintiff costs and disbursements of $9,450.

GL Colgan
Chief Judge

Judgment signed at 9.30 am on Thursday 14 June 2012