IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 125
WRC 17/10

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
BETWEEN	BRUCE WHITE, IAN HARRISON, PETER KATZ, PETER LEDINGHAM AND DAVID ARCHER Plaintiffs
AND	RESERVE BANK OF NEW ZEALAND Defendant

Hearing: (on the papers)

Counsel: Geoff O'Sullivan, counsel for the plaintiffs
Peter Chemis, counsel for the defendant

Judgment: 1 August 2012

SUPPLEMENTARY JUDGMENT OF JUDGE A D FORD ON COSTS

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[1] In my substantive judgment[1] dated 17 February 2012, I dismissed the plaintiffs' claim. I confirmed that the defendant was entitled to costs and directed that if costs could not be agreed upon between the parties then Mr Chemis, acting for the defendant, was to file submissions within 21 days and Mr O'Sullivan, counsel for the plaintiffs, was given a like time in which to respond.

[2] On 26 March 2012, the Registrar received a letter from Mr Chemis confirming that as the plaintiffs had filed an application for leave to appeal my judgment to the Court of Appeal, the defendant considered it would be more appropriate for the issue of costs to be determined following the resolution of the application for leave and any subsequent appeal.

[1] [2012] NZEmpC 20.

[3] No response was received from the plaintiffs until 19 June 2012 when the acting Registrar received a letter from their solicitor, Mr O'Sullivan, stating that the plaintiffs did not agree with the proposal to postpone the resolution of the issue of costs pending the outcome of the appeal. Mr O'Sullivan requested the Court to fix a timetable for the filing of submissions on costs. Leave to appeal had been granted on 15 June 2012.

[4] The issue before the Court, therefore, is whether costs should be determined at this point in time or deferred pending the outcome of the appeal. The case is unusual. The more common situation in the event of a pending appeal is that the successful party in this Court will seek to have costs determined and judgment enforced, while the unsuccessful party is likely to seek a stay against execution of the judgment pending the outcome of the appeal. In this case the reverse is the situation.

[5] The primary authority on the issue is the decision of the full Court in *Dwyer v Air New Zealand Ltd*.[2] That case confirmed that the practice in this Court is identical to the practice in the High Court on the question and, as stated in *McGechan on Procedure*,[3] "... whether costs should be fixed when an appeal is pending appears to be that it is a matter for the trial Judge's decision and there is no right or wrong approach to this question." The full Court identified certain factors to be considered in dealing with the issue. However, those factors related to the situation where, unlike the present case, the party seeking the fixation of costs was the successful party in the Court below. The full Court did, however, confirm that the ultimate objective is to do justice between the parties.

[6] In his letter dated 19 June 2012, Mr O'Sullivan did not explain why the plaintiffs required costs to be determined before the appeal was dealt with but in his letter in response to the Registry, Mr Chemis said that there was no "utility" in the plaintiffs' approach and he went on to explain the respective stance of the parties in these terms:

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[2] [1997] ERNZ 156.
[3] (1988, looseleaf ed. Brookers) at [HR46.18A].

> ... The Court of Appeal has granted leave for the plaintiffs to appeal His Honour Judge Ford's decision. That appeal will not be heard for some time. Further, the Court might dismiss the appeal or it could grant the appeal but remit the case back to the Employment Court for further consideration. Alternatively, it could determine the case itself in either party's favour.
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> These different possibilities lead to different implications for costs. For instance, if the plaintiffs are successful in the Court of Appeal, or subsequently if the matter is remitted back, they will be entitled to costs from the first hearing.
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> As we understand the plaintiffs' position, they want to ascertain what costs they may be liable for if they are ultimately unsuccessful. Hence the request to set costs now. For the reasons set out above and because the costs submissions will be detailed and therefore time consuming and expensive, there is no sound basis for determining costs at this time.

[7] In a subsequent letter to the acting Registrar dated 23 July 2012, Mr O'Sullivan confirmed that the plaintiffs sought a costs determination at this stage in order "to provide clarity regarding what the potential liability for costs is." Mr Chemis responded on 25 July 2012, stating in part:

> The plaintiffs are, of course, able to take advice on the likely level of any costs award against them. We have tried to help inform this advice by advising Mr O'Sullivan of the costs the Bank incurred as a result of the Employment Court proceedings, and the costs award the Bank would seek from the Employment Court if the Bank is ultimately successful.
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> This is a more appropriate course than putting the parties to the expense of having to argue a matter that may never need to be determined.

[8] I accept the thrust of Mr Chemis' submissions. It seems to me that, in terms of the justice of the case, the force of his submissions in opposition to the plaintiffs' application outweigh the single ground advanced in support. I also take into account the fact that, in terms of my substantive judgment, it was the defendant who, as the successful party, was awarded costs and invited to present submissions on the issue. Against that background, and for the reasons stated, I find the defendant's preference to now have the question of costs deferred pending the outcome of the appeal to be compelling. I therefore decline to deal with the costs issue pending the outcome of the appeal.

A D Ford
Judge

Judgment signed at 11.00 am on 1 August 2012