

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2013] NZEmpC 180
CRC 15/12**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN ELDAD DOLEV
 Plaintiff

AND NETAFIM AUSTRALIA PTY LIMITED
 Defendant

Hearing: By memorandum of submissions received from the plaintiff on
 6 September and from the defendant on 19 September 2013

Appearances: Mr B A Fletcher, counsel for plaintiff
 Mr A Russell, counsel for defendant

Judgment: 27 September 2013

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] On 18 July 2013 I issued a judgment¹ in respect of the plaintiff's challenge against the Employment Relations Authority's determination² in respect of his claims against the defendant. Mr Dolev was successful in respect of one of his claims, but not the others. At the end of my judgment, I reserved the matter of costs. If the parties were not able to reach agreement, then I allowed Mr Dolev 14 days from the date of the judgment to file a memorandum in respect of costs and the defendant would then have 14 days to respond.

[2] The parties were not able to reach agreement on costs. Mr Dolev by his counsel, filed a memorandum seeking costs dated 16 September 2013, well outside the timeframe prescribed.

¹ [2013] NZEmpC 133.

² [2012] NZERA Christchurch 65.

[3] The defendant in its memorandum in answer, raises objection to costs now being considered in favour of the plaintiff, by virtue of the delay. That objection is probably unreasonable in view of the fact that the parties were in correspondence over the matter as recently as the end of August 2013.

[4] Mr Fletcher, counsel for Mr Dolev, has now calculated that under my judgment, Mr Dolev has recovered a sum of \$10,946.64. The total costs and disbursements he seeks in respect of the proceedings before the Employment Relations Authority and the Court total \$25,888.79.

[5] The defendant also makes a claim for costs on the basis that the plaintiff was unsuccessful in the majority of claims he brought before the Court under the challenge. The defendant seeks that the costs awarded against Mr Dolev in the Employment Relations Authority be confirmed. The total costs the defendant claims in respect of the challenge to the Court amount to \$21,000. On the basis of established legal authority applying to costs in this Court, the defendant claims the amount of \$11,326.44 as costs and disbursements as a reasonable contribution towards its total expenses in the proceedings in the Court.

[6] In counsel memoranda there is mention of a Calderbank offer. The defendant claims that once tax considerations are taken into account, the sum recovered by Mr Dolev in the one head of claim in which he has been successful was less than the offer made prior to trial. It is not appropriate when considering the effect of a Calderbank letter to take account of any tax considerations which may apply. While PAYE may need to be deducted by the defendant as employer, Mr Dolev's ultimate tax position in respect of the money owing to him is not the business of the Court, nor for that matter the defendant.

[7] I do not accept the argument put forward by the defendant as to the effect of the Calderbank letter.

[8] The issue of costs of course is discretionary. On the basis of Court of Appeal authority binding this Court in respect of awards of costs the rule generally applying is that costs follow the event and an award in the vicinity of two thirds of actual and

reasonable costs expended will be awarded. In this case Mr Dolev has been partially successful in his challenge. The claim in which he has been successful was one of the larger of the claims he was making. On the other hand the defendant has been successful in defending the challenge to the majority of Mr Dolev's claims which had been disallowed in their entirety by the Authority. It seems to me that on balance this is an appropriate case where no costs should be awarded to either party. Each party is to bear their own costs in the matter.

[9] In my judgment I noted that no challenge had been filed to the award of costs in the Authority. I indicated that that matter may have to be reviewed. The defendant was entirely successful in the Authority proceedings and has successfully defended the challenge to the majority of the claims made by the plaintiff. Accordingly, the Authority's determination on costs should stand. I understand that Mr Dolev has paid those costs.

[10] The only remaining matter arising out of the memoranda filed by the parties and the correspondence attached is a payment made to the Court as security for costs pending the outcome of the case. The sum paid in was \$12,000 and will presumably have accumulated interest since the payment into Court on 18 July 2013. In view of this judgment on costs there is an order directing the Registrar to release the sum of \$12,000 together with accumulated interest to Mr Dolev's solicitors on his behalf.

M E Perkins
Judge

Judgment signed at 1pm on 27 September 2013