IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 102
ARC 43/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
IN THE MATTER OF	an application for costs
BETWEEN	CATHERINE TAN Plaintiff
AND	MORNINGSTAR INSTITUTE OF EDUCATION LIMITED T/A MORNINGSTAR PRESCHOOL Defendant

Hearing:	By memoranda of submissions filed on 23 May and 4 June 2013
Appearances:	Garry Pollak, counsel for plaintiff Paul Pa'u, advocate for defendant
Judgment:	5 June 2013

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] In my substantive judgment delivered on 16 May 2013,[1] I directed that if the parties could not agree on costs then the plaintiff should file her memorandum by 24 May 2013 and the defendant should respond by 31 May 2013.

[2] The plaintiff has duly filed her costs memorandum. The defendant did not. On the morning of 4 June 2013, Mr Pa'u for the defendant apologised for the failure and asked for an extension of time until 6 June 2013. No reason was given for the failure or the need to request an extension. It would have been helpful if the request for extension had been made on 31 May. In the event, because I would have retired

[1] [2013] NZEmpC 82.

by 6 June, I directed that the defendant's submissions be filed no later than 4 pm on 4 June 2013. They were duly filed.

[3] The first item sought by Mr Pollak on behalf of the plaintiff was the repayment back to her in the sum of $4,500 she was directed to pay into Court as security for costs. This sum, together with any interest on it, is to be repaid to her forthwith, if it has not already been paid.

[4] As to costs in the Employment Relations Authority (the Authority), the plaintiff was ordered to pay $4,500 as a contribution towards the defendant's costs in a determination issued on 3 September 2012.[2] The Authority noted that the defendant had relied on the existence of Calderbank offers and other attempts to settle. The Authority, after noting the notional daily rate of $3,500 for what was regarded as a one day investigation meeting, then stated:

> [15] The only question of substance affecting whether the notional daily rate should be increased or decreased concerned the offers to settle. For the reasons I set out above, I give the first and second offers weight, but I discount some of that weight for the reasons also set out. The overall affect, however, is that the notional daily rate should be increased.
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> [16] Taking into account all of the above considerations, I conclude that the notional daily rate should be increased to $4,500.

[5] The plaintiff challenged that determination in an amended statement of claim filed on 7 September 2012. The grounds of the challenge to the costs determination were that the costs awarded were excessive in all the circumstances, that the defendant's Calderbank letters should not have been taken into account because of their unreasonableness and that the investigation was extended because of the defendant's unmeritorious and unreasonable stance that the plaintiff resigned from her employment and was not dismissed.

[6] Having been successful in her substantive challenge which determined that she had been unjustifiably dismissed, I ordered in my substantive judgment that the

[2] [2012] NZERA Auckland 303.

Authority's costs determination must also be set aside.[3] I stated in my substantive judgment:[4]

> It would have been tempting to simply have awarded the plaintiff the amount that the Authority determined the notional daily rate should have been in that particular investigation. However, that may have exceeded the plaintiff's actual costs. I also note in the costs determination of the Authority that there is a reference to Calderbank offers and a last minute withdrawal of a claim for reinstatement. For these reasons I consider I should reserve costs both in the Authority and in the Court.

[7] Mr Pollak relied on a letter he wrote to the defendant's advocate on 7 December 2011, marked "Without Prejudice as to Costs", which stated clearly that the offer to settle was by way of a Calderbank offer and that the plaintiff reserved the right to raise this should there be any subsequent issue as to the costs between the parties. The plaintiff proposed a compensatory payment of $10,000 and a contribution to her legal costs of $2,000 plus GST.

[8] Although the plaintiff's claim was dismissed by the Authority, in the Court her challenge succeeded and she was awarded $14,300 gross, for reimbursement of lost remuneration and $7,000 for distress and humiliation under s 123(1)(c)(i) of the Employment Relations Act 2000.

[9] That then raises the issue of what costs the plaintiff should be awarded as a contribution towards the costs she incurred in the Authority. Mr Pollak submitted the notional starting point for costs in the Authority should be $3,500 plus an uplift of $1,500 for her attempts to settle the grievance at a modest and reasonable rate plus the disbursements she incurred of $71.56, which may have included the filing fee in the Authority. I say 'may' because, although Mr Pollak certified in his memorandum that the plaintiff's actual costs in the Authority were in excess of $4,500 he did not provide copies of relevant tax invoices. Mr Pollak sought on her behalf a total of $5,071.56.

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[3] At [72].
[4] At [72].

[10] Mr Pollak submitted that the costs in the Authority should be uplifted by $1,500 because the plaintiff's costs were unnecessarily increased in having to meet the unmeritorious allegation that she had resigned, rather than being dismissed.

[11] Mr Pa'u, in his memorandum, submitted that an award of costs of $1,250 should be made for the Authority proceedings which he contended had taken a little over a half-day, according to the Authority's determination. Mr Pa'u pointed out that Mr Pollak had suggested in his memorandum regarding costs to the Authority, that a contribution of $1,250 was just and reasonable and that this was noted by the Authority in its determination.

[12] By contrast, I observed that, according to the Authority's determination, Mr Pa'u sought an order for a contribution of $6,000 to the defendant's post-mediation costs of $7,500, plus disbursements of $250. Mr Pollak was clearly arguing from a position where the plaintiff had lost in the Authority and Mr Pa'u, from a contrasting position where the defendant had won. The positions are now reversed. Had they been at the time, no doubt there would have been different submissions made by the respective parties to the Authority.

[13] Mr Pa'u observed that Mr Pollak had provided no invoices to prove that his client had incurred the substantial costs in the Authority he claims she has incurred. Mr Pa'u is correct in that observation.

[14] In many cases, that has been held to be a disqualifying factor as the onus is on the person seeking costs to show that they have been incurred by the party on whose behalf the application is made.[5] In the present case, however, I am prepared to rely on Mr Pollak's certification that the plaintiff incurred more actual costs than were being sought on her behalf as a contribution. The amounts involved are relatively modest and, therefore, I consider the reliance on Mr Pollak's certification to be reasonable in all the circumstances.

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[5] See *Eastern Bay Independent Industrial Workers Union Inc v Pedersen Industries Ltd* AC11A/09, 27 April 2009, cited in *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 at [11].

[15] Mr Pa'u observed that this was a relatively straightforward matter, there being only one witness for the plaintiff, that there were expansive claims made and that she sought reinstatement, which was only abandoned at the investigation meeting but that evidence had to be prepared in anticipation.

[16] The Authority, in its determination, in response to Mr Pau's submission that the plaintiff's conduct had added unnecessarily to costs, accepted that the last-minute withdrawal of the claim for reinstatement was unhelpful but did not accept that anything in that or the other matters raised had added unnecessarily to the defendant's costs. The Authority did not accept that anything in the plaintiff's claims was unreasonable to the point where the work required to prepare the response should be reflected in costs. I have no material before me which would gainsay the Authority's conclusions, which I now adopt.

[17] In the absence of invoices, I consider that the appropriate award to make in the Authority is $4,500 for similar reasons to those of the Authority but, because of the change in the result, to the opposite party. In addition I will allow as a disbursement, the filing fee in the Authority of $71.56, which the plaintiff would have had to have paid.

[18] Turning to the costs in the Employment Court, Mr Pollak submitted that it should follow the usual principle which starts at two thirds of the actual and reasonable costs, with any appropriate uplift or reduction.[6]

[19] For an uplift, Mr Pollak relied on two matters. The first, a Calderbank offer dated 11 February 2013 made after the parties attended further mediation on 7 February 2013, as directed by the Court following the hearing. This offer to settle was for $18,000 paid in three instalments inclusive of all claims for costs and reimbursement and, in addition, the sum deposited by the plaintiff by way of security, was to be returned to her. This offer was expressly made without prejudice save as to costs in the form of a Calderbank offer with a right to raise it should there be any subsequent matter arising as to costs between the parties. The plaintiff

[6] *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA).

succeeded in recovering more than the amount of the offer but it was made after the hearing and it is difficult then to justify any uplift to the actual costs which Mr Pollak was seeking to the extent of some $5,000. The earlier Calderbank offer made by Mr Pollak may have had more relevance but it was not relied on. No details were provided as to the costs incurred after the 11 February 2013 Calderbank offer but it would have included the costs of preparing the costs memorandum.

[20] In Mr Pollak's memorandum, there is reference to earlier offers, including one on 6 September 2012, but it is not asserted, nor proved, that it was in the form of a Calderbank offer so that it could be referred to in relation to costs. If it was made without prejudice it should not have been mentioned to the Court. The other matter which is said to inflate costs is the maintenance by the defendant of the claim that the plaintiff resigned. Mr Pollack submitted that had the defendant not maintained that allegation, the Court hearing could have taken no more than one day.

[21] Mr Pa'u accepted that he had also agreed that the case would only take one day but the defendant was unaware that the plaintiff was in fact challenging the commercial decision, thus widening the inquiry considerably. He observed that this was despite the pleadings in the statement of claim. Mr Pa'u noted that the Court had suggested that if the defendant felt prejudiced, it could seek an adjournment which the Court was likely to grant. Mr Pa'u advised the Court that the defendant would proceed but it meant that the defendant had to collect further financial information and, as a result, the hearing was much longer than anticipated. Mr Pa'u submitted that this was not the defendant's fault and that, by agreeing to proceed, unnecessary costs were saved by avoiding another fixture. He submitted that the defendant had taken a reasonable approach to the litigation and the contribution to costs sought by the plaintiff was excessive in what was a straightforward matter. He suggested that an award of costs of $4,500 would be just and equitable.

[22] Mr Pollak has provided full details of the costs incurred by the plaintiff up until 6 December 2012 which totalled $13,775.56 and included the filing fee of $204.44. They did not include the hearing fees of $751.32 paid directly to the Court by the plaintiff. The total of legal costs, excluding the filing fee but including typing, photocopying, postage and couriers and GST, was $13,571.12. I have

deducted the GST component shown on the invoices of $1,935.59 as not claimable for costs, which produces a net of $11,635.53 excluding the court fees.

[23] For a three day hearing with the attendant preparation, I consider this is a modest amount of costs. I therefore conclude that they have been reasonably incurred by the plaintiff.

[24] On the usual starting point of two thirds, that would produce a figure of $7,757.02.

[25] I do not accept Mr Pa'u's submission that the plaintiff's entitlement to a reasonable contribution should be reduced because the defendant was taken by surprise. The length of time the hearing took was because the parties agreed to proceed on the basis that the plaintiff claimed that the decision that terminated her employment for redundancy was not one that a fair and reasonable employer could have reached. The costs incurred by the plaintiff to advance this proposition appeared to me to be reasonable.

[26] Contrary to Mr Pa'u's submission, I consider that there should be an uplift from the usual two thirds to account for the additional time spent on dealing with the issue that the plaintiff had resigned. I consider that the defendant's contribution should be based on 80 percent rather than two thirds. This would produce a contribution of $9,308.42. To allow the plaintiff the costs of making the present application after the rejected Calderbank offer I round this out to $9,500, together with the filing and hearing fees in the Employment Court of $955.76, making a total of $10,455.76. I order the defendant to pay this sum, in addition to the $4,571.56 for the costs in the Authority, to the plaintiff as a contribution to her costs.

BS Travis
Judge

Judgment signed at 4.30 pm on Wednesday 5 June 2013