IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 103
ARC 68/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
IN THE MATTER OF	an application for costs
BETWEEN	NEW ZEALAND LANGUAGE CENTRES LIMITED (FORMERLY GEOS NEW ZEALAND LIMITED) Plaintiff
AND	DAVID PAGE Defendant

Hearing: By memoranda of submissions filed on 25 and 26 May 2013

Appearances: Dean Kilpatrick, counsel for plaintiff
Garry Pollak, counsel for defendant

Judgment: 5 June 2013

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] As I indicated in my judgment on remedies,[1] I reserved the issue of costs in the Employment Court because the written submissions addressed Calderbank offers before I had determined remedies. This judgment now deals with the costs in the Employment Court.

[2] Mr Pollak's submissions, filed on 25 May 2013, referred to Mr Harrison's attendances from June 2010 to October 2011 to the point when he was required to give evidence and Mr Pollak's firm of solicitors was then instructed. These totalled $29,813.83 including GST. Although the narrative on the invoices does not indicate the nature of the attendances, Mr Pollak advised that they included a settlement

[1] [2013] NZEmpC 100.

conference and preparation for trial and all related to the challenge in the Employment Court.

[3] Since the involvement of Mr Pollak's firm, the defendant's further legal costs, up to and including the full day hearing on 26 March 2013, totalled $40,021.92. Mr Pollak's invoices show the nature of the attendances and the hourly rates involved.

[4] Mr Pollak submitted that the Employment Court costs should be awarded in the vicinity of two-thirds of actual costs and that two-thirds of the total of $69,835.75 incurred to date was $46,557.17. This sum was sought as a contribution to Mr Page's costs.

[5] In relation to the Calderbank offers, Mr Pollak observed that it appeared to be accepted by the plaintiff that an award of costs in the vicinity of $45,000 was reasonable and that this sum was offered by the plaintiff as part of the settlement. It was, however, contingent on the defendant accepting a significantly lower payment for remedies than those determined by the Authority and, as a precondition, a long-term instalment arrangement. Mr Pollak submitted that, other than finding that the plaintiff generally accepted the level of the defendant's claim for costs, the Court should not give any weight to the Calderbank offers, which he submitted were unreasonable.

[6] In Mr Kilpatrick's submission on costs, filed on 26 March 2013 he accepted that the defendant had succeeded on the merits and that the defendant was entitled to an award of standard costs for a hearing of three days' duration, but that no increased costs should be awarded. He referred to the discretion conferred by cl 19 of Schedule 3 to the Act and accepted that costs should follow the event. As to quantification, he submitted that the principle is one of reasonable contribution to costs actually and reasonably incurred and the normal starting point is two-thirds, citing *Victoria University of Wellington v Alton-Lee*.[2] He also cited the principles summarised in *Reid v New Zealand Fire Service Commission*,[3] *Mana Coach Services*

[2] [2001] ERNZ 305 (CA).
[3] [1995] 2 ERNZ 38.

Ltd v NZ Tramways and Public Passenger Transport Union Inc,[4] *Binnie v Pacific Health Ltd*[5] and *Health Waikato Ltd v Elmsly.*[6]

[7] Mr Kilpatrick submitted that there were no considerations to increase that amount but contended that they should be offset by the need for the plaintiff to consider the voluminous material presented on behalf of Mr Page subsequent to the substantive hearing. Whilst accepting that it was not exactly on point, he cited *TNT Worldwide Express (New Zealand) Ltd v Cunningham*[7] where costs were awarded against the successful appellant when it won an appeal to introduce further evidence because it had obtained an indulgence from the Court.

[8] Mr Kilpatrick relied on three 'without prejudice save as to costs' offers made on 20 July 2011 and 1 and 12 March 2013. He observed that the offer of 12 March 2013 was for the same amount as the 1 March 2013 offer, but did not impose a deadline for reply.

[9] The offer on 20 July 2011 was for $45,000 and preceded the substantive hearing by almost three months. The amounts obtained by the defendant as a result of the hearing far exceeded the amount of that offer. I have no further regard to it.

[10] The offer made on 1 March 2013 was for $181,306.80 and had a detailed breakdown, which included offers of $45,000 for costs in the Court and $12,070 for the Authority's costs award. Mr Kilpatrick noted that the offer followed the release of the substantive judgment in which the plaintiff failed to justify the defendant's summary dismissal. Mr Kilpatrick submitted that the offer was reasonable and it was unfortunate that the parties were unable to reach agreement. As a result, the plaintiff incurred extra costs which were relevant in determining the parties' actual and reasonable costs. Mr Kilpatrick submitted that it would be unjust to require the plaintiff to compensate the defendant for costs which had been caused by natural disasters or the conduct of the defendant. Mr Kilpatrick submitted that the costs for the defendant should be reduced to account for the additional costs incurred by the

[4] WC3/09, 1 April 2009.
[5] [2002] 1 ERNZ 438 (CA).
[6] [2004] 1 ERNZ 172.
[7] [1992] 2 ERNZ 1010 (CA).

plaintiff subsequent to the October 2011 hearing and taking into account the Calderbank offers.

[11] Mr Kilpatrick's memorandum also annexed invoices for the plaintiff's legal costs between 21 December 2011 and 30 May 2012, which totalled more than $31,000. No invoices for attendances subsequently, including the May 2013 hearing, were included. If they had been, it is likely that the plaintiff's costs would have been well in excess of $40,000.

[12] The Court has first to consider whether the actual costs incurred by the defendant were reasonable for what became a four day hearing with voluminous additional affidavits, bundles of documents and written submissions. Whilst there may have been a degree of duplication because of the work undertaken for the Authority's investigation, it is difficult to assert that in a case of such complexity the actual costs incurred of nearly $70,000, including GST, were not reasonable.

[13] There was some duplication because of the need to change solicitors close to the hearing, but I do not consider that the plaintiff can be held responsible for this. Mr Harrison's invoices included administrative fees which I do not consider appropriate to include for the purposes of assessing the proper contribution the unsuccessful plaintiff should make.

[14] I do not consider that the defendant's entitlement to a reasonable contribution should be reduced by the voluminous material he produced after the liability hearing because the parties agreed remedies would be dealt with in this matter. I consider the usual starting point of two thirds of actual and reasonable should apply in this case.

[15] The Calderbank offer was unsuccessful as the total amount of the remedies awarded amounted to $212,816.13. This excluded the plaintiff's liability to contribute towards the defendant's costs which the plaintiff assessed for the purposes of the Calderbank offer, to be $45,000 in the Court. That strikes me as the appropriate figure to award as two thirds of the actual and reasonable costs. The $46,557.17 sought by the defendant is too high because it is based on the actual costs

which include the administration fees and an element of duplication. I therefore award the successful defendant as a contribution towards his costs, the sum of $45,000.

[16] I note that there is no express statutory provision which would permit this to be included in the instalment arrangements I have put in place for the repayment of the remedies.

B S Travis
Judge

Judgment signed at 2.30 pm on 5 June 2013