

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 136
ARC 86/12**

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

AND IN THE MATTER of costs

BETWEEN TALENT BEAN LIMITED T/A
 ROASTED ADDIQTION CAFÉ
 Plaintiff

AND PREMA D'SOUZA
 Defendant

Hearing: By submissions filed by defendant on 2 July 2013 and by
 plaintiff on 16 July 2013

Appearances: Richard Zhao, counsel for plaintiff
 May Moncur, advocate for defendant

Judgment: 18 July 2013

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] On 20 June 2013 I issued a judgment in respect of the plaintiff's de novo challenge.¹ The challenge to the determination² of the Employment Relations Authority was unsuccessful. I reserved the issue of costs but in the hope that the parties might reach agreement. No agreement has been reached and memoranda from the advocate for the defendant and counsel for the plaintiff have now been received and considered.

[2] Pursuant to s 183(2) of the Employment Relations Act 2000 the Court's decision in this matter results in the determination of the Authority being set aside.

¹ [2013] NZEmpC 113.

² [2012] NZERA Auckland 402.

The award made in paragraph 37 of my judgment stands in place of the determination. The remedies now awarded to the defendant include a reconfirmation of the costs and disbursements awarded by the Authority. The defendant seeks costs in respect of the challenge. The matter is to be decided upon the principles set out in the three often cited decisions of the Court of Appeal dealing with costs awards in this Court; *Victoria University of Wellington v Alton-Lee*,³ *Binnie v Pacific Health Ltd*,⁴ *Health Waikato Ltd v Elmsly*.⁵ Those principles are now so clearly established and applied in this Court that they do not require repetition.

[3] The issue to be decided is whether the fees charged to the defendant by her advocate, Ms Moncur, were actually and reasonably incurred in all the circumstances. Once that is decided the principles applying are that costs usually follow the event, and that the award made is two thirds of such actual and reasonable charges.

[4] In this case, Ms Moncur submitted that in view of the behaviour of the plaintiff in this matter it is an appropriate case to award full indemnity costs. Mr Zhao, on behalf of the plaintiff, submitted that costs should lie where they fall. Alternatively, he submitted that the costs charged to the defendant are not reasonable, are excessive and any award should be accordingly reduced.

[5] While in my judgment I have not entered into criticism of the plaintiff lodging the challenge; it was always its right to do so, the dismissal of the defendant and the method by which that was procured could never, in this case, have been justifiable. The suggestion by counsel for the plaintiff that costs should lie where they fall is not tenable. Nevertheless, this is not an appropriate case to award full indemnity costs.

[6] The trial of this matter went into a second day. Reasonably substantial attendances would have been needed in respect of pleadings, preparation of briefs of evidence and the bundle of documents and the consideration and preparation of submissions. The costs of each party, would, in my view, be similar. While the

³ [2001] ERNZ 305 (CA).

⁴ [2002] 1 ERNZ 438 (CA).

⁵ [2004] 1 ERNZ 172 (CA).

plaintiff called three witnesses and only the defendant gave evidence, Ms Moncur would have had to carefully consider the plaintiff's evidence and ensure an appropriate response. The plaintiff has, of course, put the defendant to further expense in having to apply for an award of costs.

[7] In all the circumstances the charge made by Ms Moncur's firm of \$10,122.50 inclusive of GST is reasonable. This includes disbursements of \$60. The fees, plus GST, after deduction of the disbursements, amounts to \$10,062.50. Two thirds of that sum is \$6,708.33. Accordingly, the plaintiff is ordered to reimburse the defendant in the sum of \$6,708.33, which includes GST. The disbursement of \$60 is also to be added. This is in addition to the sums awarded in paragraph 37 of my judgment of 20 June 2013.

M E Perkins
Judge

Judgment signed at 4.45 pm on 18 July 2013