

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2013] NZEmpC 211
WRC 27/12**

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

AND IN THE MATTER of an application for costs

BETWEEN TRANZIT COACHLINES WAIRARAPA
LIMITED
Plaintiff

AND PAUL MORGAN AND MEI WILSON
First Defendants

AND MANUFACTURING AND
CONSTRUCTION WORKERS UNION
INCORPORATED
Second Defendant

Hearing: By submissions filed by the plaintiff on 18 October 2013 and by
the defendants on 11 November 2013
(Heard at Wellington)

Court: Judge AA Couch
Judge Christina Inglis
Judge ME Perkins

Appearances: Michael Gould, counsel for plaintiff
Peter Cranney, counsel for first and second defendants

Judgment: 22 November 2013

COSTS JUDGMENT OF THE FULL COURT

Introduction

[1] A full Court issued its decision¹ on 20 September 2013. The plaintiff was successful on its application for a decision of the Court as to liability for holiday leave and pay. Nevertheless, the decision of the Court disclosed difficulties relating

¹ [2013] NZEmpC 175.

to the way that the parties had treated and resolved holiday leave and pay issues in the past. The Court also indicated that the decision in this specific dispute might not apply to future public holiday entitlements for employees of the plaintiff.

[2] The issue of costs was reserved to enable the parties to make submissions on this question. Submissions have now been received. The plaintiff seeks costs against all defendants.

[3] The application for costs covers both the proceedings in this Court (a challenge to the determination of the Employment Relations Authority) and the costs incurred in the investigation proceedings in the Authority.

[4] In deciding upon costs the Court usually applies the principles arising from the three main decisions of the Court of Appeal dealing with costs applications before this Court.²

[5] Mr Gould, on behalf of the plaintiff has submitted that in applying the *Binnie* decision of the Court of Appeal, this is an appropriate case for costs to follow the event. In applying those authorities the plaintiff claims that it is entitled to two thirds of the actual reasonable costs incurred in respect of the challenge to the Court. It seeks a further award towards its costs in respect of the Authority's investigation.

[6] The matter is, however, ultimately for the Court to exercise its discretion. Mr Cranney, counsel on behalf of the defendants, has submitted that this is an appropriate case for costs to lie where they fall. Alternatively, he submitted that having regard to the circumstances giving rise to the way the matter came before the Court and the modest means of the first defendant bus drivers any costs award against them should be for a modest amount. From circumstances presented during the hearing of the challenge the Court is able to infer that indeed the two first defendants are persons of modest means.

² *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305(CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

[7] These proceedings had their genesis in a binding determination of the Labour Inspector,³ which required the plaintiff to pay the first defendants (and possibly other employees of the plaintiff), holiday pay for the public holiday in lieu of Christmas Day 2010. As Christmas Day fell on a Saturday in that year the public holiday observance for most employees in New Zealand was Monday 27 December 2010.

[8] As Mr Cranney mentioned in his submissions, the two first defendant bus drivers co-operated with the plaintiff in having the matter dealt with as a legal issue. The defendants (including the second defendant Union) agreed to a statement of agreed facts being presented to the Authority. They also presented short legal argument for the Authority.

[9] The defendants also co-operated in a statement of agreed facts being filed in the challenge to the Authority's termination. This statement of agreed facts was virtually the same as that before the Authority. Very little extra costs would have been incurred by the plaintiff in preparation of documents and legal argument presented to the Court for the challenge.

[10] Mr Cranney made the further pertinent point that the allocation of a full Court was at the instigation of the Court itself and not the parties.

[11] Mr Gould indicated that the actual costs incurred by the plaintiff in bringing the challenge amounted to \$24,802. Accordingly, the plaintiff seeks two thirds of this amount in accordance with the cited authorities on the basis that such expenses were reasonably incurred. In addition the plaintiff seeks costs on the Authority's investigation and determination of \$2,000. The Authority reserved costs in its determination.

[12] It is clear that this issue was a matter of some importance to the plaintiff. The setting of a precedent would lead to consequences in relation to other employees in addition to the first defendants. Nevertheless, we agree with Mr Cranney that a lot of the attendances on the challenge would have been substantially reduced by the similar attendances necessary for the Authority's investigation. We also accept Mr

³ At s 79, Holidays Act 2003.

Cranney's submission as to the effective outcome for each of the parties as a result of the entirety of our decision. We further accept that the defendants did not initiate the dispute and were effectively forced to participate in the proceedings, which the plaintiff obviously regarded as necessary in a wider context. The defendants fully co-operated in that process and acted in a manner whereby the proceedings could be resolved in the most cost effective manner.

[13] So far as the second defendant Union is concerned, it is difficult to ascertain why it was a party at all. It was not mentioned in the determination. The statement of claim made no pleading against the second defendant at all. No relief against it was sought and the plaintiff did not obtain any ruling from the Court which is binding on the Union. Mr Cranney's comments as to co-operation in the proceedings apply equally to the second defendant Union as to the first defendants.

[14] In all of the circumstances and having regard to the overall interests of justice, we consider costs should lie where they fall. Accordingly, we exercise our discretion by making no order for costs either in respect of the challenge or the investigation before the Authority.

M E Perkins
Judge

Judgment signed at 9.30 am on 22 November 2013