IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY

[2013] NZEmpC 215
CRC 6/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND CARDS LIMITED Plaintiff
AND	COLIN RAMSAY Defendant

Hearing: on the papers - memoranda received 28 May 2012, 3 May 2013 and 6 May 2013

Appearances: Robert Beresford, agent for the plaintiff
Robert Thompson, advocate for the defendant

Judgment: 26 November 2013

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] I gave my substantive judgment in this matter on 27 March 2012.[1] I found that the defendant had been unjustifiably dismissed and awarded him remedies totalling $10,880. I also confirmed the award of $3,000 for costs previously made by the Employment Relations Authority. Since then, the plaintiff has been attempting to pursue an appeal against that decision in the Court of Appeal.

[2] On 28 June 2012, the Court of Appeal conditionally granted the plaintiff leave to appeal. The plaintiff then applied to the Registrar of the Court of Appeal to waive the fee payable on setting down the appeal for hearing. The Registrar declined that application. The plaintiff applied to review that decision. That application was dismissed by Stevens J on 21 March 2013.

[1] [2012] NZEmpC 51.

[3] The plaintiff also applied to the Court of Appeal for a stay of proceedings for execution of the orders I made. That application was dismissed in a judgment delivered on 25 November 2013.

[4] In my substantive decision, I concluded by encouraging the parties to agree costs if possible or, in the alternative, to file memoranda. Agreement was not reached. When that became evident, Mr Thompson filed a memorandum on behalf of the defendant. That was filed about two weeks outside the time period I had indicated in my judgment but, as the delay was largely due to the parties attempting to reach agreement, I extended time to validate the filing.

[5] Mr Beresford was then to have 15 working days in which to respond to Mr Thompson's submissions. Although Mr Beresford was aware of this time scale, he did not respond.

[6] On 4 April 2013, I issued a minute to the parties in which I recorded these events and said:

> [4] When a party fails to take the opportunity to be heard on an issue, the Court will normally decide the matter without hearing from that party. It is certainly open to me to do that now in relation to costs in this case.
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> [5] I have decided, however, not to take that course. The principal reason is that Mr Beresford has been engaged for more than a year in a lengthy process of attempting to appeal my substantive decision. In the course of that process, he may well have lost sight of the fact that a costs decision remains to be made by this Court.
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> [6] If the plaintiff wishes to respond to Mr Thompson's memorandum of 28 May 2012, a memorandum in reply must be filed and served by **4pm on Friday 3 May 2013.** This time limit must be observed.

[7] In response to that minute, Mr Beresford filed a 12 page memorandum on 3 May 2013 and a further 7 page memorandum on 6 May 2013.

[8] In deciding costs, the Court usually applies the principles arising from three leading decisions of the Court of Appeal.[2] The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of

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[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).

being represented in that litigation by counsel or an advocate. A useful starting point is two-thirds of the costs actually and reasonably incurred by that party but that proportion may be adjusted up or down according to the circumstances of the case and the manner in which it was conducted. Ability to pay may also be taken into account.

[9] Although the remedies awarded to the defendant by the Court were slightly less than those awarded to him by the Authority[3], the plaintiff's challenge was effectively unsuccessful. The outcome was in the defendant's favour and it is he who should receive an award of costs.

[10] In the proceeding before the Court, the defendant incurred costs totalling $22,657.51 inclusive of GST. This figure is verified by the copies of invoices attached to Mr Thompson's memorandum.

[11] On the face of it, that is a large amount. In the circumstances of this case, however, I regard it as reasonable to a large extent. There were significant interlocutory issues, including the plaintiff's application for a stay of proceedings, an extended dispute about disclosure of documents and an argument regarding admissibility of evidence. In relation to these matters and the proceeding generally, Mr Beresford engaged in voluminous correspondence with the Court, some of which required responses from Mr Sanders. It is apparent from the narration on the invoices directed to the defendant that Mr Sanders was also drawn into extensive correspondence directly with Mr Beresford. This included attempts at settlement which were unsuccessful but sensible. Mr Beresford's brief of evidence was lengthy and discursive, requiring careful analysis and a considered response. The substantive hearing lasted four full days.

[12] The only reservation I have about the reasonableness of the costs actually incurred by the defendant is that the manner in which they were calculated is not explained in any detail in Mr Thompson's memorandum. The invoices themselves describe the specific work done but there is no indication of the time devoted to the various tasks or the rate charged for Mr Sanders' work. In fairness to the plaintiff, I

[3] $808 before tax.

must take a conservative approach to my assessment of the extent to which the costs were reasonably incurred. I find that the defendant actually and reasonably incurred costs of $20,000 inclusive of GST.

[13] I turn then to whether the manner in which this case was conducted requires a departure from the usual starting point of two thirds of the costs actually and reasonably incurred.

[14] The Employment Relations Act 2000 gives parties in the employment jurisdiction the right to be represented by a person of their choice, regardless of that person's ability or qualifications.[4] The Court recognises that right by giving lay advocates, agents and litigants in person considerable latitude and assistance in the preparation and presentation of their cases. At the same time, the Court expects such representatives to make themselves familiar with the relevant legislation, regulations and practices of the Court and to make a genuine effort to comply with them. In particular, the Court expects that, once specific requirements have been explained, a representative will follow them subsequently.

[15] In this case, Mr Beresford repeatedly and persistently failed to comply with the most basic requirements of litigation. Although he is clearly an intelligent man, he was frequently unwilling to accept what he was told by the Court or what was obvious as a matter of logic. In his conduct of the hearing, this reached the point on several occasions where he was warned that his failure to heed the Court's directions placed him at risk of being in contempt. As I recorded in my substantive judgment:

> [72] The manner in which Mr Beresford conducted the case for the Company added greatly to the length of the hearing. Both in his own evidence and in his cross examination of the plaintiff's witnesses, Mr Beresford was repetitious, discursive and frequently drifted into irrelevance. Had the evidence been limited to what was relevant to the essential issues, the case could have been heard in one day. As it was, it occupied four full days and the transcript of evidence ran to well over 400 pages.

[16] On this issue, Mr Beresford submits that the defendant was responsible for much of the additional hearing time required because he was evasive in his answers to questions in cross examination. I do not accept that submission to any significant

[4] Section 236.

extent. What Mr Beresford characterises as evasion was often confusion created by lengthy and ill-focussed questions or frustration at repetition of questions already answered. Responsibility for the excessively long hearing rests firmly with Mr Beresford.

[17] The defendant should not have to bear the additional cost of representation he incurred as a result of the unnecessary prolongation of the hearing. To allow for it, I increase the proportion of the costs for which he should be reimbursed to 75 percent.

[18] In his memoranda, Mr Beresford largely seeks to relitigate the issues dealt with in my substantive judgment. I cannot do that and therefore put those submissions aside. Mr Beresford also invites me to have regard to s 124 of the Employment Relations Act 2000, which relates to contribution. As this section relates to remedies, I dealt with it in my substantive judgment.[5] It has no application to costs.

[19] Although Mr Beresford made no submission on the point, I have considered whether the award of costs to the defendant ought to be reduced because the remedies he was awarded by the Court were less than those awarded by the Authority. I think not. I have already noted that the difference was small. It arose out of additional evidence provided by the defendant himself regarding mitigation of his claim for lost earnings. It is also significant that, prior to the hearing in the Court, the defendant offered to settle for significantly less than the sums he was subsequently awarded. The plaintiff rejected that offer.

[20] The defendant does not seek reimbursement of any disbursements.

[21] The plaintiff is ordered to pay the defendant $15,000 for costs.

A A Couch
Judge

Signed at 11.15 am on 26 November 2013.

[5] Paras [64] to [69].