IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY

[2013] NZEmpC 223
CRC16/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WALLACE & COOPER LTD trading as ANDAR HOLDINGS Plaintiff
AND	JAMES LESLIE IRVINE Defendant

Hearing:	on the papers - memoranda received 21 May, 11 June and 12 June 2013
Appearances:	Karina Coulston, counsel for the plaintiff Michael Guest, advocate for the defendant
Judgment:	2 December 2013

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] I delivered my substantive decision in this matter on 17 May 2013.[1] The challenge was unsuccessful and the defendant was awarded remedies marginally in excess of those awarded by the Authority. The parties' representatives were unable to agree on costs and memoranda have been filed.

[2] For the defendant, Mr Guest included in his memorandum a claim for interest on the remedies awarded. I decline to award interest at this stage of the matter. Any claim for interest should be made in the pleadings or, in exceptional cases, at the substantive hearing of a matter. That is because interest is a form of remedy and needs to be considered as part of the overall exercise of discretion to award remedies. In this case, there was no claim for interest made on behalf of the

[1] [2013] NZEmpC 86.

defendant at any stage prior to submissions on costs. In the absence of a convincing reason why the claim was not made earlier, it is now too late.

[3] 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 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.

[4] I am satisfied that the defendant actually incurred costs totalling $63,450 in this proceeding. This is confirmed by the invoice attached to Mr Guest's submissions and there is no reason to question it.

[5] Mr Guest submits that these costs were reasonably incurred in their entirety. In support of that submission, he has provided the Court with detailed information as to the time spent on each aspect of the matter and the rates at which he has charged for his attendances. These total 124 hours at $150 per hour and a further 249.9 hours at $200 per hour. As there is no reference in the invoices to GST, it must be presumed that these figures are inclusive of GST.

[6] Mr Guest's charge out rate is reasonable. He is an able advocate with very extensive legal experience, albeit mostly in other areas of the law. The extent to which the costs incurred by the defendant were reasonable must therefore focus on the time spent by Mr Guest on the matter. Ms Coulston submits that no more than 210 hours of work can be justified. She arrives at that figure on the basis that she spent 200 hours on the matter and the broad proposition that it cannot be reasonable for Mr Guest to have spent much more. Ms Coulston does not make any submissions about the specific figures provided by Mr Guest for each aspect of the matter.

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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).

[7] When assessing the reasonableness of costs on the basis of time spent and hourly rates, the two will always be interconnected. A skilful and experienced practitioner may be able to justify a high charge out rate but will also be expected to use that skill and experience to complete the necessary work in a shorter time than someone less experienced. Conversely, it may be reasonable for a junior practitioner who can only justify a modest charge out rate to spend more time to complete the same work. In taking a time costing approach, therefore, the Court must also stand back at the end of the process and be satisfied that the total costs incurred were reasonable for the overall amount of work required to properly prepare and present the case for the party concerned.

[8] In this case, Mr Guest's charge out rates are comparable to those considered reasonable for junior legal practitioners. As an advocate, he will have fewer business overheads then lawyers with practising certificates but, overall, there is substance in his submission that being in legal practice does not, of itself, justify a higher charge out rate or, more to the point here, that the absence of one requires a lower rate of charging. As a consequence, I take the same approach that I would to assessing the time that a relatively junior practitioner might reasonably take to complete the necessary work.

[9] On this basis, I have worked through the detailed submissions made by Mr Guest, assessing the time spent and costs incurred on the basis of the information he has supplied and my knowledge of the proceeding. I am satisfied that the time spent on each aspect of the matter was reasonable with one exception. That is the 42 hours said to have been spent on dealing with the allegation that Mr Evans improperly accessed the plaintiff's computer system. While that issue was raised in this proceeding in an effort to discredit Mr Evans as a witness, it was at the heart of proceedings before the Professional Conduct Committee of the New Zealand Institute of Chartered Accountants. Mr Evans was represented in those proceedings by Mr Guest and there was inevitably an overlap between the work done on Mr Evans' behalf and that done on behalf of the defendant in this proceeding. I am satisfied, however, that Mr Guest reasonably accounted for that overlap by reducing his charges by $5,000. Taking that reduction into account, I am satisfied overall that the costs incurred by the defendant were reasonable in their entirety.

[10] What proportion of those costs should the plaintiff be required to pay? In accordance with the guidelines established by the Court of Appeal, I take a starting point of two thirds. Mr Guest submitted that there were many aspects of the manner in which the plaintiff's case was conducted which warrant an increase in that proportion. His complaint about the plaintiff's deficient pleadings was dealt with by an award of costs I made at the time. Many of the other issues are adequately dealt with by my conclusion that the time spent and costs incurred in dealing with them were reasonable. I find, however, that the following aspects of the plaintiff's conduct of the case were unreasonable or improper:

(a) The plaintiff improperly delayed providing disclosure of documents.

(b) The plaintiff unreasonably sought to have the sound recording made by Mr Evans excluded as evidence.

(c) The plaintiff pursued unfounded allegations to an unreasonable extent. These were the suggestions that Mr Evans' hearing was impaired and that the recording he made had been tampered with. Each of these allegations was abandoned by the plaintiff but only after the defendant had briefed expert evidence.

[11] On the other hand, there were aspects of the manner in which the defendant's case was conducted which were equally unreasonable. In particular, the defendant presented expert evidence as evidence in reply and withheld it until the last possible moment. The plaintiff was prejudiced and this led to the fixture scheduled to begin on 20 November 2012 being vacated.

[12] There were other aspects of the manner in which this proceeding was presented which do both representatives no credit. The litigation was used as a vehicle for personal squabbling which was unprofessional and inappropriate. As a result, I had to direct both Mr Guest and Ms Coulston on several occasions to stop such behaviour. Both parties engaged in the presentation of evidence which was entirely irrelevant or, at best, of marginal relevance. Much of this was instigated by the plaintiff but the defendant replied in kind.

[13] Overall, I find that the manner in which the litigation was conducted requires both an increases and a decrease in the proportion of the defendant's costs which the plaintiff ought to pay and that no adjustment should be made on that account.

[14] The other circumstance I must take into account is an offer of settlement made by the defendant on 20 September 2012. That was after the final, detailed pleadings had been filed. The offer was addressed to Ms Coulston and was as follows:

> Dear Karina,
>
> WITHOUT PREJUDICE SAVE AS TO COSTS
>
> Re: Irvine v Wallace v Cooper Ltd
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> This is a without prejudice (save as to costs) Calderbank letter. My client will settle for $80,000 and bear his own costs. That is a $21,000 reduction and your client does not stand the risk of an increase of 6 months to 12 months' salary. That is an extra $75,000. Also, your client does not incur any more legal costs. As you know, this letter means that if your client loses, or gains a reduction of less than $21,000, then it is likely liable to pay my Mr Irvine's full costs which will be approximately $22,000 after a 3 - 4 day hearing. That figure could alter upwards.
>
> A lesser counter offer will NOT be considered. I respectfully suggest that a reduction of $21 ,000 is a very reasonable offer. .
>
> The publicity has also been damaging and a Court hearing will likely be reported on a day by day basis. A settlement could come with a complete shutdown of publicity and undertakings from both sides not to promote any further publicity.
>
> The offer is open until this coming Monday at 4.00 pm.
>
> Yours faithfully,
>
> Michael Guest

[15] Some explanation of the figures in this letter is required. The Authority ordered the plaintiff to pay the defendant $19,000 as compensation for distress and $75,000 as reimbursement of lost remuneration. The parties then agreed on a sum of $7,000 for costs. That made a total of $101,000 the plaintiff was obliged to pay the defendant. It follows that the defendant's offer to settle for $80,000 represented a reduction of $21,000 as Mr Guest suggested. This offer was rejected by the plaintiff.

[16] In the Court, the defendant was awarded $15,000 as compensation and $80,000 as reimbursement of lost earnings. As the total of $95,000 was substantially more than the $80,000 he had offered to settle for, Mr Guest submits that the

plaintiff's rejection of the offer was unreasonable. As a result, he suggests that the defendant should be reimbursed for the all of the costs he incurred subsequently.

[17] In response, Ms Coulston submits that the real value to the defendant of the offer was greater than the remedies he was awarded by the Court. She justifies that submission by assuming that any settlement would have been by way of compensation for distress and therefore non-taxable. She then compares that with the remedies awarded by the Court by making a notional deduction for tax of either $15,000 or $30,000.[3] On this basis, Ms Coulston submits that the offer ought not to be taken into account.

[18] I do not accept this submission. The incidence of taxation is not a consideration to be taken into account by the Court.[4] In any event, whether it was reasonable for the plaintiff to reject the offer must be assessed according to the cost to the plaintiff, not the benefit to the defendant. As $80,000 is significantly less than the total of $95,000 in remedies awarded by the Court, it was unreasonable for the plaintiff to have rejected the defendant's offer.

[19] The Court of Appeal has repeatedly said that a "steely approach" should be taken where offers to settle without prejudice to costs are rejected and not bettered at trial.[5] This may be modified where there are non-monetary considerations such as vindication but nothing of that nature has been suggested in this case. An appropriate response to the plaintiff's rejection of the offer of settlement is that it should pay 90 percent of the defendant's costs incurred subsequently.

[20] Although Mr Guest provided me with detailed information about how the costs incurred by the defendant were calculated, it is not entirely clear which work was done before and after the offer of settlement was rejected on 25 September 2012. It appears very likely, however, that the offer was made and rejected after the briefs of evidence for the defendant and Mr Evans had been prepared. To that stage, the defendant had incurred costs of $18,600. The plaintiff is to pay two thirds of that

[3] These two different figures are used in Ms Coulston's submissions>
[4] See *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [24] – [26] and the decisions referred to there.
[5] See for example *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [20].

amount. Subsequently, the defendant incurred further costs of $49,850 less $5,000 which is $44,850. The plaintiff is to pay 90 percent of that amount.

[21] The defendant did not claim reimbursement of any disbursements.

[22] The plaintiff is ordered to pay the defendant $52,765 for costs.

A A Couch
Judge

Signed at 3.15 pm on 2 December 2013