IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 49
CRC 4/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KEES DE BRUIN Plaintiff
AND	CANTERBURY DISTRICT HEALTH BOARD Defendant

Hearing: on the papers - memoranda received 4 and 28 March 2013

Counsel: Andrew McKenzie, counsel for the plaintiff
Penny Shaw, counsel for the defendant

Judgment: 5 April 2013

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] I gave my substantive judgment in this matter on 11 July 2012.[1] In it, I concluded by encouraging the parties to agree costs or, if they were unable to do so, to file memoranda according to a timetable. The parties have not followed that timetable but I am told by counsel that there is no objection to delay. Accordingly, I have considered the memoranda filed recently and taken their contents into account in this decision. This decision involves fixing costs in both the Court and the Authority. The latter is necessary because the plaintiff's challenge was successful.

Costs in the Court

[2] Counsel both acknowledge that the essential principles applicable to fixing costs in this Court are settled and well known. Costs usually follow the event. A

[1] [2012] NZEmpC 110.

useful starting point is two thirds of the costs actually and reasonably incurred by the successful party. This may be adjusted up or down to reflect the circumstances of the case and the manner in which it was conducted. Ability to pay is also a factor which may be taken into account.

[3] The application of those principles requires the Court to be properly informed of the costs actually incurred and provided with the information necessary to assess the extent to which they were reasonably incurred. This material must be provided by the party seeking costs.

[4] As to the costs actually incurred, it is usually not enough for counsel to simply provide bare figures. What the Court needs to be sure of is the amount actually paid or payable for representation before the Court in the proceeding. That is normally done by providing the Court with copies of the invoices rendered to the successful party.

[5] As to the reasonableness of those costs, further information should be provided showing how the amount was calculated or otherwise justifying it.

[6] In this case, such information was conspicuously absent from Mr McKenzie's memorandum. As to the quantum of costs incurred, he simply said that "total costs arising from the Employment Court proceedings were $15,000 plus GST." While I do not question Mr McKenzie's veracity, the Court's experience is that perceptions of what comprises costs incurred in the proceeding vary considerably. Without the ability to verify the amount stated and the specific purposes for which costs were incurred, I am therefore left in doubt about the relevant costs incurred by the plaintiff. This is of very real importance because the fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the necessary cost of representation. No account can be taken of costs which have not actually been incurred in relation to the proceedings before the Court.

[7] Mr McKenzie provided no information at all which might assist me in deciding the extent to which the costs incurred by the plaintiff were reasonable.

[8] Just as the principles applicable to the award of costs in this Court are well known, so are the consequences of failing to provide the information necessary for the Court to apply those principles. As I and other judges have frequently observed,[2] parties represented by competent counsel, as the plaintiff was in this case, can properly be expected to provide the information necessary to support a claim for costs. They fail to do so at their peril. In such cases, it is open to the Court to make no award of costs. I have contemplated taking that course in this case but have decided against doing so. Based on my knowledge of the case and general guidelines, I can make a reasoned decision. In doing so, however, I must take a conservative approach to avoid any possibility of being unjust to the defendant.

[9] The hearing of this matter occupied parts of three days which, taken together, comprised approximately two and a half full days. The matter had been fully presented and argued in the course of the Authority's investigation. That would have involved the preparation of briefs of evidence and, I infer, detailed written submissions. The briefs appeared to have been altered little for use in the Court hearing. The plaintiff's brief was updated to reflect events following the Authority's investigation meeting but there was no indication that the other briefs had been changed. The submissions provided to the Court appeared to have been based on those provided to the Authority but were significantly amended to take into account the full Court decision in *Angus v Ports of Auckland Ltd.*[3] Including the necessary incidental attendances associated with any litigation in the Court, I assess the time required to prepare and present the plaintiff's case in the Court at four days.

[10] Given the novel aspects of the case, it being the first substantive case before the Court involving the amended ss 103A and 125 of the Employment Relations Act 2000, it required the skills of an experienced advocate. Referring by way of analogy to the categories of proceedings set out in rule 14.3 of the High Court Rules, this case was comparable to category 2. The daily recovery rate for category 2 proceedings in schedule 2 of the High Court Rules is $1,990. Rounding that up to

[2] See for example *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 at [11].
[3] [2011] NZEmpC 160.

$2,000 per day and applying that rate for four days, I conclude that an appropriate starting point for an award of costs in the Court is $8,000.

[11] Mr McKenzie did not submit that there were any aspects of the case which warranted departing from a conventional starting point. Ms Shaw, however, submitted that there were two factors justifying a significant reduction. The first was that the plaintiff had not been successful in obtaining all the remedies he sought. While that is correct, it does not justify any reduction in costs. The hearing was dominated by two key issues; whether the dismissal was unjustifiable and, if so, whether the plaintiff should be reinstated. The plaintiff was successful on both issues.

[12] Ms Shaw's second submission was that, because this was the first case involving the application of the decision in *Angus*, it ought to be regarded to an extent as a test case and a lower award of costs made. I do not think this case can properly be regarded as a test case. It did not give rise to any broad principles or decide issues affecting anyone other than the parties. Rather, it involved the application of the principles enunciated in *Angus* to the particular facts of this case.

[13] The defendant is to pay the plaintiff $8,000 for costs in the Court.

Costs in the Authority

[14] On behalf of the plaintiff, Mr McKenzie sought an award of $3,000 for costs in the Authority, being the generally applied daily rate for an investigation meeting lasting one day.

[15] Ms Shaw noted that, at the time of the Authority's investigation, there was no authority regarding the interpretation and application of the amended ss 103A and 125. As a result, she submitted that this was a test case before the Authority. I do not accept that submission. Being the first case does not necessarily make it a test case. Also, as I have said earlier, it did not involve the development of any principles of general application or decide issues between anyone other than the parties.

[16] Ms Shaw also noted that the defendant had declined to seek an award of costs in the Authority, even though it had been successful. She did not make any explicit submission based on this but it was implicit in her memorandum that the defendant ought somehow to be given credit. While I acknowledge that it was a generous gesture by the defendant, and one for which it may be commended, it does not justify denying the plaintiff a proper award of costs now that events have gone his way.

[17] This aspect of the plaintiff's claim is appropriate. The defendant is to pay the plaintiff $3,000 for costs in the Authority.

Disbursements

[18] The plaintiff sought reimbursement of his filing fees in both the Authority and the Court together with hearing fees in the Court. These are all proper disbursements and ought to be reimbursed in full. The defendant is to pay the plaintiff $1,251.56 for disbursements.

Summary

[19] The defendant is ordered to pay the plaintiff the following sums:

(a) $8,000 for costs in the Court.

(b) $3,000 for costs in the Authority.

(c) $1,251.56 for disbursements in both jurisdictions.

A A Couch
Judge

Signed at 4.20 pm on 5 April 2013.