IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 93
ARC 47/12

IN THE MATTER OF	an application seeking leave to extend time for filing challenge
AND IN THE MATTER	of an application for costs
BETWEEN	TONY LOOKER Applicant
AND	AG WALTER AND SONS LTD Respondent

Hearing:	By submissions filed by the respondent on 25 March 2013
Appearances:	Marcus Mitchell Paewai, advocate for applicant Richard Upton, counsel for respondent
Judgment:	28 May 2013

JUDGMENT OF JUDGE B S TRAVIS

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[1] In my judgment of 12 March 2013,[1] I dismissed the applicant's application for leave to extend the time for filing a challenge to a determination of the Employment Relations Authority, thus bringing the proceedings to an end. I reserved costs and provided a timetable for the filing of memoranda.

[2] Only the respondent has filed an application for costs, and in spite of a number of contacts from the Registry, nothing has been filed on behalf of the applicant in opposition. Mr Paewai has sent an email advising that he was no longer representing the applicant.

[1] [2013] NZEmpC 30.

[3] The respondent's memorandum as to costs addresses the underlying principles to be found in cases such as *Victoria University of Wellington v Alton-Lee*[2], *Binnie v Pacific Health Limited*[3] and *Health Waikato Ltd v Elmsly.*[4] Counsel for the respondent, Mr Upton, advised that the respondent has incurred costs in excess of $10,000 exclusive of GST, not including any of the costs associated with the Employment Relations Authority proceedings nor the enforcement of the costs award from the Authority.

[4] It is accepted that the matter was determined on the papers but, correctly, Mr Upton observed that that does not disqualify an award of costs. The time involved would be less than if there had been an actual hearing. Mr Upton submitted that had the matter proceeded to a hearing, it should have been disposed of within a one half a day and that the Court should start its assessment of costs on the basis of an award reflecting two half days, of four hours each of preparation time, plus one half day of hearing time, another four hours, making a total of 12 hours. The respondent's hourly charge out rate is said to be $350 per hour. It was contended that this was reasonable for litigation of this nature, citing *Marshment v Sheppard Industries Ltd.*[5]

[5] Mr Upton also submitted that applying the charge out rate of $350 per hour to the twelve hours estimated gives a starting point for a costs award of $4,200. Mr Upton then submitted that any conduct which increased the costs unnecessarily should be taken into account in inflating the costs award. He listed a total of 24 matters, some of which were canvassed in my judgment, which led the respondent to incur additional costs. This totalled $6.650 including the time associated with preparing and filing the costs memorandum. This is the amount sought by the respondent.

[6] Mr Upton addressed any attempt the applicant might make to argue that he is impecunious. He submitted that the only reliable evidence was the Authority's determination which recorded that it was told during the course of the investigation

[2] [2001] ERNZ 305 (CA).
[3] [2002] 1 ERNZ 438 (CA).
[4] [2004] 1 ERNZ 172 (CA).
[5] [2012] NZEmpC 93.

that the applicant was continuing in employment elsewhere. He also relied on a statement from Mr Paewai in a letter of 29 November 2012 in which he stated:

> The plaintiff is liable for any cost as a result of my error including the legal costs from the Authority investigation so if you are concerned about the cost which seems to be the case according to your correspondence then please don't be the Plaintiff assures me he will cover it irrespective of the outcome.

[7] Mr Upton therefore submitted that the Court can be comfortable that the applicant's financial position should not impact on the costs award sought. He submitted therefore that the award of $6,650 was a reasonable and fair award as a contribution to costs, as it followed the event, the costs were unreasonably and unnecessarily increased and it was consistent with established principle and equity and good conscience.

[8] I have considerable sympathy for Mr Upton's submission and the difficulties that the respondent was put to in the way these proceedings were conducted. I have referred to these matters in my judgment.

[9] However, a balance needs to be drawn that avoids penalising the applicant for the actions or inactions of his representative.

[10] I consider that $6,650 would be reasonable costs to have incurred and accept Mr Upton's assurance that the excess of that was actually incurred by the respondent. I consider it is appropriate to apply the traditional two thirds starting point, to the sum sought which gives a total of $4,433.33. I will round this up to $5,000 to cover some of the matters which I consider justify some uplift, plus the costs of preparing and filing the application for costs. I therefore order the applicant to pay to the respondent as a contribution to the respondent's costs the sum of $5,000.

B S Travis
Judge

Judgment signed at 11am on 28 May 2013