IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 96
ARC 19/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JOHN MATSUOKA Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND LIMITED Defendant

Hearing: By submissions filed on 8, 13, 20 February and 1 March 2013

Appearances: Rob Towner, counsel for plaintiff
Garry Pollak, counsel for defendant

Judgment: 29 May 2013

COSTS JUDGMENT OF JUDGE B S TRAVIS

Introduction

[1] There have been two substantive judgments dealing with the issues in this matter. The first on 18 May 2011[1] dealt with the issue of whether the plaintiff was entitled to transfer from his previous employment at PRI Flight Catering Ltd (Pacific) to new employment with the defendant (LSG) by virtue of the provisions of sub part 1 of Part 6A in the Employment Relations Act 2000 (the Act). The plaintiff was successful in this aspect of the litigation and costs were reserved.

[2] In a subsequent judgment issued on 21 December 2012[2] the plaintiff's claim for compensation under s 123(1)(c)(i) of the Act for distress, humiliation and injury to feelings as a result of the disadvantage in not being transferred to LSG's

[1] [2011] NZEmpC 44, [2011] ERNZ 56.
[2] [2012] NZEmpC 220.

employment resulted in an award of $1,000 and his claim for penalties of $20,000 was dismissed. Costs were again reserved.

[3] There are subsequent proceedings under ARC 23/12 which relate to subsequent events which the plaintiff claims resulted in his unjustified dismissal from LSG. Those proceedings are ongoing.

[4] This judgment deals with the costs reserved in relation to the disadvantage grievance under ARC 19/11 which has now been completed.

[5] Mr Towner for the plaintiff filed his first memorandum seeking an award of costs on 8 February 2013. He observed that his application was made pursuant to cl 19 of Schedule 3 to the Act and reg 68 of the Employment Court Regulations 2000 (the Regulations). He cited the well established principles relating to the Court's discretion and the award of costs set out in *Reid v NZ Fire Service Commission*[3] and the two Court of Appeal decisions in *Victoria University of Wellington v Alton-Lee*[4] and *Binnie v Pacific Health Limited.*[5] He accepted that the usual starting point is two-thirds of the costs actually and reasonably incurred, which may be adjusted up or down according to the manner in which the case was conducted. He observed that the relevant factors include the conduct of the parties, before and during a hearing, including any conduct which unnecessarily added to the costs incurred.

[6] Mr Towner advised that the plaintiff had incurred actual costs in relation to these proceedings of $128,607, inclusive of GST, and Bell Gully's standard service fee of 2.5 per cent in relation to all disbursements and costs incurred. He advised that the fee component of the costs, at 82.5 per cent, was $106,101. He annexed copies of the invoices relating to these costs.

[7] Mr Towner submitted that only $5,240 worth of costs which were billed to the plaintiff in the invoices dated 29 July 2011 and 31 August 2011 related to this proceeding, specifically in relation to the submissions on remedies and the balance of those invoices related to the plaintiff's personal grievance claim. He advised that

[3] [1995] 2 ERNZ 38.
[4] [2001] ERNZ 305.
[5] [2002] 1 ERNZ 438.

the work to which the invoices related was described in an attachment of one and a quarter pages under the heading "Description Of Work" which has a total of 30 bullet points including the following examples:

- receiving instructions;

…

- correspondence, telephone attendances and meetings with plaintiff;

…

- preparing statement of problem;
- receiving and reviewing statement in reply and reporting to plaintiff;
- considering legal issues relating to removal application;

…

- various telephone conferences with Court;

…

- providing disclosure of plaintiff's documents;
- preparing affidavits in support of claim (8);
- preparing opening submissions;
- preparing submissions on Part 6A;

…

- attending Employment Court on 11 to 14 April 2011;

…

[8] Mr Towner advised that included in the costs were costs of $9,322 incurred by the plaintiff in relation to the proceedings in the Employment Relations Authority before the employment problem was removed to the Court on the application of the defendant with the consent of the plaintiff. No order as to costs was made by the Authority.

[9] In summary he advised that the fees of $106,101 were based on approximately 215 hours of work. He stated there was an additional 100 hours approximately of work on the file with a time value of approximately $45,000 in respect of which work the plaintiff was not charged.

[10] The hearing took four full days between 11 and 14 April 2011. He submitted that the issues before the Court were complex and novel and that the legal costs incurred reflected the substantial work involved in pursuing the claim.

[11] Mr Towner also contended that one of the reasons for the length of the trial was the calling by the defendant of unnecessary witnesses which did not materially assist the Court in determining the real issues before it. Some issues, for example, involved the plaintiff's alleged conflict of interests, his alleged misrepresentations, and the defendant's loss of trust and confidence in him were, he submitted, not material to the real issue before the Court as to whether the plaintiff had a statutory right to transfer. Mr Towner referred to the strenuous manner in which the plaintiff had pursued his claim and the rigorous manner in which the defendant had opposed it. He submitted that the plaintiff's claim, unlike many claims by individuals which come before the Court, did not concern an alleged disadvantage during the course of employment as a result of inadequate procedure or sought monetary remedies in relation to past employment. Instead, he submitted, it involved the statutory right to be employed by the defendant permanently and on his existing terms and conditions of employment.

[12] However, I note at this point that the plaintiff's claim did involve a substantial claim for compensation and penalties and involved the underlying claim that the plaintiff was entitled to substantial redundancy and unpaid holiday and other leave rights which were transferred to LSG. These latter matters are still in serious contention. There were therefore substantial monetary consequences for both sides as a result of these proceedings.

[13] Mr Towner advised that there is an oral agreement between the plaintiff and Pacific that Pacific would pay the plaintiff's legal costs in relation to the dispute as they arose and the plaintiff would reimburse Pacific to the extent of any costs awarded to him by the Court. The consequence was, in Mr Towner's submission, that the plaintiff would not receive any windfall from an award of costs.

[14] Mr Towner submitted that the plaintiff was entitled to an award of costs notwithstanding that they were paid on his behalf by Pacific, that he had won his

case and that costs should follow the event, observing that there will be a range of circumstances in which a successful party's costs may have been paid by another person. He cited *Reid*,[6] *IHC New Zealand Inc v Scott*,[7] *Evolution E-Business Ltd v Smith*,[8] and *Marshment v Sheppard Industries Ltd*.[9]

[15] The plaintiff sought an award of costs of $84,000, being two-thirds of his costs up to the Court's judgment of 18 May 2011 and one third of his costs relating to the subsequent memoranda and submissions on compensation and penalty.

[16] Mr Pollak, counsel for LSG, filed his memorandum as to costs on the same day as Mr Towner filed his. Because of this, the defendant's memorandum was not in response to the plaintiff's. I issued a minute on 11 February 2013. I expressed the assumption that the plaintiff would have proceeded first, and invited Mr Pollak who stated at the beginning of his memorandum that he did not know what quantum would be sought by the plaintiff and would respond following the receipt of the plaintiff's memorandum to file and serve any amendments to his memorandum on a timetable. The plaintiff was then given the opportunity to respond.

[17] Mr Pollak's initial memorandum sought a finding that costs should lie where they fall. Whilst accepting that the plaintiff was successful in establishing that he was an employee entitled to transfer to LSG, Mr Pollak submitted that this was a test case and that the defendant's position in resisting was neither unreasonable nor unwarranted. He referred to the polite treatment the management had given to the plaintiff, which was noted in my earlier judgment. He referred to the lengths to which the defendant was put in endeavouring to establish whether the plaintiff's wage and time records were accurate and accused the plaintiff of withholding material facts. He also referred to the plaintiff's subsequent re-employment by Pacific. There was no evidence in relation to that last matter put before the Court.

[18] I am at a loss to follow why these matters, apart from the allegation of a test case, were relevant to the question of costs. Because they were not in response to

[6] At 11.
[7] AC 45A/06, 18 October 2006 at 20.
[8] [2012] NZEmpC 58 at [11].
[9] [2012] NZEmpC 93 at [20].

Mr Towner's submissions, I did not assume they were to answer Mr Towner's anticipated allegation that the actions of the defendant had inflated the costs incurred by the plaintiff.

[19] From my knowledge of these proceedings and the reasons why matters as to the accuracy of time and wage records were so relevant to LSG, I do not find that it was inappropriate for LSG to have probed these matters which also went to questions of credibility. I do not consider they improperly inflated the plaintiff's costs or unjustifiably lengthened the duration of the hearing. These were new matters largely untested by previous decisions and the parties were entitled to considerable leeway in how they developed their respective cases, which were presented on an urgent basis.

[20] Although I have found there were aspects of a test case which, in addition to other matters, led me to dismiss the plaintiff's claim for penalties, I am not satisfied that this was a test case in the sense that is used to refer a matter of great interest to the parties and other persons to such a degree that costs should lie where they fall. I accept Mr Towner's submission that this is a case in which costs should follow the event and that the usual principles will apply.

[21] I put aside all the allegations and counter-allegations of fact, unsupported as they were by any actual evidence and most of which will be resolved in the ongoing personal grievance proceedings. Similarly I put aside Mr Pollak's reference to what he describes as two Calderbank letters, the first sent by him on 30 September 2011, and the second on 14 August 2012. Both letters purported to make offers settling all proceedings in the Employment Court and no separate offer was made to settle the present proceedings.

[22] The Calderbank letters would have had some relevance to the determination of the compensation and penalty claims, if it was possible to discern from the letters what offer was being made in relation to those aspects. Because the offers were generic, it cannot be said that the plaintiff recovered more or less than what was being offered. The issue then becomes what are the actual and reasonable costs of

the plaintiff and what appropriate contribution should the unsuccessful defendant make to those costs.

[23] Mr Pollak's memorandum in reply filed on 20 February 2013, did not respond to any of the matters of principle raised in Mr Towner's memorandum of 8 February. Mr Pollak relied on the "fundamental issues of principle" that he stated he had already raised in his 8 February memorandum which I have already dealt with above. His second memorandum addressed only the actual costs sought by the plaintiff. He noted that two-thirds of the actual costs of $128,607 were being sought and that the plaintiff's fees and costs were being met by a litigation funder. He took no particular objection to that aspect and therefore there is no need to rule on the appropriateness of an order for costs to a plaintiff who is not self-funded. That is a matter that has been commented on by the Court in other cases and may be dealt with again in the future.

[24] Mr Pollak submitted that the defendant's position, apart from the issues previously raised on its behalf, were that, if costs were to be awarded by the Court, such costs should be reasonable and appropriate. He submitted that by way of a comparison, if this matter was being considered pursuant to the High Court Rules, the basis would be:

a. At 2B rate, $1,990.00 per day; and

b. Item 1, start of proceedings, 3 days; and

c. Item 31, Plaintiff's Bundle, 2.5 days; and

d. Item 31, Plaintiff's Briefs, 2.5 days; and

e. Item 33, preparation, 3 days; and

f. Item 34, appearance at Hearing, 4 days

g. In total it would be 15 days by $1,990.00 per day, totalling $29,850.00.

[25] Mr Pollak accepted that some disbursements could be added and then, following Rule 14.2 of the High Court Rules, the assessed rate of $29,850 would then be reduced by two-thirds, to approximately $22,000-24,000.

[26] What Mr Pollak described as the "assessed rate" was actually the appropriate daily recovery rate for the specific category and, in terms of Rule 14.2(d) the appropriate daily rate should normally be two thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory applications. Thus the figure of $29,850 should not be subject to another two thirds reduction.

[27] Mr Pollak submitted that the actual costs sought by the plaintiff were four times what would be awarded by the High Court and therefore were unreasonable and excessive.

[28] Mr Pollak submitted that by way of further comparison, the legal costs for the current matter for LSG were approximately $32,000 charged at $370 per hour plus disbursements.

[29] Mr Pollak submitted that there did not seem to be any real reason why the Employment Court should depart from the High Court Rules, if an award for costs was to be made.

[30] In Mr Towner's response filed on 1 March, he stressed the real nature of the dispute and why it was complex and the trial lengthy. He submitted that issues as to the wage and time records and their accuracy were not relevant to the core question. He dealt with the plaintiff's re-employment by Pacific, but his statement was unsupported by any affidavit evidence. He referred to the two Calderbank letters and submitted that if the Court accepted that the plaintiff's actual costs were reasonable, for the reasons set out in the plaintiff's memorandum they should not be reduced by reference to the High Court Rules.

[31] As I have already stated, the plaintiff is entitled to a reasonable contribution to his actual and reasonable costs.

[32] Although neither side addressed the matter, the Court of Appeal in *Snowdon v Radio New Zealand Ltd*[10] indicated that it will consider whether the traditional means of fixing costs in this Court should be maintained in light of changes to the

[10] [2009] NZCA 557.

costs policies reflected in the High Court Rules and s 6 of the Interpretation Act 1999.[11] This appeal has yet to be heard and is awaiting the outcome of the substantive proceeding. I consider that in the meantime I should adopt the guidance provided to this Court by the Court of Appeal in the cases referred to by Mr Towner but should not ignore the High Court Rules. In a third case, *Health Waikato Ltd v Elmsly,*[12] the Court of Appeal stated:[13]

> While it would be open to the Employment Court, if it chose, to adopt the High Court approach to costs, it has not done so and it is, indeed, perfectly entitled to follow its existing practice, in terms of which costs actually and reasonably incurred are the relevant starting point.

[33] I have some considerable reservations as to whether the costs actually incurred by the plaintiff, underwritten by Pacific, were reasonable for this particular litigation. If the higher figure of $128,607 inclusive of GST, which is normally not allowed, and the standard service fee of Bell Gully of 2.5 per cent is taken into account, it gives a daily rate for the trial which would, of course, include preparation, of some $32,000.

[34] I am also somewhat disadvantaged because of the inadequacy of material put before the Court on behalf of the plaintiff. It gives total hours for the fee component of 215 hours for total fees of $106,101 from which I can calculate, therefore, an hourly rate of just under $500 an hour ($493.50). As the narrative on each of the invoices does not assist, neither does the schedule provided, because it does not indicate how much time was spent by whom at what hourly rate for each of the various work descriptions.

[35] I have been assisted by the decision of Judge Couch in *Merchant v Chief Executive of the Department of Corrections*[14] in which in excess of $250,000 was claimed as the starting point for a hearing of less than five days. It appeared that the hourly rate was $550 plus GST for lead counsel and $320 plus GST for junior counsel. Judge Couch noted the difficulty for the Court where an inadequate explanation was given as to how and why the actual costs were incurred. In that

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[11] At [21], [22] and [25].
[12] [2004] 1 ERNZ 172 (CA).
[13] At [51].
[14] [2009] ERNZ 108.

case, no explanation was given. In the present case the explanation given is inadequate to enable me to conclude from the material provided whether the costs incurred were reasonable.

[36] My initial estimate was that for this four day hearing and the subsequent submissions on compensation and penalty, a total of $30,000 would have been appropriate as a two thirds contribution to actual and reasonable costs of approximately $45,000.

[37] In fixing what would be a reasonable rate, I too have had regard, as did Judge Couch, to the appropriate daily recovery rates provided for in the High Court Rules. I adopt the calculation as set out in Mr Pollak's submissions of the appropriate daily recovery rate as just under $30,000.[15] It is highly unlikely that present proceedings would be categorised above category 2 (proceedings of average complexity requiring counsel of skill and experience considered average in the High Court) and the current daily rate for category 2 proceedings is $1,990 as at August 2012. I accept Mr Pollak's submissions that if the High Court Rules were applied the total would be 15 days totalling $29,850. This figure came very close to my initial estimate although I note it does not include the subsequent submissions in relation to penalties and compensation.

[38] In relation to that subsequent judgment on remedies, I take the view that the defendant succeeded to a large degree in having its submissions accepted and the plaintiff's award of compensation was so modest that costs in relation to those proceedings should lie where they fall.

[39] For the reasons I have given above, I can see no reason to raise the starting point for the defendant's contribution above the usual two-thirds starting point. I therefore order the defendant to pay, as a contribution towards the plaintiff's reasonable costs, $30,000. This costs award also includes the costs of preparing the memoranda in support of the costs claim.

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[15] High Court Rules, r 14.2(d).

[40] In addition, I order the payment of such disbursements certified by the Registrar of the Employment Court. The plaintiff would be entitled to the filing fees and daily hearing charges he incurred. The other disbursements are simply based on a percentage adopted by Bell Gully and do not, in my view, represent the actual disbursements incurred.

B S Travis
Judge

Judgment signed at 2.30pm on 29 May 2013