IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 98
ARC 108/10

IN THE MATTER OF	a challenge to determination of the Employment Relations Authority
BETWEEN	JUDITH BRAKE Plaintiff
AND	GRACE TEAM ACCOUNTING LIMITED Defendant

Hearing: 28 and 29 May 2013
Memoranda filed on 20, 24, 27, 28 and 31 May 2013

Appearances: Warwick Reid, advocate for plaintiff
Garry Pollak, counsel for defendant

Judgment: 4 June 2013

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] At the conclusion of my substantive judgment issued on 13 May 2013,[1] I recorded that the plaintiff was entitled to costs and that if these could not be agreed they should be the subject of an exchange of memoranda and set out in a timetable.

[2] On 20 May the advocate acting for the plaintiff, Mr Reid, advised that the parties were unable to agree on costs and sought to have the Court determine these issues. Mr Reid advised that the plaintiff incurred costs in the Employment Relations Authority (the Authority) of $9,540 and annexed an invoice in respect of that matter. Mr Reid also advised that the plaintiff incurred costs in the proceeding in the Employment Court of $27,360 and again annexed a copy of an invoice.

[1] [2013] NZEmpC 81.

[3] Mr Reid advised that the investigation meeting before the Authority took two days but that there were two aspects which made it more time consuming than usual. The first was that the case commenced by way of an application for interim reinstatement, which was lodged with supporting affidavit and undertakings as to damages, the second aspect related to the accounting issues. He submitted that the invoices were reasonable but accepted that the Authority has a tariff based approach which may limit the costs recoverable.

[4] Mr Pollak, counsel for the defendant filed a memorandum in reply on 24 May 2013. He acknowledged that the Authority's determination[2] awarding costs of $3,500 against the plaintiff could no longer stand. He submitted that there was no reason why the costs in the Authority should be increased as there was nothing unusual or extraordinary about the investigation and that consequently the Court should now fix costs at $3,500 in favour of the plaintiff.

[5] The costs determination of the Authority was not the subject of amended pleadings by the plaintiff and therefore, technically, there was no challenge to it. However, I entirely agree with Mr Pollak that it obviously cannot stand in view of the successful challenge to the substantive proceedings. I have now read the costs determination of the Authority and note that Ms Macphail, who then represented the defendant, sought an order requiring Ms Brake to pay $7,500 as a contribution towards the costs the defendant had incurred. Mr Reid on the other hand, argued that costs should either lie where they fell or alternatively that an award of $1,500 would be an appropriate exercise of the Authority's discretion.

[6] There was reference to a Calderbank offer. The Authority decided that it did not have any great influence over the way that costs should be determined and that the usual principles applied. The Authority noted that the defendant had not disclosed what its actual costs were and stated that should have been done to ensure that what was being awarded did not amount to more than the costs actually incurred. I entirely agree with that requirement.

[2] ERA Auckland AA 409A/10, 4 November 2010.

[7] The Authority's determination referred to the interim reinstatement claim which was discontinued and stated that, on the normal principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*,[3] an order of $3,000 or more for each day of investigation meeting would have been appropriate. The Authority recorded that the investigation meeting that occupied about two days although part of the second day was used for an attempt by the parties to resolve the claims using a facilitator.

[8] The Authority referred to other cases of awards reaching a total of $7,000 or even more, but concluded that there were compelling circumstances in the present case pointing to an award of much less than that sum, as being just. It referred to Ms Brake's health situation, her ability to work at the time and being without income and on only limited means on a modest benefit, her inability to meet a substantial award of costs. The Authority concluded that it would not be appropriate that she would be required to sell her accommodation if she was required to meet a substantial award of costs.

[9] The Authority described the unusual circumstances of the case and expressed the hope that Mr Reid might take it upon himself to help his former wife meet the award of costs as he was now running an advocacy or advisory business and his qualifications, skill and experience would suggest that the business was likely to be financially successful. The Authority observed that the considerable efforts Mr Reid had made in presenting Ms Brake's case were an indication of the support he gives to her in any way he can. The Authority therefore awarded $3,500 against Ms Brake stating it was doing so with some confidence that she was likely to be assisted by Mr Reid to meet the payment of that amount.

[10] I am satisfied that the Authority, had it not been for Ms Brake's personal circumstances, would have awarded at least $6,000 and possibly $7,000 on the normal daily tariff. However, because the interim reinstatement application was withdrawn and therefore unnecessary costs were incurred by the defendant, although this was not a matter that was raised by Mr Pollak, I consider that an award should include a reduction for this purpose. The quantum sought by Mr Reid of $5,000 is appropriate. He did not seek disbursements which would have included the filing fees. In those circumstances I award the sum sought by Mr Reid and direct that the

[3] [2005] 1 ERNZ 808.

defendant pay to the plaintiff as a contribution towards her costs in the Authority the sum of $5,000.

[11] Turning to the Employment Court costs, Mr Reid observed that the hearing had occupied three full days, that there were unusual features of the case in discovery and inspection of the documents and in security for costs. In these circumstances Mr Reid sought an uplift in costs in respect of the work undertaken subsequent to an offer of settlement, to 80 percent of the incurred costs of $27,360. Mr Reid sought a contribution of $20,736 and again did not seek to recover any disbursements, including filing fees or hearing fees.

[12] Mr Reid's submissions annexed a letter of 3 February 2012 marked "without prejudice save as to costs" in which he indicated Ms Brake's willingness to settle the grievance on the basis of a payment of $10,000, attributable to injury to feelings, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 and that costs awarded by the Authority against her be waived as part of the settlement. It also appears to have been made in a timely fashion, as the hearing did not proceed until 10 July 2012. As the plaintiff recovered a total of $85,000 plus an entitlement to costs, she clearly succeeded in recovering more than she was prepared to accept to settle. I therefore accept Mr Reid's contention that this should result in an uplift to the costs to be awarded.

[13] Mr Pollak's costs memorandum in reply, filed on 24 May, submitted that for the Employment Court costs, the successful plaintiff would be entitled to some costs on a reasonable basis on the law set out in the previous judgments of the Court but stated that the defendant was not aware that Mr Reid was undertaking representation of Ms Brake on a commercial basis, but, quite the contrary, was doing so for family reasons.

[14] Mr Pollak accepted that the hearing had occupied three full days but took issue with some of the plaintiff's costs as itemised in the invoices. This included costs in relation to a mediation in Tauranga, which would not normally be a matter for which costs could be claimed in the Authority. He also submitted that there were excessive claims for preparation including drafting the statement of claim and the

attendances on discovery and inspection. In his submission, the time claimed was unnecessarily exaggerated by the plaintiff.

[15] Mr Pollak relied on the interlocutory judgment of Chief Judge Colgan in relation to disclosure and security for costs issued on 20 June 2011.[4] Mr Pollak submitted that the costs in relation to this interlocutory hearing should not have to be borne by the defendant as the plaintiff's claims and requests were unsuccessful.

[16] In that interlocutory judgment the Chief Judge noted that the defendant had objected to disclosure of documents on the basis of disputed relevance, the onerous nature of making disclosure and the confidential nature of the records of clients at the accounting practice. In the course of the hearing in Auckland it is recorded that a large area of agreement was able to be reached between the parties as to what documents should have been disclosed and the real controversy then focussed on how this should be achieved. The Chief Judge then made orders requiring the defendant to disclose annual accounts, charge out rates, system employees and shareholders, bad debts, schedules of work undertaken, records of staff movements, a list of all clients lost by the defendant since the plaintiff's recruitment and details of how this had occurred.

[17] The Chief Judge found that the plaintiff's proposed expert to whom these documents should be disclosed, would not qualify as an independent expert in the proceedings, not because of any reflection on the professionalism of the expert but because of the high regard in which he held Ms Brake and the effect this could have on his objectivity and impartiality. The documents were to be disclosed in the first instance only to an independent expert chartered accountant.

[18] On the basis of this judgment, I do not see how it can be said that the plaintiff's claims and requests were unsuccessful.

[19] Mr Pollak also submitted that the plaintiff could have arranged for security for costs without the need to be directed. The defendant was successful in its request for security. The Chief Judge found that the defendant would be put to more than the usual costs of a defendant employer on a challenge attacking the decision which led

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[4] [2011] NZEmpC 64.

to the redundancy and that without an order for security for at least some of its costs, it would be unlikely to be able to recover them. On balance though he also found that it should not have the effect of disabling the plaintiff from pursuing her challenge and directed that security for costs in the sum of $6,000 to the satisfaction of the Registrar of the Employment Court at Auckland be given. In part that was satisfied by a security over a motor vehicle owned by Ms Brake. This was clearly a case in which there was considerable merit in the plaintiff's objection to the defendant's application for security. I therefore conclude that Mr Reid's costs in this regard should not be disregarded as Mr Pollak sought.

[20] Mr Pollak then addressed the steps taken to subpoena witnesses for the hearing, which, in the event, the defendant agreed to arrange. Again the costs of briefing those witnesses and making the necessary arrangements for their attendance was properly claimable by Mr Reid.

[21] Mr Pollak submitted that excessive time had been taken in preparing for the cross-examination of Messrs Grace and the new witness, Mr Robinson. The amounts of time spent may be excessive but a considerable time was still, I find, necessary to prepare the case.

[22] Mr Pollak contended that Mr Reid's time should be reduced by 88 hours to a balance of 60 hours at $180 per hour which totalled $10,800. He submitted that if the plaintiff's counsel by which I take him to mean advocate, was a practicing solicitor and a specialist in the area, a more usual rate might be $300 per hour and would take actual costs to $18,000, generally a reasonable cost for a three day Employment Court hearing.

[23] Mr Pollak submitted that the Court should apply the two thirds of actual and reasonable costs of $10,800 and award the plaintiff no more than $7,200.

[24] Mr Pollak acknowledged the Calderbank offer was received and not accepted but made no further submissions in opposition to the suggestion that this should result in an uplifting of costs.

[25] Mr Pollak then addressed the issue of whether the defendant had been cooperative regarding disclosure and production of documents and contended that it

had been and that by comparison the plaintiff's advocate had acted in a way to increase costs.

[26] Mr Pollak filed a further costs submission on 27 May, without leave, contending that there was no commercial arrangement for advocacy services between the plaintiff and Mr Reid and that the two invoices had been created recently and only as a response to the Court's judgment and did not reflect a commercial arrangement for advocacy services.

[27] I issued a minute inviting a reply from Mr Reid. Mr Reid duly responded and referred to a memorandum he had filed in Court on 15 February 2011 in opposition to the defendant's application for security in which he advised that the plaintiff, by her advocate, had told the defendant in April 2010 that the plaintiff would not incur legal expenses in respect of her grievance and that whilst that statement was true at the time, this was no longer the case. The memorandum stated, "The plaintiff, if successful, will make an application for an order to costs against the defendant". Mr Reid's memorandum confirmed that in preparing the invoices the plaintiff herself had paid the disbursements and that he, an associate and Ms Brake were all willing to swear affidavits detailing the commercial basis on which the plaintiff's legal representation was undertaken.

[28] Mr Pollak filed a further memorandum in reply on 31 May accepting that the memorandum Mr Reid referred to had been filed with the Court and advising that the defendant accepted there should be a costs award against it. He went on to submit that his submission was simply that, given the personal relations involved, the commercial arrangement was not a usual commercial arrangement and this should be reflected in a modest award of costs, as they were not being charged for initially. He accepted that Mr Reid was a professional advocate and that he and his office had expended time and effort representing the plaintiff and were entitled to some, but limited, costs. He therefore invited the Court to take his views into account and decide the final matter of costs.

Conclusion

[29] On the material before me, I accept that there was a commercial basis for the advocacy services performed by Mr Reid for Ms Brake. On the usual principles the

successful plaintiff is entitled to an appropriate contribution towards the reasonable and actual costs incurred by her. On the material before me I am satisfied that the invoices represent the actual costs incurred by her.

[30] I do, however, accept Mr Pollak's submission that the total time spent by Mr Reid was more than reasonable in relation to some of the attendances detailed by Mr Pollak. Balanced against this however, is the argument that the defendant would have been far better off to have accepted the 3 February 2012 Calderbank offer and that the plaintiff's costs incurred from that date through to the present time could have been claimed on an advocate/client basis of total indemnity.

[31] As the parties have not, however, presented their submissions on that basis, Mr Reid having sought an 80 percent uplift for the work billed after the offer of settlement I consider I should take a broad brush approach. Part of the reason for this is that it is not possible because of the lack of detail provided in the invoices, to determine precisely what work was carried out subsequent to 3 February 2012, other than the attendances for three days in Court. The hourly rate of $180 does not appear to be unreasonable for an advocate of Mr Reid's experience. Balancing such excessive hours, as may have been involved in some attendances with the claim for an uplift following the Calderbank offer, I consider $24,000 costs would have been reasonable for the advocate to have incurred and allow two thirds on the usual basis.

[32] I therefore award the plaintiff $16,000 as a contribution towards her actual and reasonable costs.

B S Travis
Judge

Judgment signed at 10am on 4 June 2013