IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 213
CRC 23/12

IN THE MATTER OF	an application for permanent non-publication orders
AND IN THE MATTER	of an application for costs
BETWEEN	DR X Applicant
AND	A DISTRICT HEALTH BOARD Respondent

Hearing:	On the papers filed by the applicant on 1 October 2013 and by the respondent on 10 October 2013
Appearances:	Hanne Janes, counsel for the applicant Paul McBride, counsel for the respondent
Judgment:	26 November 2013

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] This proceeding has a lengthy history although the only issue now before the Court relates to costs on a successful application for permanent non-publication orders advanced on behalf of the applicant. The applicant seeks full costs (of $61,353.40, including disbursements) in relation to the application. Substantial costs (of over $4,000) are also sought on the application for costs. The application is opposed by the respondent.

[2] The parties agreed that the application could be dealt with on the papers. Lengthy memoranda and supporting documentation have been filed on behalf of both parties.

Approach

[3] The principles relating to costs awards in this Court are well established.[1] Clause 19(1) of sch 3 to the Employment Relations Act 2000 (the Act) confers a discretion on the Court as to costs. It provides that:

> The court in any proceedings may order any party to pay to any other party such costs and expenses … as the court thinks reasonable.

[4] The Court's discretion when making awards must be exercised judicially and in accordance with recognised principles. The usual approach is that costs follow the event and generally amount to 66 percent of costs actually and reasonably incurred by the successful party (absent any factors that might otherwise warrant an increase or decrease from that starting point).

[5] The respondent's first point is that the applicant's claim to costs is precluded by the terms of a settlement agreement between the parties. The agreement was entered into after interim non-publication orders had been granted and provided for settlement on a full and final basis with respect to any matters "arising out of or in relation to this employment relationship and its termination". Mr McBride, counsel for the respondent, submits that this phrase is of "extremely broad import" and effectively excludes an application for costs in relation to non-publication orders that links back to the parties' original dispute.[2]

[6] The orders in this case can (in a literal sense) be characterised as arising out of or in relation to the employment relationship, however I do not consider that the terms of the agreement preclude the Court from either dealing with the application for non-publication or the costs implications of it, including in circumstances where the applicant believed that the respondent had agreed not to oppose an application. That did not prove to be the case and the application was ultimately dealt with on an opposed basis.

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[1] See *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

[2] Citing *Medic Corporation Ltd v Barrett* [1992] 3 ERNZ 523, at 530-531; *Conference of the Methodist Church of New Zealand v Gray* [1996] 1 ERNZ 48 (CA) at 56; *McCulloch v New Zealand Fire Service Commission* [2010] ERNZ 385 at [59]; *Haig v Edgewater Developers Ltd* [2009] NZCA 390; *Waikato Rugby Union v New Zealand Rugby Football Union Inc* [2002] 1 ERNZ 752; and *Bowport Ltd v Alloy Yachts International Ltd* [2004] 1 NZLR 361 in support of this proposition.

[7] The respondent also submits that no costs ought to be awarded in the applicant's favour as she was effectively seeking an indulgence from the Court. Even if the grant of a non-publication order can appropriately be characterised as an indulgence, that is the position with numerous interlocutory applications and does not (of itself) preclude an order for costs. The fact is that the application was (vigorously) opposed and ultimately succeeded. In the circumstances, I consider it appropriate to approach the costs consequences of the application in the usual way.

[8] I turn to consider the costs said to have been incurred in relation to the application. A detailed schedule of costs is annexed to the memorandum filed on behalf of the applicant. I am not satisfied, based on the information before the Court, that all of the costs referred to relate to the application for non-publication orders. For example, the invoices include claimed costs relating to researching regulations about lodging a challenge, the preparation and filing of an affidavit setting out the detailed background to the matter (which appears to relate to an affidavit earlier filed in the proceedings), counsel's interactions with the Medical Council (in July 2013) and providing media and strategy advice to the applicant. There are difficulties establishing the actual level of costs incurred in pursuing the successful application for non-publication orders, as opposed to other steps taken in these proceedings and more generally in providing advice to the applicant.

[9] Even putting these difficulties to one side I cannot accept that the claimed costs are reasonable for the purposes of assessing an appropriate contribution. The application did not involve difficult issues of law, was dealt with on the basis of well accepted principle and was determined on the papers without the need for a hearing. Much (although not all) of the work was undertaken at a charge out rate of $460.00 per hour. That suggests attendances of over 120 hours, or three weeks' work, for the purposes of applying for non-publication, a significant component of which was consumed with researching and drafting legal submissions. For comparative purposes, useful guidance can be drawn from the High Court Rules costs schedule. An application of this sort would likely attract an allocation of 1.5 days for the preparation of submissions.

[10] The claimed costs include $18,490.51 by way of fees and disbursements charged by the applicant's previous counsel. It is apparent that there was a significant amount of information that Ms Janes, the applicant's current counsel, was required to review and that it was necessary to liaise with the applicant's previous lawyers. While the applicant is entitled to legal counsel of her choice I do not consider that it is reasonable for the respondent to effectively incur the costs associated with the applicant's decision to change her legal representation. The decision led to a duplication of effort which would have been substantial, having regard to the attendances set out in the invoices annexed to counsel's memorandum.

[11] I accept Ms Janes's submission that a significant number of issues were raised by the respondent in its opposition to the application which required a considered response and that the costs that might otherwise have been incurred were increased as a result. Conversely a number of steps were taken by the applicant that added to costs, including an initial argument that the Court lacked jurisdiction, and adjournments and delays associated with changes of counsel.

[12] It was reasonable, given the nature of the interests involved, for the applicant to put a concerted effort into the application. As the Court of Appeal observed in *Binnie v Pacific Health Ltd*, the proposition that costs must not be disproportionate to the monetary value of the successful party's judgment is too absolute:[3]

> …both in itself and certainly in a case where justified vindication of a reputation is a material factor in the litigation… there will be cases where disproportion is justified in the Court's overall discretion.

[13] However, the value of the litigation to one party and the resources they are prepared to apply to it must be balanced against the other party's interests.

[14] Even taking the matters identified by the applicant into consideration, total costs in excess of $60,000 on an application for non-publication orders is well outside the range of what might otherwise be expected.

[15] Standing back and having regard to the interests at stake, the context and background of the application, and what was reasonably required to pursue it in the

[3] *Binnie v Pacific Health Ltd*, above n 1, at [11].

particular circumstances, I would assess reasonable costs as being around $7,000 to $8,000.

[16] Ms Janes submits that indemnity costs ought to be ordered in the circumstances of this case having regard to the "reprehensible" way in which the application was opposed. The party claiming increased or indemnity costs carries the onus of persuading the Court that such an award is justified.

[17] The respondent was entitled to oppose the application and, while the opposition did not succeed, it was not devoid of merit. Nor is there anything to suggest, other than by way of speculation, that the application was opposed for improper reasons. It is evident that the respondent had concerns about public safety issues which it was entitled to bring before the Court and to have considered together with other relevant factors.

[18] I do not consider that there is basis for increased costs in the circumstances of this case. I have already had regard to the fact that a number of issues were raised by way of opposition, and which required a response, balanced against the steps taken on behalf of the applicant throughout the lifecycle of the application, in reaching my assessment of reasonable costs in the circumstances.

[19] In all of the circumstances I am satisfied that an appropriate contribution to the applicant's costs is $5,000.

[20] The applicant seeks a costs contribution on its application for costs. The application was opposed but, as Mr McBride observes, in the context of full costs being sought against the respondent. Full costs are not warranted, for the reasons I have already given. In the circumstances, costs on the application itself will lie where they fall.

Disbursements

[21] The respondent objects to the disbursements claimed on behalf of the applicant, in particular relating to barristerial fees.

[22] A disbursement is defined in r 14.12(1)(a) of the High Court Rules as:

> …an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs.

[23] To qualify as a recoverable disbursement the payment must be both reasonably necessary to the conduct of the proceeding and reasonable in amount.[4] Expenses relating to the service and photocopying of documents, and conducting a conference by telephone, are included.[5] The general principle is that office overheads usually absorbed by a party's solicitors are not recoverable.[6]

[24] A barristerial fee of $2,930.85 is claimed as a disbursement. It is unclear what the nature of the work undertaken was and whether it related specifically to the application for non-publication orders. In these circumstances I am not prepared to allow it.

[25] There are a number of administrative costs referred to in the invoices annexed in support of the application (comprising $493.65, $22.09, $94.35, $24.75, $10.50 (described as "admin/telecom/post") and $250.00, $93.15, $388.83, $54.05, $123.05 (described as "office service charge")). These claimed administrative/service charges total $1,554.42. At first blush the quantum appears to be very high for an interlocutory application for non-publication orders. While telephone and postage costs are generally recoverable it is impossible to assess how the costs specified in the invoices annexed to the application have been incurred because they are lacking any detail. Similarly it is unclear what the office service charge relates to and what it comprises. The claimed disbursements are insufficiently particularised to enable an assessment to be made as to what they are directed at, whether they were necessarily incurred, specific to the litigation and whether they were reasonable. The claimed disbursements of $1,554.42 are accordingly disallowed.

[26] The claimed disbursement of $71.56 (filing fee) is allowed.

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[4] High Court Rules, r 14.12(2)(c)-(d).
[5] Hight Court Rules, r 14.2(1)(b)(ii)-(iv).
[6] *Todd Pohokura Ltd v Shell Exploration NZ Ltd* HC Wellington CIV-2006-485-1600, 1 July 2011 at [61], [70].

Conclusion

[27] The respondent must pay the applicant the sum of $5,000 by way of a contribution towards her costs on her successful application for permanent non-publication orders and $71.56 by way of disbursements.

Christina Inglis
Judge

Judgment signed at 11.15 am on Tuesday 26 November 2013