IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 22
ARC 46/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	CANDYLAND LIMITED Plaintiff
AND	JO-ANNE JARVIS Defendant

Hearing:	By submissions dated 28 November, 5 December, 10 December and 1 January 2014
Appearances:	Michele Coker, agent for plaintiff Mark Nutsford, advocate for defendant
Judgment:	14 February 2014

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] I gave my substantive judgment in this matter on 19 November 2013,[1] dismissing the plaintiff's challenge and awarding the defendant lost wages and compensation for hurt and humiliation. The parties have been unable to agree to costs and have accordingly filed memoranda.

[2] In summary, the defendant seeks indemnity costs having regard to an offer of settlement made in advance of the hearing and the way in which the challenge was conducted by the plaintiff. The plaintiff seeks an order that costs lie where they fall, primarily on the basis of financial hardship.

[1] [2013] NZEmpC 206.

[3] Clause 19(1) of sch 3 to the Employment Relations Act 2000 (the Act) confers a broad discretion 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 discretion to award costs, while broad, is to be exercised in accordance with principle. The primary principle is that costs follow the event.[2] The usual starting point in ordinary cases is 66 percent of actual and reasonable costs. From that starting point, factors that justify either an increase or decrease are assessed.[3]

[5] The hearing occupied three days. A number of attendances were required prior to the hearing, including in relation to an application advanced by the plaintiff for a stay of execution of the Authority's determination and an application by the defendant for security for costs. A conditional stay was granted by the Chief Judge. The Chief Judge also made orders that the plaintiff pay $10,000 in security for costs if amended pleadings were not filed by a certain date. Costs on both applications were reserved.[4]

[6] I am satisfied, based on the material filed on behalf of the defendant, that costs of $14,465 have been incurred in responding to the plaintiff's claim. Having regard to the circumstances, including the steps that were taken in responding to the challenge and the time consumed by each step, I consider that total costs of $14,465 were reasonable.

[7] I accept that the defendant was put to additional cost by virtue of some of the steps taken by the plaintiff, including difficulties relating to its pleadings requiring additional time (and accordingly money) being expended in responding to them. I have already taken this into account in assessing whether the claimed costs were reasonable.

[8] Mr Nutsford, for the defendant, submits that indemnity costs ought to be awarded in the circumstances of this case, having particular regard to the plaintiff's

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[2] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
[3] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
[4] [2012] NZEmpC 210.

conduct. It is said that its challenge was motivated by spite and was baseless, frivolous and vexatious. I do not consider that this is the sort of case in which indemnity costs are justified. While the plaintiff's challenge failed, I am not prepared to draw the inference that it was pursued for improper purposes. And the fact that the challenge failed does not, of itself, justify the making of such an order.

[9] Mr Nutsford submits that the plaintiff failed to comply with the Court's order relating to security for costs, having only paid the sum of $2,000 into Court. However this reflects a degree of confusion, apparently shared by both parties, as to the nature of the interlocutory orders made by the Chief Judge. The plaintiff did not breach the conditions relating to security for costs, given that amended pleadings were filed within the timeframe specified. It is true that only $2,000 was paid into Court on the stay but the effect of this, as the Chief Judge subsequently observed, was to render the Authority's determination open to enforcement. He made it clear that it did not affect the plaintiff's ability to proceed with its challenge. I do not accept the defendant's submission that the plaintiff's approach to security reflects a contemptuous approach that ought to sound in an increase in costs.

[10] The defendant made two offers to settle the proceedings. It is the second offer (of 26 October 2012) that is relied on to support an uplift. The offer was for $6,500.00 (by way of satisfaction of the awards made by the Authority in its favour), the withdrawal of the challenge, and that costs on the challenge were to lie where they fell. The plaintiff did not accept the offer. The offer was made well in advance of the hearing. The awards made in the defendant's favour following the challenge were less favourable to the plaintiff than the defendant's offer. I am satisfied, based on the information before the Court, that the plaintiff's refusal to take up the offer was unreasonable in the circumstances and that an uplift in costs is appropriate.

[11] It is submitted on behalf of the plaintiff that the company is struggling financially and is unable to meet an award of costs, whatever the amount. There is authority for the proposition that financial hardship may be taken into account in this jurisdiction in determining an award of costs. There is material before the Court to support the plaintiff's submission that it is in a parlous financial state. However, the interests of both parties need to be considered and weighed in assessing an

appropriate contribution to costs.[5] I allow a discount for financial hardship but I do not consider it appropriate that the defendant should effectively be expected to bear the weight of successfully defending the claim against her.

[12] Standing back and considering all matters before me, including the plaintiff's financial position and the other factors that have been identified, I consider that an appropriate contribution to the defendant's costs is $11,000. The plaintiff has paid $2,000 into Court. That is to be paid out to the defendant by the Registrar. That will leave a residual sum of $9,000 for the plaintiff to pay to the defendant by way of contribution to costs on the challenge.

Disbursements

[13] The defendant seeks disbursements of $1,289.16. These relate to postage, copying and binding, document service, courier fees and travel.

[14] I am prepared to allow recoverability of all claimed disbursements as necessary and reasonable to the litigation, but I disallow the claimed disbursement relating to travel ($953.12). This claimed disbursement appears to relate to Mr Nutsford's travelling costs between Awhitu and Hamilton. There are a number of employment advocates and lawyers based in Hamilton who could have been instructed in this case, and there is nothing to explain why representation from another centre some considerable distance away was considered necessary.[6]

[15] The defendant is entitled to disbursements of $336.04 on the challenge.

Christina Inglis
Judge

Judgment signed at 3pm on 14 February 2014

[5] *O'Hagan v Waitomo Adventures Ltd* [2013] NZEmpC 58 at [34].
[6] See *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35].