IN THE EMPLOYMENT COURT
WELLINGTON REGISTRY

[2014] NZEmpC 3
WRC 13/13

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NEW ZEALAND AMALGAMATED ENGINEERING PRINTING AND MANUFACTURING UNION INC Plaintiff
AND	SEALED AIR (NEW ZEALAND) Defendant

Hearing: on the papers - memoranda received 5 and 12 December 2013.

Appearances: Greg Lloyd, counsel for the plaintiff
Lorne Campbell, counsel for the defendant

Judgment: 17 January 2014

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] The background to this matter was set out in the first part of my judgment of 21 November 2013:[1]

> [1] The plaintiff and defendant are parties to a collective agreement which expired in September 2012. More than 100 employees of the defendant are members of the plaintiff union and were bound by that collective agreement.
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> [2] On 13 August 2012, the plaintiff initiated bargaining for a new collective agreement. A bargaining process agreement was concluded and the parties duly engaged in bargaining. On 26 November 2012, the parties' bargaining agents believed they had reached agreement. A document recording the terms of settlement was prepared for the purpose of ratification by affected members of the plaintiff.
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> [3] On 27 November 2012, the affected members of the plaintiff voted to accept the agreed terms of settlement but, about a week later, a dispute arose about the meaning and application of a term relating to allowances (the

[1] [2013] NZEmpC 209.

> interpretation dispute). This led to a dispute about whether a new collective agreement based on the agreed terms of settlement had been ratified by the affected members of the plaintiff and whether bargaining had concluded (the bargaining dispute).
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> [4] Both the bargaining dispute and the interpretation dispute were the subject of a proceeding lodged with the Employment Relations Authority on 27 March 2013. The defendant applied to have the bargaining dispute removed into the Court pursuant to s 178(2) of the Employment Relations Act 2000 (the Act). In a determination dated 16 May 2013, the Authority concluded that it was appropriate to remove the bargaining dispute into the Court on the grounds that an important question of law was likely to arise other than incidentally. At the suggestion of the plaintiff, the Authority also removed the interpretation dispute into the Court so that the whole proceeding might remain together.

[2] As I also recorded in that earlier judgment, the bargaining dispute was resolved by agreement. That was communicated to the Court in a joint memorandum of counsel which included the following passage:

> Counsel advise that the collective employment agreement has now been ratified and the collective agreement has been signed. The parties agree that bargaining has now concluded.
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> The other issues remain to be determined. By consent, the parties seek an order remitting the matter back to the Employment Relations Authority pursuant to section 178(5) of the Employment Relations Act 2000 for investigation and determination. By memorandum dated 21 May 2013, the Court indicated that the proceedings might be remitted back to the Employment Relations Authority in certain circumstances.
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> The parties have been unable to agree costs. The plaintiff and defendant each seek costs in relation to the proceedings in the Court.

[3] I granted the parties' request by directing the Authority to investigate the matter which the parties' agreement had effectively reduced to the interpretation issue. Counsel subsequently filed memoranda regarding costs. The plaintiff no longer seeks an award of costs and Mr Lloyd submitted that each party should bear its own costs. In his memorandum, Mr Campbell recorded that the defendant had incurred costs of $18,515 to which it sought a contribution of $4,000.

[4] The principles guiding the Court's exercise of its discretion to award costs are settled, well known and do not require repeating here. The first of those principles is that costs will usually follow the event so that the party who is successful will receive a contribution to its costs from the unsuccessful party.

[5] In this case, the application of that principle is not straightforward as the bargaining issue was not decided and there was no evidence before the Court regarding it. Counsel both described the history of the matter in their submissions but, understandably, urged me to draw differing conclusions. Counsel did, however, provide me with copies of useful documents.

[6] As the parties have settled the bargaining dispute at an early stage, I cannot with confidence express any opinion about how that dispute might have been decided if it had come to trial. The best assessment I can make is by discerning the parties' positions on this issue from the pleadings and comparing that to the agreed outcome.

[7] When the proceeding was removed into the Court, the plaintiff was required to provide a statement of claim to replace the statement of problem lodged in the Authority. The defendant then provided a statement of defence and counterclaim which was subsequently amended. Those documents defined the issues before the Court.

[8] The plaintiff sought a declaration that bargaining for a collective agreement had not concluded. Its primary argument was that the bargaining process agreement provided that bargaining would be concluded when a collective agreement had been ratified and that what had been ratified was the terms of settlement rather than a collective agreement. Thus, the plaintiff's primary argument was that the disputed provisions of the terms of settlement were not binding and could be the subject of further bargaining. In the alternative, the plaintiff sought a declaration as to the meaning and application of the disputed provisions of the terms of settlement.

[9] The defendant opposed the plaintiff's claims in respect of both the bargaining dispute and the interpretation dispute. It sought a declaration that bargaining had concluded and that the terms of settlement bound the plaintiff and its members. In the alternative, it sought an order requiring the plaintiff to present the new collective agreement to its members for ratification. Regarding the interpretation dispute, the defendant sought a declaration that the manner in which it had interpreted and applied the disputed terms of settlement was correct.

[10] The pleadings confirm that the essence of the matter as a whole lay in the dispute about what allowances certain members of the plaintiff should receive during a 20-week period prior to the introduction of changes to the rostering system. That was a dispute about the interpretation and application of certain provisions of the agreed terms of settlement and of a variation to the collective agreement made as one of the terms of settlement. As the parties could not resolve that dispute by agreement, it was entirely proper, and in the interests of both parties, that the interpretation dispute be referred to the Authority for determination.

[11] It was the plaintiff's choice to lodge proceedings not only placing the interpretation dispute before the Authority but also raising the bargaining dispute. Effectively, the plaintiff sought to have "two strings to its bow". As the bargaining dispute challenged the validity of the provisions in question in the interpretation dispute, logic required that it be resolved before the interpretation dispute could be addressed. Thus, the bargaining dispute became the immediate focus of the proceedings.

[12] On the pleadings, the outcome of the bargaining dispute sought by the plaintiff was a declaration that bargaining had not concluded and that the provisions of the terms of settlement which gave rise to the interpretation dispute were still open to further bargaining. The effect of such an outcome would have been that the interpretation dispute was not decided or, at least, not immediately. Rather it would have been postponed until further bargaining had taken place.

[13] The outcome sought by the defendant was a declaration that bargaining had ended or, in the alternative, an order requiring the plaintiff to seek ratification of a collective agreement reflecting the terms of settlement. Either of these outcomes would have led to the interpretation dispute being decided on the basis of the existing terms of settlement.

[14] The outcome reached by agreement is that a collective agreement has now been ratified on the basis of the agreed terms of settlement. This allows the interpretation dispute to be determined on the basis of the agreed terms of settlement without further delay. This is the outcome sought by the defendant. On that basis, I

find that the defendant was successful and that the starting point for considering an award of costs is that the plaintiff ought to contribute to the costs incurred by the defendant.

[15] In his submissions, Mr Lloyd raised a number of arguments against such an award of costs being made. The first was that he says the bargaining dispute arose out of a flawed bargaining process agreement, a document for which both parties were responsible. While that may be so, the fact remains that the parties have now concluded an effective collective agreement. This demonstrates that it was the parties' positions, not the bargaining process agreement, which formed the barrier to such an outcome.

[16] In a similar vein, Mr Lloyd submitted that there was significance in the fact that the bargaining dispute aspect of the proceedings had been discontinued by consent. With respect, that misses the essential points which are who initiated litigation of that aspect of the matter and, more importantly, the basis on which the agreement to settle that aspect of the matter was reached.

[17] Mr Lloyd advanced the broad proposition that a dispute about collective bargaining arguably has no winner or loser because both parties will likely benefit from the guidance of the Court. Where the dispute has gone to a hearing and a judgment has been issued, that may often be so but where, as in this case, the dispute does not progress beyond initial pleadings, the parties receive no guidance but are put to cost.

[18] Mr Lloyd was critical of the defendant's attitude in letters and emails which passed between the parties regarding the bargaining dispute. Whether or not this fairly represented the tone of the correspondence, these statements did not go to the substance of the matter. The bargaining dispute was not about attitudes; it was about interpretation of the bargaining process agreement in the context of the parties' statutory obligations.

[19] Mr Lloyd also relied on the correspondence between the parties for a submission that the plaintiff was mindful of costs at all times and sought to minimise

them. While that may be so, it remains a fact that the plaintiff chose to include the bargaining dispute in the proceedings lodged with the Authority and, if there is to be an order for costs, the burden of that should rest on the plaintiff.

[20] Mr Lloyd submitted that the bargaining dispute was a "test case", in the sense in which that term was explained in *NZ Labourers etc IUOW& Ors v Fletcher Challenge Ltd & Ors*[2], and that no award of costs should be made for that reason. What the Court said in that case was:

> In a sense every case which is novel, and this was such a case, can be described as a test case. In another sense of the term, a test case is a case of a kind which frequently comes before this Court and which, although decided as between two parties and perhaps in respect of a cause of action which is only a sample, is agreed or intended to affect not only those parties in respect of the sample cause of action but also those parties in respect of other similar occurrences and, in comparable circumstances, other parties bound by the same instruments. Another example of a test case is a case concerning the practice or procedure of this Court or some generalised ruling on a subject matter involving or affecting many parties.

[21] I do not accept that this was a test case. It is apparent from the pleadings, and confirmed in Mr Lloyd's submissions, that the bargaining dispute centred on the terms of the particular bargaining process agreement reached between the parties in this case. There is no suggestion that similarly worded agreements are in general use or even that they have been used in any other bargaining. For that reason, any decision of the bargaining dispute would have been tied very much to the facts of this case and unlikely to have provided general guidance. I note that the Authority, in its determination removing the matter into the Court, was influenced by the prospect of novel questions of interpretation of the statutory guidelines for collective bargaining arising in this case but, on my analysis of it, I think it more likely that the case would have turned on the interpretation of the particular bargaining process.

[22] Mr Lloyd's final submission was that the amount of costs said to have been incurred by the defendant was excessive. Mr Campbell says that, following the removal of the matter into the Court, he devoted 52.9 hours of his professional time to the matter which, at $350 per hour[3], resulted in costs of $18,515 being incurred by

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[2] [1990] 1 NZILR 557 at 570.
[3] All costs figures are exclusive of GST as the defendant is GST registered.

the defendant. The defendant does not seek a contribution to the costs of $5,810 incurred in connection with the judicial settlement conference. This leaves a balance of $12,705 to which a contribution is sought.

[23] Given that Mr Campbell is an able and experienced practitioner in employment law, I am surprised that so much time and effort was devoted to aspects of the matter other than the judicial settlement conference while it was before the Court. As the contribution to costs sought by the defendant is less than one-third of the costs said to have been actually incurred, however, I need not do a detailed analysis of what may or may not have been reasonable. I am satisfied that at least $6,000 in costs was actually and reasonably incurred by the defendant.

[24] I am not aware of any aspects of the parties' conduct of the litigation while it was before the Court which should influence the amount of costs awarded.

[25] The plaintiff is ordered to pay the defendant $4,000 for costs. This sum is a contribution to the costs incurred by the defendant while the proceedings were before the Court. It does not affect any claim for costs which may be made by either party in the proceedings while they were previously before the Authority or now that they are once again before the Authority.

A A Couch
Judge

Signed at 2.30 pm on 17 January 2014.