

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 5
ARC 93/12**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN HENRY NEE NEE
Plaintiff

AND C3 LIMITED
Defendant

ARC 94/12

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN ANDY NATHAN
Plaintiff

AND C3 LIMITED
Defendant

Hearing: By memoranda of counsel for defendant received on 1 October,
23 October and 29 November 2013 and memoranda of counsel
for plaintiffs 16 October, 25 October, 12 December and
13 December 2013

Appearances: Simon Mitchell, counsel for plaintiffs
Phillipa Muir and Rebecca Rendle, counsel for defendant

Judgment: 4 January 2014

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] In my judgment of 20 November 2013¹ I reserved the issue of costs in respect of both challenges for further submissions from counsel by way of memoranda. At the time when Mr Nee Nee withdrew his challenge I had reserved the issue of costs in respect of his challenge and subsequently accepted the submission of Mr Mitchell as counsel that it would be preferable not to make any order in respect of costs in Mr Nee Nee's challenge until the outcome of Mr Nathan's challenge was known. Now that further final memoranda have been received from counsel on the issue of costs the following positions arise.

[2] I am informed that Mr Nathan and the defendant, C3 Limited, resolved the issue of costs between them. This was conditional upon a payment being made on Monday 16 December 2013. If that payment was made then any judgment on costs would be unlikely to be required.

[3] Insofar as Mr Nee Nee is concerned, Ms Muir and Ms Rendle filed an updated memorandum dated 29 November 2013. That reiterates the submissions contained in the first memorandum dated 1 October 2013 in respect of indemnity costs sought against Mr Nee Nee. The later memorandum also updates the quantum of the costs incurred by the defendant in defending the challenges of both Mr Nathan and Mr Nee Nee.

[4] Mr Mitchell in his most recent memorandum of 13 December 2013 has now indicated to the Court that despite attempts to do so, he has been unable to obtain instructions from Mr Nee Nee. He is therefore unable to advance the matter.

[5] The claim for indemnity costs against Mr Nee Nee is made on the basis of the circumstances in which the plaintiff Mr Nee Nee withdrew his challenge. Those circumstances are set out in Ms Muir's and Ms Rendle's memorandum and refer to an attempt by Mr Nee Nee to mislead the Court in relation to bottles which he had produced as an exhibit. At the time when Mr Nee Nee withdrew his challenge the proceedings in their entirety were virtually complete. The only remaining matter to be dealt with was the presentation of submissions by counsel. In view of the late withdrawal by Mr Nee Nee, Ms Muir and Ms Rendle had prepared written

¹ [2013] NZEmpC 207.

submissions in respect of the claims by both plaintiffs. Ms Muir was able to modify her submissions delivered orally to the Court on the final morning. However, insofar as actual attendances of counsel were concerned, the submission is made that the costs of the defendant be borne equally by the two plaintiffs. In the circumstances I accept that submission.

[6] The defendant seeks reimbursement from Mr Nee Nee of his one half share of the legal costs, the disbursements and witnesses expense incurred. Mr Nee Nee's share of the total costs incurred by the defendant amount to \$19,529.10 plus GST and disbursements of \$225 and a witness expense of \$304. The witness expense related to the defendant's need to pay accommodation, car parking and mileage for one of its witnesses to travel from Tauranga to Auckland and remain in Auckland to give evidence.

[7] The Court is guided in the exercise of its discretion on costs by three decisions of the Court of Appeal.² This was recently reiterated by the Court in *Tan v LSG Sky Chefs New Zealand Ltd.*³

[8] On the basis of those authorities the two primary principles to be applied regarding orders for costs in this Court are, first, that costs usually follow the event and, second, that the party against whom the costs award is made should contribute two thirds of the actual and reasonable costs incurred by the successful party.

[9] On the basis of the judgment issued in Mr Nathan's challenge, Ms Muir is able to make the submission that similarly Mr Nee Nee's challenge was without merit. His attempt to mislead the Court did not prolong the hearing of the matters. Neither Mr Nathan nor Mr Nee Nee acted with integrity in their dealings with their employer, the defendant. However, that factor and Mr Nee Nee's attempt to mislead the Court, would not justify the making of an award of indemnity costs against Mr Nee Nee.

² *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

³ (2013) 10 NZELR 859 (CA).

[10] In exercising my discretion on the matter, I consider it is appropriate to apply the principles which normally apply. Accordingly, Mr Nee Nee is ordered to pay two thirds of one half of the total actual and reasonable costs incurred by the defendant. That amounts to \$13,019.40. In addition the defendant is entitled to GST on that sum and also reimbursement of one half of the disbursements amounting to \$225 and one half of the total witness expenses incurred amounting to \$304.

[11] The costs award made by the Employment Relations Authority in its determination of March 2013, in the sum of \$2,000 against Mr Nee Nee is confirmed. The application by the defendant for costs incurred in preparing memoranda in relation to the costs application is declined.

M E Perkins
Judge

Judgment signed at 2.45pm on 4 February 2014