

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2014] NZEmpC 9
CRC 27/13**

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

BETWEEN NATHAN GAVIN GUNNING
 Plaintiff

AND BANKRUPT VEHICLE SALES AND
 FINANCE LIMITED
 Defendant

Hearing: on the papers - memoranda received 21 January and 5 February
 2014.

Appearances: Peter Moore, advocate for the plaintiff
 Graham Hill, counsel for the defendant

Judgment: 7 February 2014

COSTS JUDGMENT OF JUDGE A A COUCH

[1] I gave my substantive decision in this matter on 28 November 2013.¹ The plaintiff was largely successful in that the remedies awarded to him were substantially greater than those awarded by the Authority. Costs could not be agreed and memoranda were filed.

[2] The manner in which this case was heard was unusual. Before the Authority, the defendant was represented by counsel. In response to the plaintiff's challenge, the defendant filed a statement of defence but did not attend the hearing on 18 November 2013. Rather, by agreement, counsel for the defendant filed submissions. An affidavit of the defendant's director was also filed.

¹ [2013] NZEmpC 212.

[3] I accept that the defendant's decision to offer only a limited response to the plaintiff's challenge was a pragmatic one based on cost. In his memorandum on costs, Mr Hill records that he has represented the defendant *pro bono* and that the defendant's business is not currently profitable. I return to this issue of the ability to pay later in this decision.

[4] For the plaintiff, Mr Moore seeks a contribution of \$4,332 to costs of \$6,189 said to have been actually incurred by the plaintiff in relation to the proceeding before the Court. Mr Moore also seeks costs of \$3,500 for the proceeding before the Employment Relations Authority. For the defendant, Mr Hill accepts that the defendant should contribute to the plaintiff's costs but submits that the circumstances of the case require that contribution to be much smaller than the sums sought by the plaintiff.

[5] The broad principles applicable to the exercise of discretion in fixing costs are settled and well known. In the Court, the usual starting point is two thirds of costs actually and reasonably incurred. In the Authority, the current accepted daily rate is \$3,500.

Costs in the Court

[6] Mr Moore says that he devoted 46 hours of his professional time to the Employment Court aspect of this matter. At his usual rate of \$180 plus GST per hour, he says this would have resulted in the plaintiff being invoiced for \$9,522. Thus, he says the actual invoiced amount of \$6,189.30 represented a 37 percent discount. I accept that the plaintiff was actually invoiced for this reduced amount and it is implicit in Mr Moore's submissions that this ought to be regarded as reasonable.

[7] Mr Hill challenges that submission on three grounds: the defendant's ability to pay, "costs containment" and "proportionality".

[8] Under the heading "costs containment", Mr Hill notes that the defendant's decision not to be represented at the hearing resulted in a much shorter hearing than

might otherwise have been the case and no need to prepare cross examination. That is undoubtedly correct. Mr Hill also submits that the issues before the Court were essentially a subset of those which had been before the Authority and ought not to have required much extra research or preparation. I broadly agree but I also accept Mr Moore's submission that the provision of submissions and an affidavit on behalf of the defendant very shortly before the hearing did require him to do significant new work. In particular, Mr Hill's submissions focussed on the role of the Court in a non de novo challenge, an issue which was obviously not before the Authority.

[9] Under the heading "proportionality" Mr Hill submits that the extent to which costs are reasonable must be assessed in light of what is at stake. In *Binnie v Pacific Health Ltd*² the Court of Appeal said that it was "too absolute" to say that costs must never be disproportionate to the money value of the judgment obtained but went on to say that "costs payable by a defendant should not lightly be fixed at a level which is disproportionate to the sum recovered by the plaintiff". In this case, the total remedies awarded were just over \$6,000. Having regard to the issues involved in this case, costs exceeding the amount recovered cannot be justified.

[10] A further factor I take into account is that, although Mr Moore filed reasonably lengthy written submissions, they contained little analysis of the minimum wage issues which were the only significant issues of law.

[11] Overall, even the reduced costs incurred by the plaintiff were not entirely reasonable. In my view, the upper limit of what was reasonable in all the circumstances was \$4,500 (including GST). That suggests a starting point for costs of \$3,000.

[12] Mr Moore submits that the manner in which this case was conducted warrants an uplift from that starting point. He relies on the late provision of the defendant's submissions and the unexpected filing of an affidavit on behalf of the defendant. These are relevant issues but I have already taken them into account in assessing the extent to which the costs incurred were reasonable.

² [2002] 1 ERNZ 438 at [11].

[13] An appropriate order for costs in the Court is \$3,000.

Costs in the Authority

[14] It is disclosed in the memoranda of the representatives that the defendant made an offer of settlement without prejudice as to costs prior to the Authority's investigation meeting. The offer was of \$1,000 plus a further \$1,000 for costs.³ The awards made by the Authority totalled only \$640. In his memorandum Mr Moore says "On this basis, the parties agreed to let costs lie where they fell for the ERA investigation."

[15] The plaintiff has been awarded remedies of more than \$6,000 in the Court and now seeks a contribution to his costs in the Authority. The Authority's investigation meeting took less than one day with submissions made subsequently in writing. Based on the current rate of \$3,500 per day of hearing currently used by the Authority, Mr Moore seeks a contribution of \$4,000 to the plaintiff's costs in the Authority.

[16] The defendant does not oppose an order for costs in the Authority but Mr Hill submits that the usual rate of \$3,500 per hearing day should be reduced. He notes that the plaintiff lodged three successive statements of problem necessitating three statements in reply by the defendant. He is also critical of what he perceives as irrelevant aspects of the plaintiff's evidence before the Authority. Otherwise, Mr Hill submits that the factors relied on in relation to costs in the Court are relevant to assessing a just award of costs in the Authority.

[17] Having regard to the principles summarised by the full Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*,⁴ I conclude that there are factors in this case warranting a reduction from the generally accepted rate of \$3,500 per day of hearing but only to a modest extent. An appropriate award of costs for the proceeding in the Authority is \$3,000.

³ Mr Hill refers in his memorandum to an offer of \$3,000 having been made but nothing turns on the difference.

⁴ [2005] ERNZ 808 at [44].

Ability to pay

[18] The leading authorities confirm that any award of costs in the Court should be limited by the ability of the party concerned to pay without undue hardship. In this case, Mr Hill submits that this factor should influence the Court to reduce the amount that would otherwise be appropriate. In his memorandum he says that the defendant has been the victim of serious theft and fraud and that the defendant's director considers this the worst time for trading she has experienced in five years. Mr Hill also records that the Court's substantive judgment was met by the defendant's director personally.

[19] Even accepting these statements, the information necessary to found a submission based on inability to pay has not been provided. As the Court has said on many previous occasions, what is required is a full statement of the party's financial position including assets, liabilities, income and outgoings.⁵ Nothing of that sort has been provided in this case. Accordingly, it is not a factor I can take into account.

Disbursements

[20] The plaintiff seeks reimbursement of the filing fees he has paid in the Authority and the Court, totalling \$276. That is appropriate.

Conclusions

[21] The defendant is ordered to pay the plaintiff \$3,000 for costs in the Court, \$3,000 for costs in the Authority and \$276 for disbursements.

A A Couch
Judge

Signed at 3.30 pm on 7 February 2014.

⁵ See, for example, *Metallic Sweeping (1998) Limited v Ford* [2010] ERNZ 433 at [53].