

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 26A/08
ARC 43/07
ARC 46/07**

ARC 43/07

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

AND

IN THE MATTER OF applications for stay of proceedings and
security for costs

BETWEEN OLDSCO PTI LIMITED
Plaintiff

AND PHILIP HOUSTON
Defendant

ARC 46/07

IN THE MATTER OF an application for a compliance order

BETWEEN PHILIP HOUSTON
Plaintiff

AND OLDSCO PTI LIMITED
Defendant

Hearing: By submissions filed on 3 and 9 September 2008

Appearances: Tony Drake and Mark Donovan, Counsel for Oldco PTI Limited
Penny Swarbrick, Counsel for Philip Houston

Judgment: 24 September 2008

COSTS JUDGMENT OF JUDGE A A COUCH

[1] This costs judgment relates to the 3 interlocutory applications which I heard and decided on 25 August 2008 (AC 26/08). All 3 applications were made by Mr Houston. Two of the applications were granted. One was refused.

[2] Counsel for both parties have filed memoranda as to costs.

[3] In her memorandum, Ms Swarbrick seeks full reimbursement of the costs incurred by Mr Houston in respect of the two applications in which he was successful and that no order for costs be made in respect of the application in which he was unsuccessful.

[4] In support of this unusual and apparently inequitable outcome, Ms Swarbrick relies on the fact that Oldco is impecunious and therefore unlikely to pay any award of costs made against it whereas Oldco will be able to enforce any award made against Mr Houston.

[5] While I accept that is almost certainly correct, taking it into account in the manner proposed by Ms Swarbrick would mean costs were awarded on a 2-0 basis whereas the actual outcome was 2-1. A better way of dealing with the outcome is to make an order for costs in relation to one third of the costs actually and reasonably incurred by Mr Houston.

[6] Ms Swarbrick says that Mr Houston's costs in relation to the 3 applications were \$5,550 plus GST. I accept that those costs were actually and reasonably incurred. One third of that amount is \$1,850 plus GST.

[7] A normal starting point for assessing the extent of contribution to costs which ought to be awarded is two thirds of the costs actually and reasonably incurred. In this case, Ms Swarbrick submits:

14. *The applications were necessary because of Oldco's complete disregard for its obligations to satisfy earlier orders of this Court (and the Employment Relations Authority), and because of the manner in which it has conducted itself in the litigation as set out in Mr Houston's affidavit.*

15. *But for that conduct and approach, it would have been appropriate for the usual 66% rule to apply. However, in these circumstances, it*

is submitted that an award of full solicitor-client costs is justified. Alternatively, an award significantly higher than the normal level would be appropriate.

[8] I accept this submission in part. Mr Houston had alternatives to an application for a compliance order to enforce the order for costs made in earlier proceedings. In that sense, the application for the compliance order was not necessary but rather a matter of choice by Mr Houston. Given what I have described as the “*one sided environment*” for the costs associated with Oldco’s challenge, however, I accept that the application for security for costs was a necessary response to the litigation commenced by Oldco.

[9] On behalf of Oldco, Mr Drake submitted that any award of costs should be very modest because Oldco has no ability to pay. For the reasons set out in my substantive judgment, I reject that submission. Oldco clearly has access to ample funds for the purpose not only of defending litigation instigated by Mr Houston but also for pursuing its own claims against him. Those funds ought to be used also to contribute to the costs incurred by Mr Houston in successfully resisting Oldco’s claims or overcoming Oldco’s resistance to his claims.

[10] Taking all aspects of the matter into account, I find that an appropriate award of costs in favour of Mr Houston is \$1,650.

[11] As to disbursements, Mr Houston incurred a filing fee of \$300 in ARC 46/07. He was entirely successful in that proceeding and ought to be fully reimbursed for that fee. He is also said to have incurred a disbursement of \$35 for photocopying. I allow \$15 of that sum.

[12] In summary, Oldco PTI Limited is ordered to pay Mr Houston \$1,650 for costs and \$315 for disbursements.

A A Couch
Judge

Judgment signed at 10.45 am on 24 September 2008