IN THE EMPLOYMENT COURT
AUCKLAND

AC 28A/08
ARC 64/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	BAY OF PLENTY DISTRICT HEALTH BOARD Plaintiff
AND	IAN LINDSAY BREEZE Defendant

Hearing: By submissions filed by the defendant on 18 September 2008 and by the plaintiff on 2 October 2008
(Heard at Auckland)

Judgment: 22 December 2008

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff discontinued its challenge and the defendant has applied for indemnity costs. Counsel for the plaintiff filed a memorandum on 8 September 2008 stating that due to further unavailability issues in respect of the plaintiff's witnesses, the plaintiff had chosen to abandon its appeal to the Court. It observed that the matter of costs had not been raised with the defendant. The plaintiff asked for costs to be dealt with in the ordinary way by the Court. Chief Judge Colgan directed an exchange of memoranda regarding costs, which have duly been filed.

[2] Mr Bartlett, counsel for Dr Breeze, seeks an indemnity award of $1,785 exclusive of GST based on an hourly charge out rate of $340 exclusive of GST (and minor office disbursements). He has given a detailed list of the costs incurred by the defendant, which include: perusal of the statement of claim; preparing the initial memorandum for the Court relating to urgency and dispensing with the filing of a

statement of defence; attending a 30 minute teleconference call on 29 August 2008; pursuing the interlocutory judgment of that date; preparing submissions opposing the plaintiff's application for adjournment; preparing "*first cut*" submissions and briefs of evidence for the substantive hearing, and preparing submissions on costs.

[3] There is also a claim for taking instructions at various times from the defendant's union, discounted by 50 percent because some of these related to matters in the Employment Relations Authority concerning the defendant.

[4] The claim for indemnity costs is put on the basis that the plaintiff's claim was unmeritorious and also amounted to a procedural abuse, citing *Order of St John v Greig* [2004] 2 ERNZ 137 at p161 para 98.

[5] These proceedings were commenced by a statement of claim, filed in the Court on 14 August 2008, which challenged part of a determination of the Employment Relations Authority, issued on 18 July 2008, which found that Dr Breeze had raised his grievance within the 90 day time limit. The Authority had set down the hearing of the substantive grievance on 17 September 2008.

[6] Mr Bartlett filed a memorandum on 18 August seeking directions excusing the defendant from his usual obligation to file and serve a statement of defence to the statement of claim, seeking urgency for the hearing of the matter because of the date of the Authority's hearing and suggesting that the challenge be disposed of on the papers.

[7] Mr Beech, counsel for the plaintiff, responded on 27 August, submitting that Dr Breeze had been responsible for delays until this point in time, that the application for urgency was contrived and that a statement of defence was required. He observed that if the plaintiff was successful in its challenge this would be determinative of the claim and in any event thereafter the proceedings should be dealt with in the Court rather than in the Authority.

[8] Chief Judge Colgan dealt with these matters in his judgment of 29 August 2008. He accepted the defendant's contention that the plaintiff's statement of claim

was discursive and largely irrelevant to the issues to be determined on the challenge. He found it would be unduly onerous in these circumstances to require Dr Breeze to plead comprehensively to the statement of claim as filed. He found, in view of the Authority's allocation of an earlier investigation meeting, that the discrete issue of limitation should be heard and disposed of promptly. He set a date for the hearing of the challenge on Thursday 11 September 2008, with a timetable for the exchange of briefs of evidence.

[9] On 29 August Mr Beech filed a memorandum in which he addressed the enquiries he had made as to the availability of the plaintiff's witnesses for the hearing on 11 September 2008. He had found that three of the four witnesses the plaintiff wished to call were not readily available. One would be in Australia on that day. He therefore applied for an adjournment of the fixture. He also advised the Court that there had been a teleconference call with the Employment Relations Authority and that, if the Employment Court proceedings were adjourned, the Authority would also adjourn the hearing of 17 September and had provided a backup fixture of 24 to 26 November. Dr Breeze opposed the adjournment application. Mr Beech responded by a further memorandum on 1 September.

[10] Chief Judge Colgan, by minute dated 1 September 2008, agreed with Mr Bartlett that it was difficult to understand what the evidence the plaintiff was seeking to call had to do with the question of when Dr Breeze had raised his personal grievance. He observed that a careful reading of the plaintiff's detailed statement of claim revealed no apparent reliance on oral communications between Dr Breeze and the witness who would be in Australia on 11 September. He permitted relevant evidence from that witness to be filed in affidavit form as that witness was unlikely to be cross-examined on his evidence. In these circumstances he declined the plaintiff's application for adjournment and confirmed the timetable he had made.

[11] On 8 September Mr Beech filed his memorandum advising that because of the further unavailability issues relating to witnesses, the plaintiff had chosen to abandon its challenge to the Court.

[12] Mr Bartlett in his submission on costs contended that the plaintiff's challenge was a delaying strategy to avoid the Authority's investigation meeting on 17 September and outlined the correspondence and the steps taken in the challenge.

[13] Mr Beech endeavoured to explain the plaintiff's actions in his memorandum.

[14] I find that while there are some indications that the plaintiff was attempting to move the proceedings in their entirety into the Court and thus to avoid an investigation by the Authority, the plaintiff was, as Chief Judge Colgan found in his judgment of 29 August 2008, entitled to pursue its challenge and to call evidence in support. The challenge was not an abuse of the process of the Court.

[15] Further I do not accept Mr Bartlett's submission that the challenge was entirely without merit. I note on the face of the Authority's determination that the first definitive notification to Dr Breeze of the attitude of the plaintiff, which might have given rise to a disadvantage grievance, was in a letter dated 9 August 2007. The Authority also found that Dr Breeze raised his grievance on 6 March 2008. Unless there is some error in the recording of these dates, on the face of it, it did not appear that Dr Breeze's grievances had been raised within the 90 day period.

[16] I therefore find that this is not a case for indemnity costs but an ordinary case of contribution towards the actual and reasonable costs incurred by the defendant. I am satisfied that from the detailed setting out of the costs incurred that they are reasonable and indeed modest in the circumstances of the urgency which attached to this matter. The usual starting point is two thirds of actually and reasonably incurred costs which the defendant sought as an alternative. On this basis I consider that an overall award of $1,200 inclusive of minor office disbursements would be a reasonable contribution to the defendant's costs, and so order.

B S Travis
Judge

Judgment signed at 11am on 22 December 2008