

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 39/08
ARC 12/03**

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

AND IN THE MATTER OF an application for costs

BETWEEN JUDI DAWN PRINS AND FRANCISCUS
CORNELIUS JOHANNES PRINS
Plaintiffs

AND TIROHANGA GROUP LIMITED
(FORMERLY TIROHANGA RURAL
ESTATES LIMITED)
Defendant

Hearing: by memoranda of submissions received on 27 June 2006 and 8 August and
13 September 2007

Judgment: 24 September 2008

SUPPLEMENTARY JUDGMENT (NO 2) OF CHIEF JUDGE GL COLGAN

[1] Judgments have been delivered in favour of the plaintiffs on their personal grievances and allowing them costs on the challenge to this Court.

[2] Subsequently counsel for the plaintiffs has reminded the Court that they also challenged the Authority's costs determination but that in the course of the hearing it was agreed that this would be dealt with by written submissions and after the outcome of the substantive challenge was known.

[3] The Authority awarded Mr and Mrs Prins \$14,418.60 as a contribution towards their costs, plus \$581.40 towards their disbursements, being a total of \$15,000. They say this was unjustly insufficient and did not follow principles applicable to such awards. In

particular, the Prins emphasise the terms of a Calderbank offer made by them to the defendant on 25 July 2002, offering to accept \$20,000 each as compensation for hurt feelings, humiliation, and loss of dignity under s123(1)(c) of the Employment Relations Act 2000 (“the Act”) and, in the case of Mrs Prins, a further \$5,000 as compensation for sexual harassment. Together, these sums amounted to \$45,000. The offer was left open for acceptance for a period of about a fortnight. As is usual with such offers, the defendant was put on notice that if not accepted, the Prins would produce the letter in support of an application for costs if successful in the Authority. The defendant did not accept the offer. It was, however, more than the amount which the Authority subsequently awarded to the plaintiffs so that the Calderbank offer was not brought to its attention in that forum.

[4] As the plaintiffs point out, however, the Court’s judgment of 10 May 2006 has now replaced the Authority’s determination and the total amount of the awards made by the Court is more than \$58,000. Together with an additional sum of \$923 for remuneration not paid for days in lieu of holidays that the Authority awarded and has subsequently been paid by the defendant, the sums recovered in litigation by the Prins total about \$60,000, significantly in excess of the \$45,000 offer just referred to.

[5] In these circumstances the plaintiffs seek full indemnity costs and disbursements for the entire proceeding from 11 December 2001 to 11 July 2003 or, alternatively, and as a fall-back position, for the period from 25 July 2002 (the date of the Calderbank offer) to 11 July 2003, being the conclusion of proceedings in the Authority.

[6] The plaintiffs’ proceedings were commenced with the filing of their statement of problem on 11 December 2001 that were concluded in the Authority on 11 July 2003. The Authority’s investigation meeting began on 16 August and continued on 2 September and 21 October 2002. Written submissions were subsequently made and the Authority’s final determination was issued on 11 July 2003. Mr Drake, counsel for the plaintiffs, submits that the Authority’s investigation was drawn out principally because of the manner in which the defendant and its managing director, Barry Walters in particular, chose to defend the claims. Counsel submits that because of the large number of witnesses put forward by the defendant at the Authority’s investigation, they were put to the additional expense of preparing cross-examination and possible rebuttal evidence, especially in relation to evidence belatedly adduced by the company.

[7] Mr Drake also points out that the plaintiffs had to apply to the Authority for orders requiring the defendant to produce the original of a suspect employment agreement, another employment agreement with Mr and Mrs Wheeler, and its payroll records relevant to the plaintiffs. Counsel makes the point that although the Authority made the orders sought, the defendant disclosed none of those documents.

[8] The investigation meeting in the Authority lasted 3 full days and even this period was reduced from what had otherwise been by the preparation by the plaintiffs of full briefs of evidence of their witnesses.

[9] One of the three investigation meeting days was in Hamilton to suit the majority of the defendant's witnesses. This added travel time and expense for the plaintiffs and their counsel and, correspondingly, benefited the defendant whose witnesses did not have to travel to Auckland. On the other hand, the events in the case occurred and most witnesses were from the Waikato and Central North Island areas.

[10] Mr Drake emphasises the futility of the defendant's perseverance with its contention that Mr and Mrs Prins had been made redundant justifiably in the face of evidence that others, Mr and Mrs Wheeler, had been contracted to perform their work. Counsel submits that this line of defence was not retreated from until Mr Wheeler forwarded to the Authority copies of his and his wife's employment agreements with the defendant which, it is said, the defendant already had but did not disclose to the Authority. Counsel criticises the defendant for seeking to deny these facts for as long as possible over the 3-month period of the Authority's investigation.

[11] Mr Drake emphasises that the true position was that, contrary to its assertions, the defendant did not sell or lease the motel to Mr and Mrs Wheeler and in fact employed them to be replacement managers for the plaintiffs. Counsel suggests that this sustained strategy was intended to cause the plaintiffs to run out of funds and to abandon their claims and/or that Mr and Mrs Wheeler would not be found and the truth revealed. Counsel emphasises that the defendant, through its managing director Mr Walters, chose not to disclose key documents despite orders requiring him to do so, that he gave false evidence, and continued to maintain unsubstantiable facts. Counsel submits that if the defendant had acted properly and in good faith by disclosing evidence before the Authority's

investigation, its meetings would have been much shorter and the plaintiffs' costs significantly less. Counsel further submits that the award of costs should reflect adequately the initial costs which the defendant's strategy caused the plaintiffs to incur.

[12] Mr Drake draws to my attention the recent judgment of the Court of Appeal in *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188. The Court of Appeal, in determining that exemplary damages are not available for contract breaches, noted that: "... in appropriate cases, indemnity costs may be available for improper conduct in the course of litigation". The plaintiffs submit that the defendant's improper conduct and that of its managing director, Mr Walters, make this case an appropriate one for indemnity costs to be awarded in respect of the Authority's investigation. Also drawn to my attention is the Court of Appeal's judgment in *Health Waikato Ltd v Van der Sluis* [1997] ERNZ 236 enjoining the Employment Court to enforce Calderbank offers to encourage settlement of employment cases.

[13] Although Mr Drake urges me to follow the principles expounded by the Court of Appeal in a trio of cases (*Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305, *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438, and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172), those cases apply to Employment Court litigation. As the full Court noted in *PBO Ltd (formerly Rush Security Ltd) v da Cruz* [2005] 1 ERNZ 808, different considerations apply to costs in the Employment Relations Authority.

[14] The plaintiffs claim indemnity costs and disbursements in the Authority of \$44,453.59. This consists of solicitor-client legal costs of \$38, 837.50, GST on these of \$4,854.69, and Authority filing and hearing fees totalling \$520.00. Other disbursements include New Zealand Police forensic document examination service fees and the usual claims for photocopying, tolls and stationery. Mr Drake makes the point that he appeared without a junior in the Authority although several staff solicitors from the plaintiffs' solicitors did assist with research, preparation for the investigation meeting and similar work. The Court has been provided with a breakdown of these legal costs.

[15] Turning to their alternative submission in support of indemnity costs following the making of the Calderbank offer on 25 July 2002, these are said to be \$34,627 (inclusive of GST) with the same disbursements as referred to in the Authority's determination.

[16] Mr Drake advises the Court that the plaintiffs applied for legal aid towards the end of the Authority's investigation meeting. They anticipated receiving a grant for the concluding stages of that process, after 18 October 2002, and therefore their costs for that period were excluded from the figures provided to the Authority in support of their application for costs. In the event, however, the plaintiffs' legal aid application was declined so that they met the full costs of their representation for the duration of the Authority's investigation.

[17] Mr Drake refers to the plaintiffs' limited financial means and what he submits would be the absence of financial difficulty for the defendant in the event of an indemnity award. Counsel invites the Court to make an award of costs and disbursements for the Authority proceedings similar to that which would have been awarded for a case of similar length and complexity in the Employment Court.

[18] I accept that the Court's judgment on costs issued on 16 May 2007 did not address sufficiently the matter of the plaintiffs' costs in the Employment Relations Authority which was a discrete issue and reserved for subsequent consideration. Although that judgment refers to a number of the elements relevant to the Authority's costs award, it does so in the context of costs in this Court. That is made clear, for example, by the reference at paragraph [3] of my judgment of 16 May 2007 to the plaintiffs seeking "*full reimbursement of legal costs and disbursements from the date of commencement of the proceeding in the Employment Court, 3 February 2003*".

[19] As I have already noted, the Authority awarded costs and disbursements totalling \$15,000. That was a substantial award for proceedings in that forum but there is no question that it should be reduced. The real question is whether, in the circumstances, it should be increased significantly.

[20] There cannot, however, be double accounting for the defendant's unwise refusal of the Calderbank offer. This has been taken into account already in my judgment on costs in this Court. That will result, therefore, in an award of a substantial contribution to actual and reasonable fees but not an indemnification of them.

[21] For the same reasons as I employed in the judgment of 16 May 2007 to arrive at a reasonable fee for legal costs in this Court, I conclude that a reasonable fee for legal costs in the Authority proceedings would have been \$25,000 (inclusive of GST but exclusive of disbursements). As set out in paragraph [16] of my judgment of 16 May 2007, this is not a judgment about, or criticism of, actual legal costs incurred. The Court must, nevertheless, make an assessment of reasonable costs in all the circumstances before determining what a reasonable contribution should be to these. It must also be borne in mind that this was litigation in the relatively informal and low level Authority and so an award of costs must be consistent with the principles on which other awards are made by that body.

[22] The plaintiffs are entitled to an increase of the amounts for costs and disbursements awarded by the Authority on the grounds set out earlier in this judgment.

[23] The defendant is to pay the plaintiffs \$20,000 (inclusive of GST) as a reasonable contribution to reasonable legal fees for their representation in the Authority. The defendant is also directed to pay disbursements to the plaintiffs of \$581.40 as directed by the Authority.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Wednesday 24 September 2008