IN THE EMPLOYMENT COURT
AUCKLAND

AC27A/09
ARC 41/09

IN THE MATTER OF	an application for injunction
AND IN THE MATTER OF	an application for costs
BETWEEN	NEW ZEALAND AMALGAMATED ENGINEERING PRINTING AND MANUFACTURING UNION INC First Plaintiff
AND	PIERE GODQUIN Second Plaintiff
AND	JENAN ISSAC Third Plaintiff
AND	SARAH NIXON Fourth Plaintiff
AND	KATHRYN FERRIER Fifth Plaintiff
AND	LAURA TAPP Sixth Plaintiff
AND	GENEVIEVE MORRIS Seventh Plaintiff
AND	SHARON ELLIOTT Eighth Plaintiff
AND	MARCUS CHANDLER Nineth Plaintiff
AND	ZEAL 320 LIMITED First Defendant
AND	AIR NEW ZEALAND LIMITED Second Defendant

Hearing: By submissions filed by the plaintiffs on 4 September 2009, by the second defendant on 28 September, by the first defendant on 29 September 2009 and by the plaintiffs on 6 October 2009

Judgment: 22 December 2009

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] This is an application by the first defendant Zeal 320 Limited ("Zeal") and the second defendant Air New Zealand Limited ("Air NZ") for costs following the plaintiffs discontinuing their proceedings against the first and second defendants on 29 September 2009. On 7 July, after a hearing on 3 July, I declined the plaintiffs' application for interim injunctive relief against Zeal and Air NZ. For the reasons given in my judgment, I found the case advanced by the plaintiffs was very weak and their arguments only barely satisfied me that there was an issue to be tried. An undertaking was given by Zeal not to take any steps to call the second to ninth plaintiffs to any disciplinary meetings or to ask them to provide any responses or explanations to the concerns it has raised with them. I found that the balance of convenience favoured Zeal and that the overall justice of the case also favoured Zeal.

[2] Air NZ denied that it was the employer of the employee plaintiffs and applied to be struck out from the proceedings.

[3] The substantive matter was set down for hearing in the week commencing 27 July 2009. This was rescheduled for the week commencing 7 September 2009. The fixture for the substantive hearing was vacated when the collective bargaining, which had underpinned the allegations of unlawful lockout in the applications for interim and permanent injunctions, produced a ratified collective agreement. It was agreed that the present proceedings would be discontinued but no agreement was reached on costs.

Zeal's claims

[4] Zeal sought an award of 80 percent of the actual costs incurred in respect of the interim hearing. Those costs were said to be $30,761.58 with GST and disbursements inclusive. In respect of the substantive proceedings Zeal sought a contribution at the rate of 66 percent of the actual costs, which were an additional $31,300.50 with GST and disbursements inclusive.

[5] Mr Caisley's memorandum on behalf of Zeal referred to the Court's power to award costs in schedule 3 clause 19 of the Employment Relations Act 2000 ("the Act") and the leading authorities, including the three Court of Appeal cases of *Victoria University of Wellington v Alton-Lee*[1], *Binnie v Pacific Health Limited*[2] and *Health Waikato v Elmsly*[3]. He submitted that the primary principle is that costs should follow the event, a proposition which Mr Little, in opposition, did not dispute. Mr Caisley submitted that, in this case, the non-acceptance of a *Calderbank* offer should also be taken into account citing *Ogilvy & Mather (NZ) Ltd v Darroch*[4] and *Elmsly* at para [53].

[6] As to the costs incurred at the interim hearing, Mr Caisley submitted that they were reasonable having been undertaken by a partner and a senior associate, the matters were urgent, unusual and complex, contained allegations concerning the lifting of the corporate veil and followed the making of a reasonable settlement offer that should have been accepted. The case also required Zeal to prepare extensive evidence about 13 separate disciplinary issues involving eight individuals, the ongoing collective negotiations and its corporate identity in relation to other companies within the Air NZ group. It also required consideration of novel propositions about the interface between disciplinary actions and lockouts and how this related to procedural fairness.

[7] Mr Caisley submitted that Zeal had conducted the litigation in an exemplary manner and this should be taken into account in fixing costs. He submitted that at all times Zeal had cooperated with the plaintiff and the Court in agreeing to a tight timetable, providing a comprehensive and clear statement of defence and evidence

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[1] [2001] ERNZ 305 (CA)
[2] [2002] 1 ERNZ 438 (CA)
[3] [2004] 1 ERNZ 172 (CA)
[4] [1993] 2 ERNZ 943

and detailed submissions and had made an appropriate settlement offer which was not accepted. Zeal had provided undertakings to the Court and yet the plaintiffs elected to proceed with their claim against both defendants in the face of those undertakings.

[8] The settlement proposal, dated 30 June 2009, was annexed to an affidavit of Mr Doak, who was employed by Air NZ as senior legal counsel, and whose affidavit was filed in support of the costs applications of both Zeal and Air NZ. Mr Caisley summarised that settlement proposal as follows:

a) agreeing to the substantive matter being set down on the first available date being 15 working days after the interim hearing;

b) undertaking that Zeal would comply with any order that the Court might make;

c) Zeal would take no action in the interim on the disciplinary cases involving allegations of unlawful leave taking;

d) no final decisions adverse to the plaintiffs would be taken by Zeal in other relevant disciplinary cases pending the outcome of the substantive case;

e) Zeal would make it clear to the plaintiffs that its investigations into harassment complaints were to be dealt with on their own merits and were not connected with the bargaining.

[9] Mr Caisley submitted that had that proposal been accepted on 30 June, Zeal would have been saved the expense of two days of intensive preparation and the costs of a very full day's hearing in the Employment Court on 3 July 2009. For these reasons Zeal submitted that an award of costs higher than the routine starting point of 66 percent would be justified.

[10] As to the costs of preparing for the substantive hearing, Mr Caisley submitted that the plaintiffs' claims were without merit, there were alternative options

available, the plaintiffs had failed to comply with timetable orders, had fundamentally changed their proceedings and had failed to promptly discontinue or vacate the fixture when the matter was settled on 26 August. A notice of discontinuance was not signed until 4 September, which was the final working day before the substantive hearing was due to start.

Air NZ's claims

[11] Air NZ sought 100 percent of the costs it had incurred in the interim injunction and for the work associated with the substantive proceedings. The memorandum filed on behalf of Air NZ by Mr Towner and Mr Clarke addressed the same authorities as Mr Caisley's memorandum and stressed that the plaintiffs' conduct had unnecessarily added to its costs. They also placed reliance on the 30 June *Calderbank* offer. Air NZ claimed to have incurred legal costs of around $14,762 in relation to the interim injunction hearing and approximately $13,714 in preparation for the substantive hearing. Copies of the accounts rendered to both Zeal and Air NZ were annexed to Mr Doak's affidavit.

[12] The main thrust of counsel for Air NZ's memorandum was that the plaintiffs' application for interim injunctions against Air NZ were wholly misconceived from the outset for the following reasons:

a) the employee plaintiffs each provided affidavit evidence that they were employed under employment agreements with Zeal;

b) none of the plaintiffs' affidavits suggested that they had any employment relationship with Air NZ or that Air NZ had in any way aided and abetted Zeal in its allegedly unlawful industrial action;

c) there was no cause of action alleged against Air NZ in the plaintiffs' statement of claim and all the actions which the plaintiffs alleged constituted a lockout were the actions of Zeal;

d) the plaintiffs did not adduce any evidence in support of a claim for relief against Air NZ; and

e) in any case the claim against Air NZ was doomed to fail because no notice of industrial action was required under the relevant provisions of the Employment Relations Act 2000.

[13] Counsel for Air NZ submitted that when the claim against it was wholly unsuccessful at the interim stage, there was then an opportunity for the plaintiffs to have discontinued their claims against it and their failure to do so put Air NZ to additional costs and inconvenience that it should not have been required to bear.

[14] Counsel referred to several cases where the Court has awarded increased costs where an unsuccessful party has brought proceedings that could not succeed and had persisted in those proceedings after that fact has been brought to their attention, citing: *Hardie v Round*[5], *Fogelberg v Association of University Staff (No 2)*[6], and *Reid v New Zealand Fire Service Commission*[7].

[15] Air NZ also referred to a second *Calderbank* offer dated 15 July 2009, in which Air NZ offered to allow the plaintiffs to discontinue if they made a contribution of $8,000 towards Air NZ's costs, which at the time were around $15,000. The letter also warned that Air NZ would seek full solicitor client costs from the date that the offer closed. The offer remained open for acceptance until 5pm on 16 July. It was not accepted within that time. Counsel for Air NZ claim that from 16 July until the discontinuance Air NZ incurred legal costs of approximately $13,714.

The plaintiff's position

[16] Mr Little for the plaintiffs submitted that, as a matter of equity and good conscience, no award for costs should be made in this case. He submitted that the

[5] AC 9A/08 5 June 2008
[6] [2003] 2 ERNZ 712
[7] [1995] 2 ERNZ 608

proceedings had an obvious industrial context. He referred to a statement made at the 3 July hearing that if the parties settled the bargaining which underpinned the issue, then the proceedings would come to a natural end because there would be no alleged lockout to restrain.

[17] Following the 3 July hearing he submitted the parties had focussed their attention on the underlying issue of the collective bargaining. He submitted that the first plaintiff union owed statutory and moral duty to its members to act in their best interests in the bargaining. For this reason the union did not obstruct the settlement when the only outstanding issue was the claim for costs by Zeal and Air NZ against it. Mr Little submitted that the defendants' insistence on costs, in full awareness of conflict in which the union was placed, was manipulative and could only be actuated by vindictiveness. He submitted that the fact that several other matters of litigation were settled illustrated the manipulation in which the defendants were indulging. He submitted that to award costs would be to reward untoward conduct on the part of the defendants and would create a disincentive to settle contentious bargaining to avoid litigation. Finally he submitted that, in the interests of allowing bargaining parties to build productive employment relationships, the Court should refrain from making an award for costs in this case.

[18] In direct response to the submissions made on behalf of Zeal and Air NZ, Mr Little submitted that because no meaningful action was taken by Zeal on the disciplinary actions, the plaintiffs effectively obtained the effect of the remedy they were seeking. He submitted that the offer to settle of 30 June 2009 left the plaintiff employees with having to defend allegations of serious misconduct, which were seen as intimidatory and which had an impact on the collective bargaining. He submitted, that the plaintiffs could not have known that the defendants had no intention of making good their threats to investigate the allegations of misconduct. He submitted therefore, the litigation was not conducted inappropriately by the plaintiffs. He claimed that following the interim hearing the employees and employer parties were active in negotiating a settlement of the collective and there was no late notification of the settlement to the Court which caused the defendants any inconvenience. He accepted that the case was a difficult one for the plaintiffs to mount against Zeal, but

they had sought to restrain Zeal's conduct because of the negative effect they considered it could have on the bargaining then on foot.

[19] As to the claim for indemnity costs by Air NZ, Mr Little submitted that the two defendants were inextricably linked, there was no formal application to strike out and the strength of the plaintiffs' claims against Air NZ was not tested because Zeal was willing to settle the underlying industrial action. He submitted that Air NZ was properly cited and would have been required to defend the allegations that it was inextricably linked and intertwined with Zeal and the proceedings had the desired effect of restraining the defendants' conduct. He submitted that leaving the matter of costs in these proceedings as the only matter not settled at bargaining was a manipulation of the union's obligation to act in good faith in the interests of its members and not to put its corporate interests before those of its members.

Discussion

[20] The Court has a wide discretion as to costs conferred by clause 19 of Schedule 3 of the Act. Section 189 provides that, in all matters before it, the Court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such provisions or orders, not inconsistent with a statute or relevant agreement, as in equity and good conscience it thinks fit.

[21] I was not persuaded by Mr Little that the refusal of the defendants to abandon their claims for costs amounted to disentitling conduct.

[22] There was, however, force in the submissions made by Mr Little that costs can be a disincentive to a union seeking relief from the Court in the context of protracted negotiations for a collective agreement. That certainly was the context in which the plaintiffs' claims were brought. The disciplinary actions the plaintiffs sought to restrain and the allegations of an unlawful lockout arose in the course of those negotiations. It was also to the credit of the parties that they were able to settle the underlying collective negotiations before the substantive matter went to trial. I have no doubt that the plaintiffs' proceedings provided some incentive for that

settlement. For these reasons it was tempting, to accept Mr Little's submissions, that costs should lie where they fell.

[23] The difficulty with that proposition, however, was the conduct of the plaintiffs in face of the undertakings that Zeal was prepared to give.

[24] Had Zeal's offer been accepted both it and Air NZ would not have had to incur the substantial costs they did. The Court was told by the Court of Appeal in *Elsmly* that it should take a "*steely*" approach to *Calderbank* offers as being in the broader public interest[8].

[25] But for the *Calderbank* offers I would have accepted Mr Little's submissions and made no order for costs.

[26] In *Elmsly* the Court of Appeal also stated that it would be open to the Employment Court, if it chose, to adopt the High Court approach to costs, but as it has not yet done so, it was perfectly entitled to follow its existing practice of regarding costs actually and reasonably incurred as the relevant starting point[9]. This is a matter which the Court of Appeal may review one day as the decision granting leave to the applicant in *Snowdon v Radio NZ Ltd*[10] indicates.

[27] The High Court Rules, however, provide some helpful guidance as to whether the costs said to have been actually incurred were reasonably so incurred. If the costs incurred by the successful party are not reasonable they may be adjusted for the purpose of carrying out the next step of deciding whether a two-thirds contribution is appropriate[11].

[28] For Zeal, which had a greater exposure because it was the actual employer of the second to nineth plaintiffs, if the High Court Rules applied, the categorisation of the proceeding under Rule 14.2(b) might have been higher than the proceedings as pleaded against Air NZ. If they were category 2 proceedings of average complexity,

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[8] *Elmsly* Para [53]
[9] Para [51]
[10] [2009] NZCA 557
[11] *Binnie*, 439

requiring counsel of skill and experience considered average in the Employment Court, the appropriate daily recovery rate would be $1,600 per day. The daily recovery rates are said to be broadly two thirds of the rates that New Zealand practitioners in the relevant categories currently charge to clients[12]. If they were category 3 proceedings because of their complexity or significance, requiring counsel to have special skill and experience in the Employment Court, then the appropriate daily recovery rate would be $2,370 per day. Allowing some two days for the preparation and opposition to the interim injunction application and supporting affidavits in terms of schedule 3, item 4.13; preparation for hearing of the defended interim injunction of 1 day in terms of Schedule 3, item 4.14 and an appearance at the hearing of 1 day, making a total of 4 days, would give a category 2 total of $6,400 and a category 3 total of $9,480. Two thirds of the $30,761 ignoring cents, actually incurred, if this sum was reasonable, would be $20,507 which is more than twice the category 3 band C under rule 14.5(2). I have carried out a similar exercise for the preparation for trial for Zeal and on the more modest costs incurred by Air NZ.

[29] Based on these calculations I consider the starting point of two thirds of the reasonable costs incurred by Zeal would be $9,000 for the interim injunction and $6,000 for preparation, making a total of $15,000.

[30] For Air NZ, the starting point would be $5,000 for the interim injunction and $4,500 for preparation, making a total of $9,500.

[31] The next step is to consider how much, more or less, of the figures representing the two thirds of what I consider to be the actual and reasonable costs, ought to be awarded in the present circumstances. As I have previously stated, were it not for the *Calderbank* offer, I would have allowed costs to lie where they fell because of the context of the negotiations for the collective agreement.

[32] Turning to the effects of the *Calderbank* offer, I accept that the undertakings from Zeal may have saved both it and Air NZ from the costs of the interim

[12] McGechan on Procedure HR14.4.01

injunction application, had they been accepted, but there still would have been substantive proceedings for which preparation was required. There was also a clear inference to be drawn from Mr Little's submissions that the proceedings did provide a spur to the parties to complete their protracted negotiations.

[33] Although Air NZ was not the legal employer of the 2-9 plaintiff employees, it appears from the affidavit evidence that it was intimately involved in the negotiations and provided the management team who conducted these on behalf of Zeal. Zeal is a wholly owned subsidiary and I observed that the accounts rendered by counsel for Zeal were addressed to Air NZ. The involvement of Air NZ in the proceedings, therefore, may have had a bearing on the negotiations for the collective agreement. In these circumstances I do not consider that full indemnity costs should be payable to Air NZ in any event.

[34] I consider a broad brush approach is appropriate to costs in the present case. The *Calderbank* offers could have saved some of the costs associated with the interim injunction. I have balanced this consideration against the industrial context of the proceedings and the settlement of the protracted collective negotiations, which would have suggested a nil costs award. I conclude that in all the circumstances it would be reasonable for the plaintiffs to pay half of the two-thirds figures I have calculated for both the interim injunction and the preparation for the substantive proceedings. I therefore order the plaintiffs to pay, first as a contribution to Zeal's costs a total of $7,500 and, second, as a contribution to Air NZ's costs a total of $4,750.

B S Travis
Judge

Judgment signed at 3.15pm on 22 December 2009