

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 20/07
AEC 19/01**

IN THE MATTER OF an appeal to a decision of the
 Employment Tribunal

AND IN THE MATTER OF an application for costs

BETWEEN PONIFASIO IOANE
 Plaintiff

AND WAITAKERE CITY COUNCIL
 Defendant

Hearing: Submissions received from the applicant on 30 January 2007,
 13 March 2007 and 27 April 2007 and from the respondent
 on 5 April 2007

Judgment: 2 May 2007

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] Mr Ioane unsuccessfully sued Waitakere City Council in the Employment Tribunal for unjustifiable dismissal from employment. The proceedings were commenced under the now repealed Employment Contracts Act 1991. Mr Ioane was legally aided in the Tribunal proceedings as he has been throughout. Costs were reserved by the Adjudicator Member of the Employment Tribunal.

[2] Mr Ioane appealed the decision and the Employment Court awarded him \$60,166 for reimbursement of lost income and \$7,500 compensation for humiliation, loss of dignity and injury to feelings. Costs were reserved.

[3] On an appeal and cross-appeal the Court of Appeal reduced the awards for lost remuneration and compensation on a global basis to \$17,000. No costs were awarded but the Court of Appeal gave a direction that costs in the Employment Court would have to be fixed by this Court.

[4] I have now received submissions from counsel on the issue of costs in this Court. Chief Judge Goddard, who heard the matter in this Court, has now retired. Hence the matter being dealt with by a different Judge.

[5] Submissions have been made as to this Court also fixing costs in the Tribunal. The Legal Services Agency paid \$9,069.85 in fees for the Tribunal proceedings. It procured a charge over a property owned by Mr Ioane to secure repayment. Mr Pa'u, counsel for Mr Ioane, submits the Court should award costs in that amount. Ms Latimer submitted on behalf of Waitakere City Council that this Court has no jurisdiction to award costs in the Tribunal. Further, she submitted, the matter could not be referred back to the Tribunal as the Tribunal is now functus officio on the grounds that timetabling on costs submissions was set and such time limits have now expired. That submission overlooks the transitional provisions of the Employment Relations Act 2000. The Tribunal can be reconstituted and could consider an application to waive the time limits set. The Tribunal is not functus officio. Nevertheless, I agree with her submission that with the elapse of time it may not be appropriate for an award of costs to now be made in the Tribunal. In any event it is more likely that if the issue of costs were revived there, the Tribunal would be unsympathetic to any award in favour of Mr Ioane in view of its substantive findings and despite his success on appeal. Certainly, this Court has no jurisdiction to award costs for the Tribunal proceedings. If costs had been awarded in favour of the employer in the Tribunal proceedings, those costs could possibly have been set aside by Chief Judge Goddard when he dealt with the appeal. Theoretically, Mr Ioane could now seek costs from the Tribunal under the transitional provisions of the Employment Relations Act. In view of the pessimistic prospects of success the Legal Aid Agency may be unlikely to fund such an application.

[6] Insofar as costs in this Court are concerned, I have considered the submissions of counsel. Ms Latimer's primary submission is that costs should lie where they fall. However, if an award of costs is made she urges that should be on the basis of principles usually applying in this Court. That would involve a starting point of two thirds of reasonable solicitor/client costs. She then submits that these should be further reduced to take account of the fact that Mr Ioane was only partially

successful in his claim: *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA); *Li v Vice Chancellor of Auckland University of Technology* unreported, Colgan CJ, 12 January 2006, AC2/06; *Westpac Banking Corporation v Smythe* unreported, Couch J, 30 June 2006, AC5A/06.

[7] Those submissions that either costs should lie where they fall or be substantially reduced overlook the fact that while Mr Ioane did not succeed in his primary goal of reinstatement, he nevertheless proved his dismissal was unjustifiable and received what could only be regarded as substantial damages in the form of reimbursement of wages and compensation.

[8] I am not prepared to let costs lie where they fall. Costs should follow the event despite reinstatement being rejected. The appeal hearings, I note, consisted of 2 days. Having regard to the preparation necessary for two separate hearings in this Court, I regard the total fees of \$10,283.18 allowed by the Legal Services Agency (see letter attached to Mr Pa'u's memorandum of 13 March 2007) as very modest. However, I agree with Ms Latimer that the usual approach of this Court is two thirds of reasonable fees and I see no reason to depart from that in this case. The matter is of course, always one of the Judge's discretion but some consistency should prevail and only be departed from in limited circumstances. Accordingly, there will be an award of costs in favour of Mr Ioane in the sum of \$6,800.00.

M E Perkins
Judge

Judgment signed at 3.45pm on Wednesday 2 May 2007