IN THE EMPLOYMENT COURT
AUCKLAND

AC 29/09
ARC 30/09

IN THE MATTER OF	an application for leave to file challenge out of time
BETWEEN	OGILVY NEW ZEALAND LIMITED Applicant
AND	MARGARET WHITTEN Respondent

Hearing: By submissions filed on 22 June, 17 and 20 July 2009
(Heard at Auckland)

Appearances: Chris Patterson, counsel for applicant
Susan Hornsby-Geluk, counsel for respondent

Judgment: 14 August 2009

JUDGMENT OF B S TRAVIS

---

[1] The applicant, Ogilvy New Zealand (Ogilvy NZ) has applied for leave to challenge out of time a costs determination of the Employment Relations Authority issued on 31 March 2009. The statement of claim challenging the determination was two days late. The application for leave has been opposed by the respondent.

[2] With the agreement of counsel, it was determined that, in order to avoid further costs, the matter should be determined on the papers and a timetable for filing of written submissions was agreed. It was also agreed that the submissions should deal not only with the application for leave but also the merits of the challenge so that, if leave was granted, the challenge to the costs award could also be disposed of on the same papers.

[3] The application for leave was supported by an affidavit of Stephanie Cooper, the personal assistant of Chris Patterson, counsel for the applicant. It referred to a request on 3 April 2009 by the respondent through her counsel, Ms Hornsby-Geluk, requesting payment of the Authority's award of costs totalling, with GST, $4,934.25. Mr Patterson replied on 6 April 2009 saying Ogilvy NZ regarded the award as being "*manifestly excessive and punitive in nature*" and was intending to challenge the determination and have the manner in which it was made reviewed under s184(1A) of the Employment Relations Act 2000. It also offered to pay $4,386 into Kensington Swan's trust account to be held pending an order of the Court or to apply for a stay. Ms Cooper deposed that the applicant had attempted to file its statement of claim which was rejected correctly by the Registry as being out of time. It annexed a copy of the statement of claim. The affidavit did not set out any reasons for the delay.

[4] The application for leave claimed that the delay in filing the statement of claim has not prejudiced the respondent, that notice of an intention to challenge had been given during the period in which the applicant had the right to challenge, and that it would be just and equitable to grant the application.

[5] In support of the opposition to the application for leave, an affidavit from the respondent was filed which refers to a reply to Mr Patterson's email of 6 April 2009. This reply from Ms Hornsby-Geluk was sent on 15 April 2009 and required urgent advice whether Ogilvy NZ was considering a challenge or an application for review. There was no response from Mr Patterson to that email. The respondent's affidavit also sets out in some detail a letter from Mr Patterson dated 27 January 2009 to Ms Hornsby-Geluk, purportedly on a "without prejudice" basis, which set out certain matters by way of consequence for the respondent if she did not withdraw her personal grievance. Over the objection of Ogilvy NZ, that letter was received by the Authority and taken into account in the Authority's determination on costs.

[6] The Authority's determination related to the application by the respondent for costs in respect of Ogilvy NZ's unsuccessful applications for removal and the referral of a question of law to the Court. The respondent sought indemnity costs of

$8,772 plus GST. Ogilvy NZ in response submitted that an award in the range of $300 to $600 would be appropriate.

[7] The Authority found that the respondent's response to what it described as *"the eleventh hour applications"* made by Ogilvy NZ, were full and comprehensive and showed that considerable effort had been applied at the respondent's cost. The Authority determined that the respondent should have an award of costs but not on an indemnity basis because the Authority did not consider counsel's hourly rate was entirely recoverable in the Authority. The Authority stated this was not a comment on counsel's involvement but the Authority had not permitted recovery of costs at such a level. It stated: "*There has been previous reference to roughly half of counsel's charge out rate as recoverable in this forum as an upper bound*" (para [6]). It found that the plaintiff's applications for removal and referral of a question of law were unmeritorious, made at a very inconvenient time and that it was reasonable to draw an inference that they were designed to delay the Authority's substantive investigation. The Authority concluded that the defendant should not have had to incur the costs that she did and, on the basis of its equity and good conscience jurisdiction, awarded her half of the fee in the sum of $4,386.

[8] Mr Patterson in his written submissions regretted the failure to have filed the statement of claim within time and accepted it was entirely his fault and responsibility and asked for this opportunity to rectify his mistake.

[9] That is a matter which should have been addressed by way of an affidavit in support of the application for leave, not in a memorandum of counsel. I am therefore left in the position, as Ms Hornsby-Geluk has argued for the respondent, of having no explanation for the delay. The reference by Mr Patterson to *Graham v Airways Corporation of New Zealand Ltd* [2004] 1 ERNZ 564 was said to mirror the present case. In *Graham*, however, the delay was explained. There the delay of a day was considered to be minimal and I agree with Mr Patterson that 2 days is not a great deal more extensive.

[10] Ms Hornsby-Geluk submitted that there was prejudice to the respondent in the failure of Ogilvy NZ to respond to her email of 15 April 2009 which left the

respondent in a state of uncertainty. She referred to the respondent's ongoing hardship and prejudice by reason of the protracted nature of the litigation, partly mitigated by the costs awarded in the Authority. She sought to distinguish the *Graham* case because there, the plaintiff had a highly meritorious case which influenced the Court in its decision to grant leave. The issue in *Graham* was the uncertainty as to how costs should be determined in the Authority, a matter she submitted has been put to rest in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. Counsel submitted that unlike *Graham* and in the present case, it is an employee who stands to be prejudiced by the granting of the leave, whereas the corporation employer in the present case will have no difficulty in meeting the amount of costs awarded.

[11] I consider that there is prejudice to the respondent but if the reasons for a relatively short delay had been explained, leave would have been granted if the challenge was meritorious. The parties have addressed detailed submissions on the merits of the challenge.

[12] Mr Patterson has submitted that the quantum of the costs determination was arbitrary, manifestly excessive, and punitive. He referred to the notional daily tariff based approach contained in *Da Cruz*. There the Court referred to the Department of Labour's figures for average costs awards over a 6-month period. Mr Patterson produced a Department of Labour analysis of costs awards in the period 1 January 2008 to 30 June 2008 and submitted that the majority of the costs for less than 1-day investigations was between $1,000 and $1,499. He submitted that in this case there was one telephone conference between the parties and an exchange of memoranda and therefore the award was manifestly excessive and well beyond the daily average or a reasonable sum for such a minimal time commitment. He submitted that the Authority had failed to consider a range of similar cases by analogy and referred to other Authority determinations. He also contended that costs should be predictable and that to allow the costs determination to stand would create a perverse precedent in that parties engaged in minor interlocutory matters, dealt with on the papers, could expect to receive well over double the average costs award for a 1-day substantive investigation meeting.

[13] Ms Hornsby-Geluk in opposition submitted that the Authority had followed the correct approach in that the plaintiff's position was unmeritorious and motivated by improper considerations. She cited *Abdalla v Chief Executive Officer of the Southern Institute of Technology* CC 4/06, 5 May 2006 and *Ho v The Chief of Defence Force* [2005] ERNZ 93 where the Defence Force had sought to prevent its employees from giving evidence on behalf of Ms Ho. The costs there were awarded on a full indemnity basis.

[14] Ms Hornsby-Geluk submitted that the costs award was not made in respect of minor interlocutory matters but that counsel was required to research and provide three lengthy submissions on a number of legal issues including without prejudice communications, applications for removal, breaches of settlement agreements, and claims relating to malicious institution of civil proceedings and malicious process in the High Court. She also submitted it was relevant that Ogilvy NZ had failed to respond to the Authority within the timeframe specified by it and that this had caused the respondent additional costs in making detailed submissions in response.

[15] As to the notional daily tariff approach, Ms Hornsby-Geluk submitted that this was only one way of determining costs and the Authority was not bound to follow it. She accepted that although the case did not require an investigation meeting, the volume of correspondence and submissions, exacerbated by Ogilvy NZ's actions, put the respondent to unnecessary cost and expense. She submitted that to apply the notional daily tariff approach would fail to take into account, and would be inconsistent with, the equity and good conscience jurisdiction of the Authority. She submitted that the award was fair and reasonable and therefore the application for leave to challenge out of time should not be allowed.

Conclusion

[16] As I have stated, the failure to provide the reasons for the delay could in itself be fatal to the application for leave. Further, having considered the merits of the challenge, I accept Ms Hornsby-Geluk's submissions and conclude that the proposed challenge is insufficiently meritorious to warrant the granting of leave to file out of time.

[17] Had this matter been approached by the Authority on a notional daily rate, in view of the amount of material that was before it, and the importance of the matter to the parties, a daily rate closer to $5,000 might have been appropriate.

[18] In substance, the Authority was awarding, on an indemnity basis, half of the legal costs incurred by the defendant. Half was being awarded because the Authority considered counsel's hourly rate was not entirely recoverable because it was at a level that was roughly twice what it considered was an upper rate.

[19] The Authority reached conclusions that Ogilvy NZ's applications were unmeritorious and the matters contained in the letter in question were *"unfortunate"*. Having read the letter, I agree with these views. The letter is, like the *Ho* case, a threat to take steps to prevent the defendant being able to call a material witness. These are matters which would justify indemnity costs, not as a penalty, but to recognise the costs to which the respondent was put unnecessarily in defending her position. For these reasons I accept Ms Hornsby-Geluk's submissions and find the challenge to be without merit. I therefore decline the applicant's application for leave to file its challenge out of time.

[20] Costs are reserved and may be the subject of an exchange of memoranda, the first of which is to be filed and served within 30 days of the date hereof if the parties cannot reach agreement. A response is to follow within 21 days.

BS Travis
Judge

Judgment signed at 12 noon on 14 August 2009