IN THE EMPLOYMENT COURT
AUCKLAND

AC 9/07
ARC 46/06

IN THE MATTER OF	a de novo challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC TRANSPORT EMPLOYEES UNION INCORPORATED First Plaintiff
AND	NATIONAL DISTRIBUTION UNION INCORPORATED Second Plaintiff
AND	TRANSPORTATION AUCKLAND CORPORATION LIMITED AND CITYLINE (NEW ZEALAND) LIMITED Defendants

Hearing:	By memoranda of submissions filed on 22 December 2006 and 9 February 2007
Court:	Judge B S Travis Judge C M Shaw Judge M E Perkins
Judgment:	23 February 2007

COSTS JUDGMENT OF THE FULL COURT

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[1] In a decision of the full Court in these proceedings dated 27 November 2006, the issue of costs was reserved. If the issue of costs was to be pursued leave was granted for the filing of memoranda.

[2] The defendants now seek costs in a memorandum filed by their counsel Mr Caisley. Mr Cleary, counsel on behalf of Business New Zealand Incorporated, a party granted leave to appear and be heard, has indicated that his client does not wish

to participate in the issue as to costs. Mr Cranney, counsel for the plaintiffs and the New Zealand Council of Trade Unions ("NZCTU"), opposes the application for costs and submits costs should lie where they fall. NZCTU was also granted leave to appear and be heard in these proceedings. It chose to be represented by the plaintiffs' counsel.

[3] The Court has jurisdiction to deal with costs pursuant to clause 19 of schedule 3 of the Employment Relations Act 2000. This provides:

> ***19 Power to award costs***
>
> *(1) The Court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the Court thinks reasonable.*
>
> *(2) The court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[4] Mr Caisley referred in his submissions to the well known authorities dealing with costs: *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. The principles which the Court must adopt in exercising its discretion under s19 are well established by those authorities. The position is well encapsulated in the following statement from *Alton-Lee* at paragraph [48]:

> *[48] The primary principle is that costs follow the event. As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred. These principles reflect a balance involving a number of factors. We mention only some of them. Access to justice considerations point away from automatic full recovery of costs for the successful party. On the other hand, a monetary judgment will often be of little practical moment to a successful party unless the losing party is required to make a substantial contribution to the costs of obtaining it. Further, litigation is expensive, time-consuming and distracting and the requirement that a losing party not only pays his or her own costs but also makes a subsequent contribution to those of the successful party undoubtedly acts as a disincentive to unmeritorious claims or defences. Special rules as to costs which apply where there have been payments into Court or Calderbank letters encourage settlement.*

[5] In this case the defendants have been successful in resisting the challenge by the plaintiffs against the determination of the Employment Relations Authority. The defendants, we are informed, incurred actual costs of $18,306.56 including GST in the proceedings before this Court. In addition, disbursements have been incurred

amounting to $148.56. The defendants seek a contribution of $15,000 plus the disbursements.

[6] The defendants deny this was a test case and say it was merely a case concerning construction of a particular clause in the collective agreement. It was submitted that the decision has no broader application to employer or employee groups.

[7] Mr Cranney did not elaborate on that aspect of the defendants' submissions in his own memorandum. He submitted that the costs claimed by the defendants are inflated in view of repetition of attendances incurred in the proceedings before the Authority.

[8] In deciding whether the defendants are entitled to costs and if so what the amount of such costs should be, we have had regard to principles established in the authorities previously referred to. However, we are of the view that costs in this matter should lie where they fall. The employer (defendant in these proceedings) initiated the proceedings before the Authority. The Union challenged the determination to this Court. The defendants appear to be have been content not to pursue costs in the Authority – we are not aware of any application having been made there even though costs were reserved by the Member of the Authority.

[9] Even though this case consisted primarily of an issue of construction of a collective agreement the arguments depended upon the effect of a statutory overlay and its interpretation. In respect of our interpretation of the statute the matter is of general importance. While this is not decisive it is a material consideration in the exercise of our discretion in respect of costs.

[10] This case involved the effect of the amendments to the Holidays Act 2003, which is to come into force on 1 April 2007. From that date all employees are entitled to an increase in annual holidays to 4 weeks per annum. This was the first case to come before the Court involving a consideration of this amendment. We consider our interpretation will be of assistance in the drafting and construction of employment contracts generally.

[11] Accordingly we decline the defendants' application for costs and order that costs lie where they fall.

M E Perkins
Judge
for the full Court

Judgment signed at 12.15pm on Friday 23 February 2007