IN THE EMPLOYMENT COURT
AUCKLAND

AC 26/09
ARC 54/05

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND	
IN THE MATTER OF	an application for costs
BETWEEN	KEN MERCHANT Plaintiff
AND	CHIEF EXCEUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: Submissions received 30 January & 3 April 2009

Judgment: 25 June 2009

COSTS JUDGMENT OF JUDGE A A COUCH

---

[1] I gave my substantive judgment in this matter on 17 December 2008. I concluded by encouraging the parties to agree costs if possible or, if they were unable to do so, directed that they file memoranda. They have now filed memoranda.

[2] Clause 19(1) of Schedule 3 to the Employment Relations Act 2000 confers on the Court a broad discretion to make orders as to costs but, as with all such discretions, it must be exercised judicially and in accordance with principle. The key principles applicable to the Court's discretion to award costs have been set out by the Court of Appeal in three very well known decisions: *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.

[3] The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel or an advocate. A useful starting point is two-thirds of the costs actually and reasonably incurred by that party but that proportion may be adjusted up or down according to the circumstances of the case and the manner in which it was conducted. Ability to pay is also a factor to be taken into account.

[4] In this case, it is said that the defendant's cost of representation in the Court was $262,046.81 and that disbursements of $8,093.39 were incurred. Both of these figures are inclusive of GST.

[5] In support of these figures, copies of 30 invoices from the defendant's solicitors have been provided. These relate to attendances between 27 September 2005 and 23 May 2008 and record the sums claimed by way of disbursements. I accept that these invoices verify that the costs claimed by the defendant were actually incurred.

[6] In relation to costs, the next issue is the extent to which they were reasonably incurred. On the face of it, a figure of more than $260,000 for costs in relation to a case which took less than five days to hear is very high indeed. This must particularly be so in light of the fact that much of the evidence and the essential aspects of the submissions on behalf of the defendant had been prepared in the course of the Authority's investigation. This figure requires full and detailed explanation.

[7] In the memorandum filed on behalf of the defendant, it is submitted that the costs incurred were reasonable in their entirety but I have been provided with no information which would enable me to assess whether this is so. The invoices do not include any description of the work to which they relate. In every case, those invoices are simply for "*professional services*". Counsel's memorandum contains no quantitative information at all other than the total sums of money involved. For example, there is no indication of how much time or effort was devoted to particular aspects of the matter or how the fees charged were formulated.

[8] Rather then provide such information, counsel for the defendant invites me to determine the extent to which the costs incurred were reasonable by reference to the

"multiplier" approach taken in *Okeby v Computer Associates (NZ) Limited* [1994] 1 ERNZ 613. That approach involves taking the length of hearing and multiplying it by a factor to take account of the time and effort involved in preparation. In this case, counsel submits that a multiplier of 3 is appropriate. Based on a five day hearing and adopting hourly rates of $550 plus GST per hour for lead counsel and $320 plus GST for second counsel, it is submitted that costs should be fixed at 66% of $102,768.75 or $67,827.38. Full reimbursement of disbursements totalling $8,039.39 is also sought, making a total of $75,920.00.

[9] This approach is unsatisfactory. The obvious and most fundamental difficulty is that taking a "multiplier" approach is inconsistent with the clear guidelines provided by the Court of Appeal in the cases I have referred to earlier. Those guidelines require the Court to assess the reasonableness of costs incurred on the basis of what was actually done. Using the multiplier approach involves a purely notional assessment.

[10] The multiplier approach is also unsatisfactory for other reasons. The cases in which it was used were almost exclusively decided under the Employment Contracts Act 1991. The dynamics of such cases were distinctly different to a de novo challenge under the Employment Relations Act. Appeals to the Court from decisions of the Employment Tribunal tended to have relatively short hearing times but usually required extensive consideration of a transcript of evidence and detailed submissions. In contrast, de novo challenges under s179 of the current legislation tend to have relatively longer hearing times and require much less preparation. That is because the evidence has already been prepared, either largely or entirely, for the purposes of the Authority's investigation. Similarly, by the time the matter gets to the Court, the issues are usually clear and any submissions of law are likely to have been rehearsed and refined before the Authority. Given these differences, the multiplier ratios suggested or used in decided cases provide little assistance in the present case.

[11] Counsel offers no explanation for the failure to provide information about how and why the defendant's actual costs were incurred. This is surprising. The principles applicable to the award of costs in this Court are so well known and defined that parties represented by competent counsel, as the defendant in this case undoubtedly is, can properly be expected to provide the information necessary to support a claim for

costs or, at the very least, explain why they have not done so. They fail to do so at their client's peril. In such cases, it is open to the Court to simply make no order for costs as the Chief Judge recently did in *Eastern Bay Independent Industrial Workers Union Inc v Pedersen Industries Limited*, unreported, 27 April 2009, AC 11A/09. While I have seriously considered that option in this case, I have come to the view that it would not be a proper exercise of my discretion. Although the material provided by counsel falls well short of what ought to have been provided, a combination of what has been provided and my knowledge of the case provides me with sufficient information to make a just decision. In doing so, however, I must necessarily take a conservative approach to avoid the possibility of injustice to the plaintiff.

[12] As noted earlier, the defendant suggests that it was reasonable to engage two counsel throughout the hearing at a combined rate of $870 per hour plus GST. I do not accept that proposition. Parties to litigation are entitled to engage competent counsel of their choice and it is appropriate that a successful party be recompensed for the reasonable cost of such representation. Equally, it is open to a party to engage more experienced or skilful counsel than the case might warrant or to devote additional resources to the matter over and above that reasonably required. Where a party chooses to do that, however, it cannot expect to recover from an unsuccessful opponent the additional cost incurred. Having heard this case and thereby having a thorough understanding of what it involved, it seems to me that it could readily have been conducted for the defendant by a single experienced and capable representative. Thus, while it was undoubtedly convenient and helpful to Mr Taylor to have the assistance of Ms Elkin as second counsel, I do not find that it was necessary in the sense that the plaintiff ought to contribute to the cost of her appearance.

[13] I have difficulty also with the rate of $550 plus GST per hour apparently charged for Mr Taylor's attendances. While that figure may properly reflect a market assessment of Mr Taylor's undoubted skill and experience as counsel, this case did not require representation at that level. The issues were mainly factual. There were no novel or particularly contentious questions of law involved.

[14] In fixing a reasonable rate, I have regard to the appropriate daily recovery rates provided for in the High Court Rules. These are defined as being two thirds of the

daily rate considered reasonable in relation to the proceeding – see Rule 14.2(d). Rule 14.3 defines three categories of proceedings according to the skill and experience required:

Category 1 proceedings	Proceedings of a straightforward nature able to be conducted by counsel considered junior in the High Court
Category 2 proceedings	Proceedings of average complexity requiring counsel of skill and experience considered average in the High Court
Category 3 proceedings	Proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court

[15] In respect of each of those categories, appropriate daily recovery rates are specified in the second schedule as follows:

Category 1 proceedings	$1,070 per day
Category 2 proceedings	$1,600 per day
Category 3 proceedings	$2,370 per day

[16] The appropriate daily recovery rates are subject to annual review by the Rules Committee in consultation with the New Zealand Law Society, the New Zealand Bar Association and the Legal Services Agency. The rates set out above are those fixed on the coming into effect of the current High Court Rules on 1 February 2009.

[17] When applied in the High Court, it seems to be implicit in the Rules that a proceeding must be regarded as being in one of the three categories for all purposes. Having regard to the definitions of those categories and the associated rates by way of analogy to proceedings in the Employment Court, however, it is open to me to regard particular proceedings as falling one side or the other of any one of those categories. I regard this proceeding as between category 2 and category 3. For the most part, it required the skill and experience of an average practitioner in the Employment Court but, in a few respects, warranted somewhat more experienced counsel. By this means, I find that an appropriate daily recovery rate is $1,800 per day which equates to a reasonable daily rate of $2,700 for the hearing. These rates are inclusive of any GST.

[18] No indication is given in the Rules of the number of hours per day of hearing the appropriate daily recovery rate is intended to reflect but, for the purposes of this

case, I regard it as being 8 hours. A reasonable daily rate of $2,700 therefore equates to a reasonable hourly rate of $337.50, which is $300 plus GST.

[19] The defendant suggests that 10 days preparation time at 7 hours per day ought to be allowed for two counsel, making a total of 140 hours of professional time. This appears to be inclusive of attendances in relation to opposed interlocutory matters, of which there were several. Counsel for the defendant submits that this was justified by the manner in which the plaintiff's case was conducted, including:

a) Changes to the legal basis of the plaintiff's claim between the Authority's investigation and the Court hearing.

b) Three amendments to the statement of claim requiring amendments to the statement of defence.

c) A need to seek further particulars of aspects of the plaintiff's claim and what is described as the *"vague and evasive"* nature of the particulars which were provided.

d) The plaintiff being slow to comply with directions to the point where "unless" orders were made.

e) A dispute about whether certain evidence the plaintiff wished to lead was privileged.

f) Difficulties in obtaining full disclosure of documents by the plaintiff.

[20] There is a good deal of substance in these complaints about the manner in which the plaintiff's case was conducted and I accept that they added significantly to the time and effort required by counsel for the defendant to respond effectively. I also accept that changes to the essential causes of action relied by the plaintiff required additional evidence to be briefed and submissions to be significantly revised for the Court hearing. The defendant is entitled to be properly recompensed for the costs associated with that work.

[21] At the same time, it is clear that a large part of the work required to be done to prepare the case eventually presented to the Court by the defendant was done prior to and in preparation for the Authority's investigation. Costs in relation to that work are a matter for the Authority. I note also that, in respect of the plaintiff's application for an extension of time within which to commence the current proceedings in the Court, counsel for the defendant expressly waived any claim for costs. That application was the subject of a defended hearing before Judge Shaw in which the nature and merits of the revised case the plaintiff proposed adopting was traversed in detail. The work required to prepare for that hearing must have significantly advanced preparation for the case the defendant ultimately had to meet.

[22] In the absence of detailed information about the time actually devoted to the various interlocutory issues and to general preparation for hearing, I can only make a broad estimate of the time and expertise reasonably required. Overall, I find that 100 hours of pre-hearing work was reasonably required.

[23] Applying these conclusions to the parameters of the case, I find that a conservative estimate of costs reasonably incurred by the defendant is $47,250. Two thirds of that amount is $31,500.

[24] I must now consider whether the manner in which the case was conducted warrants a departure from that two thirds starting point. I find that it does. Most of the interlocutory issues which arose in this case were the result of changes to the plaintiff's claims or failure by the plaintiff to comply with directions of the Court. With respect to these issues, the defendant was put to substantial expense which ought not to have been necessary. The plaintiff may also be criticised for the manner in which aspects of the hearing itself were conducted and I find that this prolonged the hearing to a small extent. Taking all aspects of the case into account, I increase the proportion of costs which ought to be reimbursed from two thirds to four fifths. This equates to $37,800.

[25] Turning to the disbursements claimed, these are in two categories. The first is described as *"telephone calls, photocopying, facsimile, printing and other office services"*. The second category is *"travel and accommodation expenses"* for two

witnesses and for both Mr Taylor and Ms Elkin as counsel. No particulars were provided of either of these categories.

[26] The description of the first category as *"office services"* and the nature of those specifically referred to suggests that they are charges made for services provided by the defendant's solicitors using their own resources or paid for as part of the normal overheads of their practice. Such charges are not disbursements in the true sense of the term because they did not involve the payment of sums of money to third parties for the provision of specific goods or services. In the absence of particulars, it is impossible to conclude that any part of the sum claimed comprised disbursements in this sense. I therefore decline to order reimbursement of any part of that sum.

[27] As to the second category, the travel and accommodation costs of Mr Taylor and Ms Elkin are not allowed. There are many counsel in Auckland who could have effectively represented the defendant in this matter. Thus, while it was open to the defendant to engage counsel from Wellington in preference to local counsel, the additional cost involved cannot be regarded as a necessary expense recoverable from the plaintiff without convincing explanation. None was offered.

[28] The travel and accommodation expenses of Mr Whewell and Ms Duncan would normally be a different matter. They were witnesses whose evidence was relevant and necessary to the defendant's case. In the normal course, the defendant ought to be reimbursed for the cost of securing their presence in Auckland. In this case, however, that cost is impossible to assess. Neither counsel's memorandum nor the invoices to the defendant from its solicitors contain any reference to these particular costs. All that has been provided is a global sum claimed for both counsel and witnesses. Thus, while it is very likely that the defendant had to pay a significant sum for the travel and accommodation of the two witnesses concerned, I cannot be sure of that and I have no idea of the amount involved. In such circumstances, it would be unfair to the plaintiff to guess or even estimate the sums involved. I therefore decline to order reimbursement of any part of the second category also.

[29] The final issue is the plaintiff's ability to pay. The established principle is that ability to pay should be taken into account if payment of the sum which is otherwise

appropriate would cause undue hardship to the plaintiff. Assessment requires consideration of the total financial position of the plaintiff including both assets and liabilities and income and necessary expenditure.

[30] In his affidavit, the plaintiff says that he has assets of approximately $500,000 and liabilities of $130,000; a net capital position of $370,000. I regard this as a conservative estimate as the plaintiff has omitted all chattels from his list of assets. In particular, I note that the assets do not include a car yet running expenses for a car are included in outgoings.

[31] The plaintiff's income after tax is $3,049 per fortnight. He claims to have expenses of $3,209 per fortnight but that figure is plainly not limited to essential living expenses. It includes, for example, savings of $320 per fortnight and a range of expenses which are optional and related more to the maintenance of a comfortable lifestyle. It may be noted also that the plaintiff makes a net loss of $160 per fortnight on a rental apartment he owns.

[32] While I accept that payment of $37,800 would cause a measure of hardship to the plaintiff, it would not cause hum undue hardship. It follows that ability to pay is not a factor which ought to affect the exercise of my discretion to award costs.

[33] In conclusion, I order that the plaintiff pay the defendant the sum of $37,800.00 by way of costs.

A A Couch
Judge

Signed at 12.30pm on 25 June 2009