IN THE EMPLOYMENT COURT
AUCKLAND

AC 13/09
ARC 65/08

IN THE MATTER OF	de novo challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	costs
BETWEEN	PETER ANTHONY TAYLOR Plaintiff
AND	NEW ZEALAND TRANSPORT AGENCY Defendant

Hearing: By memoranda received on 16 January and 12 March 2009
(Heard at Auckland)

Judgment: 1 April 2009

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] In an oral interlocutory judgment (AC 46/08) on 1 December 2008, I held it would have been appropriate to have struck out the plaintiff's amended statement of claim because it failed to comply with the Employment Court Regulations 2000. To avoid prejudice to the plaintiff because of the inadequate pleadings, I gave him 14 days to file a statement of claim that complied with the Regulations. Instead the plaintiff filed a notice discontinuing his challenge to the determination of the Employment Relations Authority. In my interlocutory judgment, I found that the defendant was entitled to the costs to date and reserved them to be addressed by way of memoranda.

[2] The defendant has now applied to the Court for an order that the plaintiff pay its legal costs. Ms Sullivan, counsel for the plaintiff, has advised the Court that she did not have instructions to make costs submissions.

[3] Ms Turner, counsel for the defendant observed that the plaintiff had filed a statement of problem with the Employment Relations Authority on 25 October 2007. On 17 July 2008 the Authority issued a determination that the plaintiff's grievance had not been filed within the 90-days statutory timeframe and that there were no exceptional circumstances for raising a grievance out of time (*Taylor v Land Transport NZ*, AA 257/08, D King).

[4] Ms Turner observed that the 28-day period to challenge the Authority's determination expired on 14 August 2008. The statement of claim was filed on that day by facsimile, although the hardcopy was not filed until 15 August. It was not served on the defendant.

[5] The original statement of claim did not comply with the Regulations, and Chief Judge Colgan, in a minute dated 18 August 2008, directed the plaintiff to file and serve an amended statement of claim.

[6] The amended statement of claim was filed initially by facsimile on 27 August 2008, with the hardcopy being filed on 29 August 2008. Counsel for the defendant did not receive a copy of the plaintiff's amended statement of claim until 23 September 2008.

[7] The defendant opposed the filing of the amended statement of claim by way of a memorandum dated 15 October 2008. This application was heard on 1 December 2008 and led to the issuing of the interlocutory judgment to which I have referred.

[8] Ms Turner referred to the principles to be applied by the Court in assessing costs citing *Okeby v Computer Associates (NZ) Ltd* [1994] 1 ERNZ 613. Ms Turner also referred to the Court's adoption of the practice of awarding a percentage of the reasonably incurred costs, citing *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438, confirmed in *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.

[9] The defendant advised that it had incurred total costs of $23,395 (excluding GST and disbursements) in defending the matter in the Authority due to extensive

discovery issues and the number and historical nature of the plaintiff's claims. It sought a contribution towards those costs.

[10] In the Authority's determination at paragraph [50] of 17 July 2008 it made the following order as to costs:

> *If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days from the date of this determination. The applicant should file a memorandum in reply within 14 days of the receipt of the respondent's memorandum.*

[11] By minute dated 19 February 2009 I invited counsel to advise me what steps were taken in the Authority to follow up this direction, and, if no steps were taken, the basis for the Court's jurisdiction to award costs when they had not been sought in the Authority.

[12] Counsel for the defendant responded on 12 March 2009 referring to correspondence from the defendant to the plaintiff concerning costs. No reply was received from the plaintiff. The plaintiff then filed his challenge in the Court on 15 August 2008.

[13] Ms Turner submitted that under clause 19(1) of Schedule 3 of the Employment Relations Act 2000 the Court in any proceedings may order any party to pay any other party such costs and expenses including expenses of witnesses as the Court seeks reasonable. She cited, *New Zealand Public Service Association v Southland Regional Council*, CC 15A/05, 22 December 2005 which stated at paragraph [5]:

> *I do not accept the plaintiff's contention that it is not open to the Court, on a challenge such as this in which the challenger was unsuccessful, to deal with costs in the Authority. Although, as the plaintiff says, it was suggested in Eniata v Amcor Packaging (New Zealand) Limited unreported, 24 May 2002, AC 19A/02, that costs in Authority investigations should be for that body to determine, subsequent cases have confirmed the common sense and justice of these being open to determination by the Court on a challenge.*

[14] Ms Turner submitted that the Court had the discretion to award costs for any proceedings, including those in the Authority. She referred to the defendant's correspondence which, she said, amounted to actions on behalf of the defendant to resolve the issue of costs. In the interim the plaintiff had filed his challenge. She submitted the Court now had jurisdiction to determine the costs incurred in the Authority, based on the principles outlined in *PBO Ltd (formerly Rush Security) v Da Cruz* [2005] ERNZ 808.

[15] I accept entirely that the Court has the jurisdiction to make an order in relation to costs in the Authority, where for example, the parties have made submissions to the Authority, but it has not determined the issue of costs before the challenge was filed. Here, however, the defendant has not complied with the Authority's direction that, if it was unable to resolve the issue of costs, it ought to have filed its memorandum within 28 days from the date of the Authority's determination. The defendant apparently did not do so.

[16] In these circumstances it is for the defendant to apply to the Authority for any relief against its failure to file its costs memorandum. It cannot circumvent this process by applying to the Court in the first instance. I will therefore make no order for costs in the Authority.

[17] The defendant has advised that it incurred costs of $8,085, excluding GST and disbursements. No details were provided as to how those costs were made up. I note that the defendant filed written submissions in support of its strike out application and was required to attend a hearing on 1 December 2008. I consider that a reasonable contribution to the costs that the defendant has incurred in relation to the Court proceedings to date would be $3,000 and award that amount.

B S Travis
Judge

Costs Judgment signed at 4pm on 1 April 2009