IN THE EMPLOYMENT COURT
AUCKLAND

AC 1/09
ARC 83/08

IN THE MATTER OF	a de novo challenge to a determination of the Employment Relations Authority
BETWEEN	MARK ALLRIGHT Plaintiff
AND	CANON NEW ZEALAND LIMITED Defendant

Hearing: By submissoins filed on 19 December 2008 and 27 January 2009

Judgment: 5 February 2009

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] This proceeding comprised a challenge by the plaintiff to a *"preliminary injunction"* issued by the Authority. In my substantive decision, I dismissed the challenge and reserved costs. I encouraged the parties to agree on costs but they were apparently unable to do so. I have now received memoranda from both counsel.

[2] The substantive case was unremarkable. The employment agreement between the parties contained a covenant in restraint of trade. Mr Allright breached that covenant and argued that it was not enforceable. Canon sought an injunction requiring him to comply with it. When the Authority granted Canon's application for an interim injunction, Mr Allright challenged that determination. The hearing took half a day and was conducted on the usual basis for interlocutory matters. Evidence was by affidavit with submissions heard in Court. The case for both parties was presented economically.

[3] It is common ground that the defendant is entitled to an award of costs. It is only the amount which is in issue

[4] For the defendant, Mr Rooney advises me that the defendant incurred costs in defending the challenge which were in excess of $20,000, excluding GST, together with disbursements totalling $890. He seeks an award of costs of $6,480.

[5] For the plaintiff, Mr Bevan submits that an appropriate award of costs would be $2,500 and that, in absence of particulars of the disbursements incurred, they ought not to be allowed.

[6] 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.

[7] 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.

[8] Both counsel refer to these key principles in their memoranda but both urge me not to apply them in this case. Relying on the dicta of Shaw J in *Chief Executive of the Department of Corrections v Taiwhiwhirangi (No 2)* [2008] ERNZ 73 and on the approach taken by the Chief Judge in *Maritime Union of New Zealand v TLNZ Limited* [2008] ERNZ 91, Mr Rooney submits that the High Court Rules should be applied. Mr Bevan relies on the decision in *Okeby v Computer Associates (NZ) Limited* [1994] 1 ERNZ 613 to submit that an award should be based on a reasonable hourly rate for time estimated by using a multiplier of the hearing time.

[9] The obvious difficulty with both of these approaches is that they are inconsistent with the clear guidelines provided by the Court of Appeal in the cases I have referred to earlier. Those decisions are binding on this Court and must be regarded as having overtaken the decision in *Okeby*. While the Chief Judge did distinguish those decisions in the *Maritime Union* case, he did so on the basis that a different approach may be required in test cases or where the case decided a point of general application. This is not such a case. It involved the application of established principles to the particular facts of an individual person.

[10] In *Taiwhiwhirangi*, Shaw J did not have resort to the High Court Rules in substitution for the principles enunciated by the Court of Appeal but rather in order to apply them. In that case, counsel had failed to provide the information necessary to decide the extent to which the costs actually incurred were reasonable. In those circumstances, Shaw J found that the only objective means of assessing their reasonableness was to compare them with the High Court scale of costs.

[11] To that extent, there is a parallel in this case. On the face of it, the amount of costs actually incurred is very high for a matter in which most of the preparatory work had already been done in the course of the proceedings before the Authority. It requires explanation of how costs were calculated but none has been provided. Equally, no other information has been provided which would enable me to assess the extent to which they are reasonable. In these circumstances, I must make an assessment based on my knowledge of the proceeding of what is reasonable but I also have regard to the High Court Rules as an objective guide.

[12] In his submissions on the High Court Rules, Mr Rooney has treated these proceedings as if they were general civil proceedings commenced in the first instance in this Court. That is inappropriate. The challenge was limited to the interim relief granted by the Authority. A better analogy is with an appeal against a decision of an Associate Judge with some allowance for the need to address evidential issues. While the Schedule to the High Court Rules does not specifically allocate time for defending such proceedings, it is appropriate to allow equal time to that allocated for commencing them. I accept Mr Rooney's suggestion that the matter be assessed on a 2B basis.

[13] In accordance with band B, the times allowed for the relevant events would be:

Preparing and filing statement of defence	0.5
Appearance at telephone conference	0.2
Preparation for hearing	0.5
Appearance	0.5
Total	1.7 days

[14] In addition, I would allow an additional half day for dealing with evidential issues. Mr Rooney sought an allowance for second counsel. In my view, this case was not so large or complex that second counsel was reasonably necessary and I make no allowance in that regard. This results in a total of 2.2 days and, at the daily rate applicable to a category 2 proceeding of $1,600 per day, suggests an award of costs of $3,520 would be reasonable. As the amounts allowed under the High Court Rules are intended to reflect two thirds of the costs which might reasonably be incurred, this suggests reasonable costs of $5,280. This is consistent with my broad assessment of what would be appropriate, based on my knowledge of the case as a whole.

[15] Mr Rooney submitted that any award of costs ought to be increased to reflect specific aspects of the manner in which the plaintiff's case was formulated and pursued. I do not accept that there is sufficient substance in any of those submissions to justify such an increase. In addressing such considerations, the question must be whether the conduct complained of increased the costs incurred by the other party. I am not satisfied there was any such effect in this case.

[16] As noted earlier, no particulars were provided of the disbursements of $890 claimed by the defendant. This is a fundamental omission. Without knowing what the disbursements were, I cannot properly make any order for their reimbursement.

[17] There is no issue in this case of Mr Allright's ability to pay any award of costs made against him.

[18] In summary, the plaintiff is ordered to pay the defendant $3,520 for costs and the claim for disbursements is disallowed.

A A Couch
Judge

Judgment signed at 4.00pm on 5 February 2009