IN THE EMPLOYMENT COURT
AUCKLAND

AC 11B/09
ARC 20/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for recall of costs judgment
BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION INC Plaintiff
AND	PEDERSEN INDUSTRIES LIMITED Defendant

Hearing: by submissions filed on 4 and 9 June 2009

Judgment: 10 June 2009

SUPPLEMENTARY JUDGMENT #2 OF CHIEF JUDGE GL COLGAN

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[1] The defendant has applied to the Court to recall its first supplementary judgment of 27 April 2009 declining to award costs to it.

[2] This is not an application that is appropriate to the very limited recall of judgment procedure. An application to recall and reissue a judgment is appropriate if it contains a slip or omission or other similar error or omission so that it can be said that the judgment does not reflect the Court's intention for the result.

[3] The defendant's real complaint is that the Court did not make either the award of indemnity costs that it sought or indeed any award at all. The defendant says that the Court erred by interpreting improperly the submissions made to it in support of the application for costs, and that the Court ought to have asked it to

provide further information in support of its application instead of dismissing the claim to costs because of a failure to provide that information.

[4] These are not grounds that would support a recall of the judgment and, as the defendant wishes, an order for what are effectively indemnity costs which were refused earlier. The application for recall is dismissed.

[5] Although not part of my judgment, it may assist the defendant to understand the costs judgment if I add the following explanation.

[6] Although it is correct that I determined that it would be appropriate for the Employment Relations Authority to determine costs in that venue, the defendant's claim for an award of $13,800 for a 1-day hearing conducted locally, raised in my mind the very real possibility that such amount may have included a claim for Authority costs. As with all challenges by hearing de novo (as this was), it is almost inevitable that there will be a considerable amount of preparatory work put in for the Authority investigation that will not need to be repeated for the challenge.

[7] The authorities, including judgments of the Court of Appeal, make it very clear that the basis for awarding costs in the Employment Court is a reasonable contribution to costs reasonably incurred. The Court must always make assessments, first, of what costs were actually incurred, second, the reasonableness of them in all the circumstances, and finally what should be a reasonable contribution to those costs reasonably incurred, again in all the circumstances of the parties and the case. A claim to $13,800 for a 1-day hearing conducted by a lay advocate, but otherwise unsupported by any information, did not enable the Court to make an award for costs.

[8] It is not incumbent on the Court to rectify parties' deficiencies in the conduct of their cases by identifying those omissions and providing spontaneously opportunities for their rectification.

[9] The defendant now identifies the makeup of its costs of representation for which an indemnity is sought. This indicates that almost 60 hours of its advocate's

time was expended in preparation for, and at the hearing of, the challenge at an hourly rate of $220. It must be very doubtful whether, deducting say 8 hours for time spent in Court on the day of the hearing, more than 50 hours of preparation was justifiable. Taking, for example, and as a crude multiplier for preparation, between 2 and 3 times the actual hearing time, no more than, say, 30 hours would have constituted a fair basis for calculating a reasonable fee. I would also note that an hourly rate of $220 for all time expended may well not have survived scrutiny. Even if, however, a reasonable fee of, say, $6,000 had been incurred, a two-thirds contribution towards this, as the Court of Appeal has set as the usual starting point, would probably have yielded a justifiable figure of no more than about $4,000. This would not have been the case for an award of indemnity costs and certainly for 60 hours of work.

[10] In any event, and as I have concluded, the grounds for a recall and reissue of the Court's judgment are not made out and that application is dismissed.

GL Colgan
Chief Judge

Judgment signed at 11.30 am on Wednesday 10 June 2009