IN THE EMPLOYMENT COURT
AUCKLAND

AC 5A/06
ARC 8/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WESTPAC BANKING CORPORATION Plaintiff
AND	RAEWYN SMYTHE Defendant

Hearing: By memoranda filed on 23 February and 9 March 2006

Judgment: 30 June 2006 at Noon

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] On 10 February 2006 I gave my substantive judgment in this matter (number AC 5/06). I concluded by observing that each party had been partially successful and partially unsuccessful and expressed the preliminary view that costs and disbursements should lie where they fell. However, I reserved the right to either party to make submissions in an effort to persuade me to a different conclusion.

[2] Mr Sharp took advantage of that opportunity by filing a memorandum in which he submitted that an award of costs and disbursements should be made in favour of the defendant. For the plaintiff, Mr Rooney filed a memorandum in response, supporting my preliminary view that no award of costs or disbursements should be made.

[3] The memoranda of both counsel were detailed and contained references to relevant authorities. I have considered them in full and derived considerable assistance from them in considering the issue more fully.

[4] In addition to referring me to the key principles applicable to the fixing of costs generally, Mr Sharp made four specific submissions:

a) That the usual practice in this country is that, even where a party has been unsuccessful in most issues, an award of some remedies will be followed by an award of costs.

b) That the remedies awarded to the defendant will be of *"no practical moment"* unless she also receives a substantial contribution to her costs.

c) That the interests of the parties were not limited to monetary considerations and that the defendant had a legitimate interest in establishing that she had been treated unfairly.

d) That the proceedings were initiated by the plaintiff in order to challenge the Authority's determination that the positions in question were substantially similar. Both parties devoted the large majority of their resources to this issue on which the plaintiff was unsuccessful.

[5] Mr Sharp informed me that the defendant's actual costs of representation were $33,690 plus GST, being his fees for 112.3 hours of work at $300 plus GST per hour. In addition, Mr Sharp said that the defendant incurred disbursements of $6,500.00 plus GST for Ms Wood's fees and further unidentified disbursements of $276.50 plus GST. The awards sought by the defendant were $20,000.00 together with full reimbursement of all of the disbursements.

[6] I accept the first of Mr Sharp's particular submissions that a claimant who is successful to some extent is frequently awarded costs despite failing on other issues. At the same time, I must bear in mind that the Employment Court is directed by s189(1) of the Employment Relations Act 2000 to exercise its jurisdiction in equity and good conscience. This includes the exercise of its discretion to award costs. In appropriate cases, this may require an issue by issue approach.

[7] Mr Sharp's second submission was based on the judgment of the Court of Appeal in *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 and, presumably, paragraph [48] of that judgment in particular. It seems to me that Mr Sharp's submission takes what the Court of Appeal said there somewhat out of context. What was said was *"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.* I note also that this was but one of several principles or factors referred to in that paragraph which the Court of Appeal said should be taken into account.

[8] Applying this dictum, the only aspect of her claim in which the defendant was successful was her disadvantage personal grievance for which she was awarded $6,000.00 compensation. Very little of the lengthy hearing in the Court was devoted to that issue so that, to use the words of the Court of Appeal, the *"costs of obtaining"* that remedy were only a small part of the overall costs incurred by the defendant.

[9] I accept Mr Sharp's third submission that the defendant had a legitimate, non-monetary interest in establishing that she had been treated unfairly but that can only apply to the aspect of her claims in which she was successful, that is the disadvantage personal grievance.

[10] Mr Sharp is undoubtedly correct in his fourth submission that both parties devoted the large majority of their time and effort to the issue of whether the two positions in question were substantially similar and that the plaintiff was unsuccessful on this issue. More particularly, the issue to which the parties devoted so much of their resources was whether the two positions in question involved broadly comparable responsibilities, skills and competencies. But that issue was not decisive of the claim. Indeed, the issue of substantial similarity was so clearly decided on the requirement for comparable remuneration that it was unnecessary to decide the issue relating to the attributes required for the positions at all.

[11] The questionable utility of the work done to address that particular issue is underlined further by the fact that the claim for redundancy could have been decided without reference to the broader issue of substantial similarity. The decisive issue was whether or not the defendant was dismissed. This was, of course, an issue not raised by either party even though it was an essential element of the claim.

[12] For the plaintiff, Mr Rooney submitted that, from the outset, the defendant's principal aim had been to secure redundancy compensation. The defendant having failed in that claim, Mr Rooney submitted that she did not merit any award of costs. I accept there is force in this submission so far as that aspect of the claim is concerned. As I have said, however, both parties overlooked essential issues in focussing on the issue of the attributes required for the positions and in devoting so much of counsel's time and effort to that issue.

[13] Mr Rooney's second submission was in the form of a comparison of the remedies sought by the defendant and the remedies awarded. In his analysis, the defendant obtained 6.8% of the remedies sought. In light of this figure, Mr Rooney submitted that *"… the defendant's modest success in the Court, compared with her claims for substantial damages, should result in only a modest award of costs."* I accept that this is a factor to be taken into

account but not in an arithmetical way. A party who is successful in obtaining any significant remedies will normally be entitled to a substantial contribution to the costs of litigation necessary to obtain those remedies. It will usually only be where the remedies awarded are trivial or nominal that the relationship between the sums sought and the sums awarded will be a factor persuading the Court to reduce the amount of costs awarded. In this case, the remedies awarded on the personal grievance were neither trivial nor nominal. I therefore place little weight on this factor.

[14] Mr Rooney also submitted that the amount of time Mr Sharp devoted to the proceedings in the Court was unreasonable. Given that Mr Rooney told me that the costs incurred by the plaintiff in pursuing the challenge were more than $50,000 plus GST, this submission was somewhat ironic. For the reasons set out above, I regard the time and effort devoted to the redundancy compensation issue by counsel for both parties was excessive.

[15] Having reflected on all of the submissions made, I am persuaded that I should depart from my preliminary view but not to the extent sought by Mr Sharp.

[16] The specific aspect of the Authority's determination challenged by the plaintiff was the conclusion that the positions of electronic banking consultant and transactional relationship consultant were substantially similar. But that was an aspect of the overall claim by the defendant for redundancy compensation. Thus, while the defendant may be said to have been successful in resisting the particular challenge mounted by the plaintiff, that was at best a pyrrhic victory because the defendant failed in her overall claim to which it related. In these circumstances, it is not appropriate that either party contribute to the costs incurred by the other in respect of that issue.

[17] That leaves only the defendant's personal grievance that she had been treated unfairly in the course of the restructuring process conducted by the plaintiff. Had that been the only issue pursued by the defendant, the hearing would have occupied less than one day. Allowing for an appropriate amount of preparation time, a total of 20 hours of counsel's time might reasonably have been spent on the matter. At Mr Sharp's rate of $300.00 plus GST, that would mean that costs of $6,000.00 plus GST might reasonably have been incurred. I am prepared to award the defendant $4,000.00, being two thirds of that amount.

[18] I have had regard to the defendant's claim to be reimbursed for disbursements. Given that Ms Wood's evidence related solely to the substantial similarity issue, I decline to make any award in respect of her fees. As to the further amount of $276.50 plus GST said to have been incurred by the defendant, the nature of the expenditure was not identified, nor was

there any indication of how it related to the two aspects of the defendant's claim. Given the relatively small amount, I am prepared to accept that the sum claimed was actually incurred but I infer that only a portion related to the personal grievance. On that basis, I award disbursements of $100.00.

[19] In conclusion, the plaintiff is ordered to pay the defendant:

a) costs of $4,000.00; and

b) disbursements of $100.00; and

c) if the defendant is not registered for GST and has not paid the costs she incurred through a GST registered entity, an additional sum of $512.50 representing the GST the defendant will have paid on $4,100.00.

A A Couch
Judge

Judgment signed at noon on Monday, 30 June 2006

Solicitors: Simpson Grierson
Swarbrick Beck