

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 24/07
ARC 61/05**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN ADAIR NITHSDALE JEFFRIES
 Plaintiff

AND ADIS INTERNATIONAL LIMITED
 Defendant

Hearing: Submissions received on 23 February 2007 and 19 March 2007
 (Heard on the papers)

Judgment: 15 May 2007

COSTS JUDGMENT OF JUDGE B S TRAVIS

[1] In my substantive judgment issued on 7 December 2006 I rejected the plaintiff's challenge, which had attempted to show that her resignation had amounted to a constructive dismissal, and I reserved costs. I also observed that I had not received any submissions in support of the challenge by the plaintiff against the Authority's determination of costs, it being agreed between the parties that this matter should await the outcome of the substantive challenge. I directed that if the parties were unable to agree on costs then all matters, including the costs in the Authority, were to be addressed in an exchange of memoranda.

[2] Ms Cervin, counsel for the defendant, filed her memorandum seeking costs as the parties had been unable to resolve the issue between themselves. Mr Ryan, counsel for the plaintiff, filed a memorandum in response. The submissions in those memoranda have addressed both the challenge to the Authority's costs determination as well as the defendant's claim for a contribution towards its costs in the Court.

The challenge to the costs award in the Employment Relations Authority

[3] The plaintiff in her amended statement of claim challenged the \$3,000 costs award made against her by the Authority for a hearing that took 1 day. The plaintiff submitted that the costs award was in the upper level of the notional daily rate relied on by the Authority and invited the Court to reduce it to \$2,000.

[4] In its costs determination, dated 20 October 2005, the Authority summarised the submissions. The defendant, Adis International Ltd, had sought an award of \$20,000 against actual costs of \$54,883.75. The defendant had highlighted what it saw as the historical and unmeritorious nature of the plaintiff's claims and the misleading nature of her evidence. The plaintiff had submitted that the actual costs were wholly out of proportion with costs that could reasonably be expected for preparation and attendance at a one day hearing before the Authority and invited the Authority to have regard to the general level of daily costs awards of between \$1,500 to \$2,000. The plaintiff had submitted that anything more would be punitive to her given her personal circumstances and her decision to represent herself at the Authority.

[5] The Authority found that the plaintiff had delayed pursuing her rights and that this, together with the multitude of breaches claimed by her, had contributed to the very high costs incurred by the defendant. In setting costs the Authority stated it had had regard to the submissions and all matters relevant to the conduct of the hearing, taking into account that the plaintiff was allowed significant leeway to present her claim as she saw it. The Authority said it had also considered the general level of costs awarded for a one day hearing and that a number of the claims made by the plaintiff and their historical nature had necessitated a greater than average amount of preparation by the defendant. It found that the sum of \$3,000 was a reasonable and modest contribution to the costs the defendant had incurred.

[6] In his submissions on behalf of the plaintiff in relation to costs, Mr Ryan submitted that the leading authority on costs in the Employment Relations Authority was the decision of the full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808. This confirmed that the Authority is able to set its own procedures and has, since its inception, applied a number of basic tenets concerning costs. These include: it has a wide discretion as to whether costs would be awarded

and what amount; the discretion is to be exercised in accordance with principle and not arbitrarily; the statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority; costs are not to be used as a punishment, although a party's conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award; it can consider whether costs incurred were unnecessary or unreasonable; costs generally follow the event; without prejudice offers can be taken into account; the awards will be modest and are frequently judged against a notional daily rate; the nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances. Mr Ryan, in substance, repeated the submissions that had been made by the plaintiff to the Authority namely that the hearing took only one day and \$3,000 was at the upper level of the notional daily rate and that the award ought to be reduced to \$2,000 which, it was submitted, was more consistent with the factors outlined in *PBO Ltd*.

[7] Counsel for the defendant submitted that there was an unusual feature in the case which supported a substantial award of costs, namely the considerable number of issues raised, including new issues raised for the first time by the plaintiff during the investigation meeting and the historical nature of the allegations advanced. A number of the claims and complaints were raised after the plaintiff first claimed her grievances, all of which were found to have lacked substance by the Authority. Considerable time had elapsed since the alleged incidents took place and therefore the defendant had to address matters that were raised well out of time. The defendant noted that the personal grievance was claimed on 3 January 2001 but no formal action was taken to have the claim heard and determined by the Authority until 4 December 2003 when the plaintiff lodged her statement of problem alleging constructive dismissal. This was two days before the statutory deadline lapsed for lodging the proceedings. This led the defendant to have to investigate numerous allegations going back over a period of ten years and both the defendant's management staff and its solicitors had expended a considerable number of hours to answer the claimed grievances.

[8] The defendant's submissions complained about the plaintiff's failure to disclose the incident which had taken place with her co-worker Mrs Pascoe, on the

last working day before she resigned. This incident had led the Authority to conclude that it was Ms Pascoe's refusal to swap days off that was in the forefront of the plaintiff's mind in her decision to resign her employment. A similar finding was made by the Court. The defendant submitted the plaintiff had given misleading evidence and the way she had advanced her case had unnecessarily lengthened the hearing time and the time expended in preparation. In all these circumstances the defendant submitted the costs ordered by the Authority were modest.

[9] Counsel for the defendant also referred to a Calderbank offer that was made on 6 May 2004, shortly after a failed mediation. It invited the plaintiff to discontinue the present proceedings without any obligation to make a contribution to the defendant's cost, which were then about \$6,500. The letter said that if the offer was rejected the defendant reserved the right to produce the letter to the Authority on the question of costs. The offer was rejected.

[10] The defendant's submissions to the Court concluded by asserting that the Authority's determination should not be overturned; the plaintiff should take responsibility for the delay in the proceedings and in pursuing her claim and grievances generally; she could meet the award because she had already deposited that sum into the defendant's solicitors trust account and the funds were being held on trust; the award was not punitive and was a fraction of the actual costs incurred by the defendant in defending the matter before the Authority.

[11] I accept the defendant's submissions. This case was made unnecessarily complex in the Authority by the addition of new claims and by reference to old matters that had predated the grievance by many years. All of those earlier matters were found by both the Authority and the Court to have been disposed of at the time they were first raised, to the satisfaction of the plaintiff, but her raising of them again involved additional time for both the defendant's preparation and at the investigation.

[12] The amount of the costs order was in line with the notional daily rate at the higher end because of the complexities which the Authority referred to in its determination and which were canvassed in detail in the defendant's submissions. I find that the award was well within the scope of the Authority's discretion and was a

principled determination in all the circumstances. The plaintiff has failed to discharge the burden of showing the Authority's costs determination was wrong in either fact or law and therefore her challenge is dismissed and the costs award of the Authority will stand. The amount paid into trust in respect of the Authority's costs award, including any interest thereon, may now be released to the defendant.

Costs in the Employment Court

[13] The defendant sought costs in the Employment Court on the basis that this was an appropriate case for costs to follow the event. The case had occupied four days of Court time. Counsel referred to the useful starting point of 66 percent of costs actually and reasonably incurred, taking into account factors that may justify an increase or a decrease, citing *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA).

[14] The defendant advised that it had incurred \$76,246 in legal fees preparing for and attending the Employment Court hearing and that the defendant had not been charged for time incurred by junior counsel who attended the hearing. In addition, approximately 22.7 hours recorded by the defendant's solicitors were not billed to the defendant. Following *Binnie*, 66 percent of the amount incurred is \$50,322. Further a number of factors were submitted which were said to justify an increase in costs. These may be summarised as follows:

- (a) a number of interlocutory steps were taken by the defendant, including the need to file an application for a verification order relating to disclosure and a notice requiring the plaintiff to file a more explicit statement of claim;
- (b) the plaintiff had raised a number of issues and led a significant amount of evidence in relation to two causes of action which she finally abandoned. The plaintiff accepted that her seven claims of unjustifiable disadvantage had been raised out of time and could not succeed, but these were not abandoned until the close of the hearing. These unnecessarily increased both the amount of pre-trial preparation and the length of the hearing;

(c) the plaintiff was unsuccessful in all aspects of her claims and was held to have been treated fairly by the defendant;

(d) the plaintiff's claims of disadvantages dated back almost to the commencement of her employment in March 1995 and the historical nature of these claims required the defendant to reconstruct and re-familiarise itself with events dating back some time;

(e) it was necessary to brief the evidence of witnesses, two of whom were no longer employed by the company.

[15] The defendant submitted relevant Calderbank offers should be taken into account. The original offer to allow the plaintiff to discontinue her proceedings before the Authority was made on 6 May 2004. Two further Calderbank offers were made to the plaintiff's former solicitors, Hesketh Henry, on 23 August 2005 and 1 November 2005. The latter indicated that the defendant would not require the plaintiff to pay the \$3,000 costs awarded by the Authority, offered to pay the sum of \$1,000 towards her legal costs subsequently incurred in filing her statement of claim in the Employment Court, provided she discontinued her proceedings and confirmed that all her grievances had been fully resolved. When the plaintiff changed her solicitors a similar offer was made to Haigh Lyon on 6 December 2005. These offers were not accepted. Subsequent to the unsuccessful settlement offer the defendant incurred more than \$76,000 in legal fees.

[16] The defendant submitted, following *Smith v Sovereign Ltd (Owned and Operated By The ASB Bank)* unreported, Travis J, 12 December 2006, AC 71/06, that the case can be tested as if it was a High Court proceeding. *Smith* was also a 4 day hearing in which costs under the High Court Rules came to \$42,800. The defendant set out a similar analysis in the present case. Applying category 2B of Schedule 3 of the High Court Rules, the defendant submitted, would result in an allocation of 24.5 days covering the preparation of the statement of defence, disclosure, case management, preparation of briefs, attendances relating to the agreed chronology and agreed bundle of authorities, preparation for the hearing and the hearing itself. At \$1,600 per day this makes a total of \$39,200 as a contribution to the actual and reasonable costs.

[17] Finally, the defendant recognises the Court can take account of the plaintiff's financial position in exercising its discretion in fixing costs. In all the circumstances the defendant submitted that the costs in the sum of \$30,000 should be awarded as a fair and reasonable contribution towards its costs and had no objection to this sum being paid on an instalment basis.

[18] Mr Ryan for the plaintiff referred not only to *Binnie* but also to *Victoria University of Wellington v Alton-Lee* [2001] 1 ERNZ 305 (CA) and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA), and submitted that these “*triumvirate*” of Court of Appeal decisions have established the principles to be applied by the Employment Court in fixing costs. He submitted that the first step is to decide whether the costs actually incurred were reasonable and to make adjustments if they were not. The second step is to decide, after appraisal of all relevant factors, what level is reasonable for one party to contribute to the other, 66 percent being generally regarded as helpful in ordinary cases.

[19] Mr Ryan submitted that the defendant's claim for costs was not reasonable as the amount said to have been incurred, in excess of \$76,000, was “*astonishing*” when it was taken into account that the briefs filed in the Authority were strikingly similar to the briefs filed in the Employment Court. Copies of those briefs of evidence were annexed to the defendant's submissions. He contended that the case, while involving a number of witnesses, was not a complex matter and, although it took 4 days to complete, the awarding of costs at any substantial level would be oppressive and would cause the plaintiff undue financial hardship. Attached to the memorandum was an affidavit and bank statements supporting the plaintiff's claim that she is impecunious and that her financial situation should be taken into account when determining the level of costs to be awarded.

[20] The plaintiff submitted that a reasonable contribution to the defendant's costs would be between \$12,000 and \$16,000, reflecting a notional daily rate of \$3,000 to \$4,000 per day in the Employment Court.

[21] It is difficult to reconcile the submissions of Mr Ryan as to a notional daily rate with the principles that he correctly sets out from the “*triumvirate*” of Court of

Appeal cases, as he described them. The use of the High Court Rules provides a ready guideline as to whether the costs actually incurred for the type of litigation were reasonable. The new scale of costs is now kept up to date and is said to reflect what are fair and reasonable costs for the particular types of cases. The only material which would justify a reduction from the two thirds of actual and reasonable costs, in this case, given that much of the plaintiff's case was finally abandoned at the conclusion of lengthy evidence and cross-examination, must be the plaintiff's financial situation.

[22] In broad terms I again accept the defendant's submissions and, based on the use of the High Court scale as an indication of what is reasonable, an award of \$30,000 would be a modest contribution to the defendant's costs. This however is a Court of equity and good conscience, which does take into account the unsuccessful party's ability to pay.

[23] In the plaintiff's affidavit she says that she has paid her past solicitors' costs on her credit card, which has now reached its limit. A statement from Mastercard dated 11 February 2007 is annexed as an exhibit and this shows an outstanding balance of nearly \$18,000. Also exhibited are two statements from the ANZ Bank, dated 23 February and 1 March 2007, showing that the two accounts are in overdraft to a total of just over \$3,400. The plaintiff does not provide any evidence of her assets nor the level of costs she paid for her own representation nor her current income. She contends that if the amount of \$30,000 is awarded she would be unable to pay it, which would, she says, be oppressive and cause her undue financial hardship.

[24] In this somewhat unsatisfactory state of evidence it does appear that the plaintiff has financial difficulties at present and an award of \$30,000 is more than likely to exacerbate the situation for her. For this reason only, the amount of the award I will make, as a very modest contribution towards the defendant's reasonably incurred costs, will be somewhat less than the amount the defendant was fairly prepared to accept. In spite of the similarity between the briefs of evidence in the Authority and the Court, I am not persuaded that the level of costs actually incurred since the making of the Calderbank offers were unreasonable for they are closely in

alignment with the High Court scale. Further the \$30,000 sought was well less than two thirds of actual and reasonable costs.

[25] However, solely because of the plaintiff's financial circumstances, I order her to pay the sum of \$20,000 as a contribution towards the defendant's costs for the four day hearing in the Employment Court and associated interlocutory matters. Any issues as to how that sum is to be paid and whether it is to be by instalments, I leave to be dealt with by the parties.

B S Travis
Judge

Judgment signed at 3.30pm on Tuesday 15 May 2007