

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 47A/06
ARC 50/05
ARC 51/05**

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

AND IN THE MATTER of an application for costs

BETWEEN ARC 50/05 BRIAN CLIFF
ARC 51/05 ALLAN WILLIAM GROOM
Plaintiffs

AND AIR NEW ZEALAND LIMITED
Defendant

Hearing: Written Submissions received 20 September 2006 for the plaintiff and
3 October 2006 for the defendant

Judgment: 17 November 2006

COSTS JUDGMENT OF JUDGE C M SHAW

[1] The successful plaintiffs have applied for an award of costs incurred over a number of Employment Relations Authority and Court hearings: an application for reinstatement in the Employment Relations Authority and a Challenge to the Authority's determination in the Employment Court; an investigation of the substantive claim in the Employment Relations Authority and a challenge to the Authority's determination on the substantive claim.

[2] Counsel filed memoranda in support of the parties respective positions to which were attached documents relevant to the question of costs.

[3] The total costs to the plaintiffs were \$91,552.50. They also claimed disbursements of \$4,753.66 which included Court costs. The plaintiffs are seeking 90 percent of their actual and reasonable costs. All figures in this judgment include GST.

[4] The defendant does not dispute that an award of costs should follow the event but strongly resists an order in the amount claimed. The defendant raises no objection to the Authority costs being determined by the Court.

[5] The application must be dealt with in two parts: the costs in the Authority and those in the Employment Court. This is because the principles governing awards of costs differ between the two institutions for reasons given by the full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*¹.

[6] Mr Thompson submitted that the Employment Court's ultimate finding of a 25 percent contribution by each plaintiff should be reflected in the costs award. I reject that submission. I agree with Couch J in *Singh v Sheraldee Holdings Ltd (t/a New World Opotiki)*² where he held that a reduction of remedies because of contribution does not mean that the Court will necessarily reduce an award of costs. In this case the plaintiffs' contribution to their personal grievances was recognised by a reduction in remedies pursuant to s124 of the Employment Relations Act 2000. I note there is no statutory provision for contribution impacting on the costs.

1. Application for interim reinstatement in the Employment Relations Authority

[7] The plaintiff's costs on this application were \$13,500 plus \$140 disbursements.

[8] Although the interim reinstatement application was dealt with on the papers, the two applicants were required to prepare a significant amount of material for the Authority in order for it to determine this application. Given that the preparation was for two applicants with similar but by no means identical circumstances, the \$1,000 suggested by Mr Thompson as a starting point is extremely low. On the other hand, in the absence of supporting invoices or description of actual work done, the expenditure of \$12,150 for such an application is at the upper end of costs reasonably incurred. In any event, costs in the Authority are more likely to be granted on the basis of a tariff although this is dependent on discretionary factors.

[9] I take into account the fact that the Authority dealt with two applications at once and there was a need for counsel to fully prepare on the papers for both of them. On the other hand, there were no costs associated with an investigation meeting.

¹ [2005] 1 ERNZ 808

² Unreported, Couch J, 26 October 2005, AC 53A/05

[10] The Employment Relations Authority tariff ranges up to about \$3,000 a day. For an interim application of this sort \$2,500 is appropriate. I judge that the reasonable preparation of an interim application for reinstatement in a case such as this would reasonably have taken 2 full days. The plaintiffs will be awarded \$5,000 contribution to their costs for that application plus \$140 disbursements.

2. Substantive investigation meeting in the Authority

[11] The plaintiffs' costs for this were \$21,206.25.

[12] The investigation took 5 days and was acknowledged by Mr Thompson to have been efficiently conducted. Mr Roberts submitted that, as the plaintiffs' representatives were supplied with detailed internet activity data only days before this investigation meeting, it was unable to engage an expert in the time available and it was necessary for Mr Roberts to spend a significant amount of his time before and during the investigation to review and analyse this data which had not been seen before.

[13] Given this factor and the length and complexity of the investigation, I consider that this is a case that warrants an application of the Authority's tariff range at the upper level of \$3,000 a day. On that basis the award of costs will be \$15,000.

3. Interim reinstatement at challenge in the Employment Court

[14] This hearing took almost a full day of submissions based on affidavit evidence filed by the parties.³ It covered questions of both fact and law. In addition to material submitted to the Authority, the parties filed further affidavits for the Court. The Court held that the plaintiffs had tenably arguable cases to be reinstated and made conditional reinstatement orders.

[15] Air New Zealand had cross-challenged the Authority's finding that there would be no adequate remedies for the plaintiffs if interim reinstatement was not granted but the cross-challenge was dismissed. The Court held that the Authority had correctly decided that aspect of the case.

[16] The plaintiffs' costs at this hearing were \$10,406.25. The applicants' affidavits from the interim reinstatement application were able to be used in support of the challenge which reduced the plaintiffs' costs. Mr Thompson submitted that the plaintiffs' claim for 90 percent of this amount for a less than a full day hearing is grossly excessive.

³ *Cliff v Air New Zealand Ltd* [2005] 1 ERNZ 1

[17] In the absence of any other measure by which to gauge the costs, I have had recourse to the schedules to the High Court Rules governing the appropriate daily recovery rates and time allocations to ascertain the reasonableness of the costs claimed by the plaintiffs.

[18] Given the complexity of these proceedings with two plaintiffs and a multitude of technical evidence, it warranted counsel of category 2 skill level. The daily rate for an interim application for a category 2 proceeding is \$1,600. The time allocated in the High Court Rules for preparation and filing an interlocutory application and affidavits requiring a large amount of time is 2 days. Hearing time is measured in quarter days. In this case this amounts to 2 days making a total of 4 days of preparation and hearing.

[19] On this basis in the High Court the plaintiffs would have been entitled to \$7,110. This equates to approximately two-thirds of the actual costs incurred by the plaintiffs which I find were reasonable. I find that \$7,000 would be a reasonable contribution to the costs of the plaintiffs on this application.

[20] The defendant will pay a contribution of \$7,000 costs to the plaintiffs plus Court costs as fixed by the Registrar.

4. *The challenge to the substantive findings*

[21] The plaintiffs were wholly successful in their claims of unjustified dismissal apart from the reduction in remedies to reflect their contribution.

[22] Their costs were \$44,302.50. The hearing time was 6½ days and two counsel were involved. If preparation time is calculated as twice the time of the hearing as allowed for in the High Court Rules, the total time for the purpose of costs is 19.5 days. At the daily rate of \$1,600 and \$800 for junior counsel costs in the High Court would amount to \$46,800. In this light the plaintiffs' actual costs of \$44,302.50 is comparatively low. It is also extremely reasonable when measured against the usual factors of length, complexity, and importance to the plaintiffs.

[23] If this case had been heard in the High Court the plaintiffs would have been entitled to \$46,800. In this Court the usual proportion of costs is two-thirds of actual and reasonable costs incurred. I do not accept Mr Roberts's submission that factors such as the way in which the defendant conducted itself justify a 90 percent contribution towards the plaintiffs' costs however, in the light of the overall success of the plaintiffs, I find that a usual award of approximately 66 percent of the actual reasonable costs is not appropriate because it would result in the award of compensation to each plaintiff being rendered completely nugatory. The defendant

will pay a contribution to the plaintiffs' costs in the sum of \$40,000 plus disbursements of \$118.66 and Court costs as fixed by the Registry of the Employment Court.

Conclusion

[24] The following orders are made:

- **Application for reinstatement in the Employment Relations Authority.**
The plaintiffs are awarded \$5,000 contribution to their costs plus \$140 disbursements.
- **Investigation of substantive claim in the Employment Relations Authority.**
The plaintiffs are awarded \$15,000.
- **Challenge to the Authority's determination in the Employment Court.**
The plaintiffs are awarded costs \$7,000 plus Court costs to be fixed by the Registrar.
- **Challenge to the Authority's determination.**
The plaintiffs are awarded \$40,000 plus disbursements of \$118.66 and Court costs to be fixed by the Registrar.

**C M Shaw
JUDGE**

Judgment signed at 2pm on 17 November 2006

Solicitors: J Roberts, Auckland, for the plaintiff
G L Norton, Auckland, for the defendant