

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 11/07
CRC 29/06**

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

AND IN THE MATTER OF an application for costs

BETWEEN METALLIC SWEEPING (1998) LTD
 Plaintiff

AND SANDRA FORD
 Defendant

Hearing: Submissions received on 4, 8 and 21 May 2007

Judgment: 23 May 2007

COSTS JUDGMENT OF JUDGE A A COUCH

[1] This matter involved a challenge to a determination of the Employment Relations Authority granting leave to the defendant to raise a personal grievance outside the 90 day period prescribed by s114(1) of the Employment Relations Act 2000.

[2] On 23 March 2007, I conducted a telephone conference with counsel at which the matter was set down for hearing on Monday 23 April 2007. I also directed that Mr Beck was to file and serve briefs of evidence of all witnesses relied on by the defendant no later than Friday 13 April 2007.

[3] On Thursday 19 April 2007, Mr McGinn advised Mr Beck that the challenge was to be withdrawn. The following day, Mr McGinn advised the Court of this by email. That disposed of the substantive proceedings but there remains outstanding the issue of costs.

[4] Counsel are agreed that, in these circumstances, the defendant is justly entitled to an award of costs. Where they differ is on the amount of that award. Being unable to agree, the parties have referred the issue to the Court for decision. In support of their clients' respective positions, Mr McGinn and Mr Beck have both filed detailed and helpful memoranda.

[5] On behalf of the defendant, Mr Beck seeks full reimbursement of costs amounting to \$4,653 and disbursements of \$1,012.50 being the fees of an expert witness. The total sum sought by the defendant, therefore, is \$5,665.50 exclusive of GST.

[6] For the plaintiff, Mr McGinn submits that an appropriate award of costs would be no more than \$800 and that the defendant should not be reimbursed for the expert witness's fees.

[7] Mr Beck and Mr McGinn both relied on the general principles relating to the award of costs set out in *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA). In that case, the Court of Appeal said that the first step should be to determine what costs were actually and reasonably incurred by the successful party. The second step is to determine the proportion of that amount which should be awarded, with two thirds being a useful starting point. From that starting point, the proportion might be adjusted up or down according to the circumstances of the case including the manner in which either party may have conducted its case so as to unnecessarily increase the costs of the other. I adopt that approach.

[8] By way of explanation of the costs incurred by the defendant, Mr Beck provided me with an extract from his firm's time recording system. This showed attendances totalling 23.7 hours, almost all of which had involved Mr Beck, and that his time had been charged at the rate of \$200 per hour. The work recorded as having been done by Mr Beck included 5 hours to draft a statement of defence and more than 7 hours to revise the defendant's brief of evidence.

[9] For the plaintiff, Mr McGinn suggested that the amount of time spent on the matter by Mr Beck was excessive and substantially beyond that which was

reasonable. He submitted that a reasonable estimate of the time required to carry out the work done by Mr Beck prior to the matter being withdrawn was 6 hours. In support of this submission, Mr McGinn referred me to the legal aid application made by the defendant, a copy of which was attached to Mr Beck's memorandum. This related to the whole of the defence to the plaintiff's challenge. Using the Legal Services Agency standard rates, Mr Beck sought legal aid on the defendant's behalf of \$1,750 representing 14 hours work.

[10] In assessing the extent to which the costs incurred by the defendant were reasonable, I adopt the dictum of the Chief Judge in his recent decision in *Prins and Prins v Tirohanga Group Limited (formerly Tirohanga Rural Estates Limited)* unreported, 16 May 2007, AC 27/07:

[16] As has been said in many other costs judgments, the necessity for the Court to establish a reasonable cost of litigation that another party must bear is not a criticism of actual legal costs incurred. The Court is well aware that these vary between lawyers for a number of valid reasons. The Court's task is to assess as best it can the level of professional representation warranted by the particular case and to set a reasonable amount that the other party should be called upon to contribute to that.

[11] In this case, the issues were within a relatively narrow compass and the facts had already been traversed before the Authority. It was appropriate to retain and brief an expert witness but it is apparent from Mr Beck's time record and the invoice from Dr Earthrowl that this required relatively little input from Mr Beck. Allowing for a half day hearing, it seems to me that the time estimate of 14 hours given by Mr Beck in the legal aid application was appropriate. Deducting the time which would have been required for the hearing, but making allowance for contingencies which may not have been included in Mr Beck's estimate, I conclude that a reasonable amount of time to complete the work necessary before the proceedings were discontinued was 12 hours. At the rate of \$200 per hour actually charged by Mr Beck, which rate was entirely reasonable, I conclude that the extent to which the costs actually incurred by the defendant were reasonable was \$2,400.

[12] I turn then to the extent to which the plaintiff should be required to contribute to that sum. Mr Beck urged me to infer from the plaintiff's late discontinuance that the proceedings had simply been initiated to put the defendant to unnecessary cost and to cause her unnecessary distress. On this basis, he submitted that the proceedings were vexatious and that the defendant should be fully reimbursed for her reasonable costs. To reach such a conclusion would require compelling evidence over and above the simple fact that the proceedings were withdrawn at a late stage. In the absence of such evidence, I do not accept Mr Beck's submission. Having said that, however, it is a reasonable inference from the late withdrawal of the proceedings that, after seeing the expert evidence to be given by Dr Earthrowl, the plaintiff accepted that its chances of success were slim and sought to cut its losses. Mr McGinn effectively conceded this in his memorandum.

[13] Mr McGinn argued that the plaintiff was nonetheless justified in initiating the challenge because the defendant had not adduced expert evidence before the Authority and it was inappropriate for the Authority to grant leave on medical grounds in the absence of such evidence. I reject that proposition. The Authority did not act in excess of its jurisdiction or contrary to principle in reaching its determination on the basis of the evidence provided by the defendant.

[14] Counsel for both parties submitted that the conduct of the other party had increased costs unnecessarily. I do not find those submissions persuasive.

[15] Taking all aspects of the matter into account, I fix the contribution which the plaintiff ought to make to the defendant's costs at \$2,000.

[16] It is clear from Mr McGinn's memorandum that it was the expert evidence of Dr Earthrowl which precipitated the plaintiff's decision to withdraw the proceedings. That being so, the plaintiff ought to reimburse the defendant for the costs incurred in obtaining Dr Earthrowl's opinion.

[17] I infer from the fact that the defendant is employed for wages that she is not registered for GST. The award of costs in her favour should therefore be increased

by the amount of GST payable on that sum. Equally, reimbursement of the expert witness fee should include the GST component of it.

[18] In summary, the plaintiff is ordered to pay the defendant \$2,250 for costs and \$1,175 in respect of disbursements.

A A Couch
Judge

Costs Judgment signed at 2.30pm on Wednesday 23 May 2007