

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 27/07
ARC 12/03**

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

AND IN THE MATTER OF an application for costs

BETWEEN JUDI DAWN PRINS AND
FRANCISCUS CORNELIUS
JOHANNES PRINS
Plaintiffs

AND TIROHANGA GROUP LIMITED
(FORMERLY TIROHANGA RURAL
ESTATES LIMITED)
Defendant

Hearing: By memoranda of submissions received on 27 June, 6 July and 4 and
15 August 2006

Judgment: 16 May 2007

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The plaintiffs who were successful in their challenge to the Employment Relations Authority's determination seek costs against the defendant. The plaintiffs claim indemnity costs of \$68,314.13 (including disbursements of \$2,659.13) which sums are inclusive of GST. That is, coincidentally, almost precisely the same amount as the plaintiffs were awarded in monetary remedies, \$68,056.58.

[2] Significant features of the plaintiffs' claims to indemnity costs include the following.

[3] First, the plaintiffs point to an offer to settle the litigation made "*without prejudice save as to costs*" on 25 July 2002, approximately three weeks before the Authority's investigation meeting was due to take place. Although, accurately as it

has transpired, the plaintiffs' solicitor then predicted that they would recover between \$60,000 and \$80,000 plus interest and costs, they were prepared to settle for \$45,000, being characterised as \$20,000 for each as compensation for hurt feelings, humiliation and loss of dignity under s123(1)(c) and \$5,000 for Mrs Prins for sexual harassment. That offer was not accepted by the defendant. The plaintiffs say that this caused them to incur unnecessarily the costs of the Authority hearing for which they were not reimbursed by its order and all costs expended by them on the proceeding in this Court. They now seek full reimbursement of legal costs and disbursements from the date of commencement of the proceeding in the Employment Court, 3 February 2003. They say that indemnity costs are warranted because of the defendant's improper conduct, both during the proceeding and during their employment, and in reliance on their offer to settle just outlined which should be regarded in the same way as a *Calderbank* offer.

[4] I do not accept that the defendant's improper conduct in employment (however egregious) should be marked by a greater than usual award of costs. The defendant's wrongs have been marked already by both a monetary penalty and compensatory awards. I accept, however, that improper conduct in the course of litigation may be, and indeed often should be, reflected in costs: *Paper Reclaim Ltd v Aotearoa International Ltd* unreported, 14 March 2006, CA 70/04. As the Court of Appeal indicated in *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 493, awards of indemnity costs are not confined to extraordinary cases in which the unsuccessful party's case was wholly lacking in merit and the pursuit of the litigation could be described as reprehensible.

[5] Focusing on what they say was the defendant's (in reality Mr Walters's) improper conduct in the course of the litigation, the plaintiffs identify the following. In a "*first brief of evidence*" that was not ultimately used at trial, Mr Walters appeared to make serious allegations of deceitful conduct against Mrs Prins and the firm of solicitors whom she first approached to represent her. I agree that these outlandish expressions of opinion should not have appeared in a brief of evidence prepared by an experienced employment law advocate, however fervently and sincerely the beliefs may have been held by Mr Walters. But, eventually, common sense prevailed and the brief was not used and the allegations, or at least the most egregious of them, were not made in Court.

[6] Next, it is correct that towards the end of his evidence-in-chief, Mr Walters read a supplementary brief of evidence that he had himself prepared overnight and that I infer he persuaded his advocate, Mr Peebles, that he should read in a gratuitous fashion from the witness box. This alleged that the plaintiffs and their solicitor had “*altered the material facts presented previously*” and advised of Mr Walters’s intention to take his complaint further. I accept that it was inappropriate for Mr Walters to have made these statements in evidence and he ought to have been told so by his advocate who should have retained control of the conduct of the proceeding for the defendant. Again I do not doubt the sincerity of Mr Walters’s beliefs but nor do I doubt their inaccuracy. Ultimately, these rhetorical statements made no difference to the determination of the case and delayed the hearing only briefly, but they were, nevertheless, improper.

[7] Next, Mr Drake for the plaintiffs has drawn to my attention the defendant’s repeated failures to comply with judicial directions in the conduct of the case despite very clear warnings from a Judge of the consequences of these failures. I accept that the defendant both delayed the case and put the plaintiffs to increased cost in their prosecution of it by its failures that were perhaps in part due to the failures of its advocate.

[8] Next, Mr Drake points to my adverse findings about Mr Walters’s credibility and his general conduct towards the plaintiffs and other employees as an employer. These were, however, made for the purpose of determining credibility and should not form the basis of an award of increased costs against the defendant.

[9] While it is correct that I found that Mr Walters set out to lie and deceive deliberately his employees at the motel to create the semblance of a justified reason to dismiss Mr and Mrs Prins, that was not an issue in the proceeding for which relief was sought by the plaintiffs. In the same vein, Mr Walters’s sexual harassment of Mrs Prins, compounded by his lies and deceitfulness, is not a ground to increase the costs award against him. The Court’s disapproval of that conduct had been marked already in the compensatory awards made. Into the same category fall the plaintiffs’ complaints about the defendant’s failure to act in good faith towards the plaintiffs and to treat them fairly and reasonably as employees. These are failings or breaches that have already been compensated for and I do not propose to increase, de facto,

those awards by increasing what might otherwise be the costs award against the defendant.

[10] In a different category, however, is the conclusion that Mr Walters created a number of self serving documents upon which he subsequently attempted to rely to defend the plaintiffs' claims. As Mr Drake has pointed out, I concluded that some of these were not ever sent to the plaintiffs as Mr Walters had alleged but, rather, were used in an attempt to justify his actions when the matter came to Court. That is a relevant factor when costs come to be set.

[11] Turning to the offer by the plaintiffs to settle the litigation before it went to the Employment Relations Authority, I accept Mr Drake's general submission that *Calderbank* offers have been approved expressly by the Court of Appeal as a way of encouraging proper settlements of employment cases: *Health Waikato Ltd v Van der Sluis* [1997] ERNZ 236. As Mr Drake acknowledges, the plaintiffs' offer was not a *Calderbank* offer but was nevertheless a proposal to settle sensibly for less than has eventually been awarded but before hearing and trial costs were incurred.

[12] With the benefit of hindsight that is, of course, correct and the only question is whether, as a matter of principle, plaintiffs whose reasonable offers of settlement have been spurned in this way should be able to recover indemnity costs incurred after rejection of the offer. Mr Drake submits that they should, following r48G of the High Court Rules 1985. That provides, in effect, that either party may propose in writing a settlement of the proceeding that is expressed to be without prejudice except as to costs although such a communication is not to be made known to the Court until the question of costs is to be decided. So what has generally been known as a *Calderbank* offer made by a defendant to a plaintiff may equally be made by a plaintiff to a defendant and, if not accepted, may sound in costs if the plaintiff equals or betters the offer by a judgment as has occurred in this case.

[13] I accept, both as a matter of practice and in the particular circumstances of this case, that the plaintiffs' reasonable costs of litigation incurred since their offer to settle for \$45,000 made on 25 July 2002 but which was rejected by the defendant, should form the basis of a costs award against it. Put simply, the defendant had an opportunity to settle the case at an early stage for a sum less than it is now obliged to pay and at a time when the costs of both parties were significantly lower. Although

of course with the benefit of hindsight, the defendant should have accepted the offer but refused it. The costs reasonably incurred by the plaintiffs since that time should not be lost to them as a consequence of the defendant's unreasonable refusal.

[14] I start with the plaintiffs' legal costs. These are evidenced by two bills from their solicitors to them. The first is dated 30 January 2004 and contains no more detail than that it was "... *for professional legal services from 17 October 2002 to 31 October 2003*". The fee was \$22,427, GST on that was \$2,803.38, and disbursements including a Land Transfer Office search fee, Companies Office agency fees and the Employment Relations Authority's filing fee, totalled \$234.09, a grand total on that bill of \$25,464.47. The plaintiffs accept that this invoice covers a period of seven months when the case was before the Employment Relations Authority. This bill of costs is said to have been set by an hourly rate that was reduced from counsel's usual rate of \$420 to \$340, as was the following account.

[15] The second bill of costs is dated 5 July 2006 and is similarly cryptic ("... *for professional legal services from 1 November 2003 to 5 July 2006*"). It is for a total of \$52,000 said to have been reduced from a potential \$58,575 on a time and attendance basis. Added to the fee of \$52,000 is GST of \$6,500 and disbursements including a process server's fee, photocopying charges, tolls and stationery, a LINZ search fee, and a District Court filing fee on an application for certificate of judgment and charging order, totalling \$475.13. Also claimed as disbursements are air fares for the plaintiffs' witness Jenny McLeod from Taupo to Auckland and Auckland to Rotorua on 1 October 2003 and for another of the plaintiffs' witnesses, Lindsay Wheeler who was to travel from Napier to Auckland and return on 2 October 2003. There were non-refundable air fares lost when the hearing was postponed by a last minute adjournment sought by the defendant. There were also the Employment Court's hearing fees totalling \$980 which are a proper disbursement in the proceeding.

[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.

[17] So, for example, while it may have been for entirely good reasons that the plaintiffs were represented at the hearing by two lawyers, the complexity of the case was not such that in my view the defendant should be called upon to contribute to the costs of two counsel. Likewise, although the plaintiffs were entitled to counsel of their choice, it would not be right in my conclusion for the defendant to reimburse the plaintiffs for representation billed at even the reduced hourly rates charged.

[18] The hearing occupied three days in Court. Allowing for preparation leading to this court time, I consider that the contribution that the defendant should be called upon to make to the plaintiffs' legal costs should be fixed at \$45,000 (including GST). This represents an indemnity award of what I consider would have been reasonable costs incurred after the rejection of the settlement, plus an allowance of \$5,000 for pre-offer legal costs. Added to that, the defendant should reimburse the plaintiffs for disbursements including the court filing fee of \$200, court hearing fees of \$980, wasted travel costs for Mr Wheeler and Mrs McLeod of \$654, witness summons service fees of \$73.13, witness conduct money of \$150, witness travel costs for Mrs McLeod and Mr Mackersey of \$200, and photocopying, toll and stationery charges totalling \$279.50. For the sake of clarity, I disallow disbursements claimed for a LINZ search fee for the purpose of obtaining a charging order and District Court filing fees of \$80 in respect of the same matter.

[19] In summary, the defendant is to pay to the plaintiffs the sum of \$47,536.63.

[20] I regret the delay in issuing this judgment. For reasons that are not apparent, the papers were not drawn to my attention until recently.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Wednesday 16 May 2007