IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 7/08
CRC 10/08
CRC 11/08

CRC 10/08

IN THE MATTER OF	an application for leave to file challenge out of time
AND IN THE MATTER OF	an application for costs
BETWEEN	TANIA KA'AI, JOHN MOORFIELD AND TANIA SMITH Plaintiffs
AND	THE VICE-CHANCELLOR OF THE UNIVERSITY OF OTAGO Defendant

CRC 11/08

AND IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TANIA KA'AI, JOHN MOORFIELD AND TANIA SMITH Plaintiffs
AND	THE VICE-CHANCELLOR OF THE UNIVERSITY OF OTAGO Defendant

Hearing: By submissions received on 24 April, 9 and 13 May 2008

Judgment: 23 May 2008

COSTS JUDGMENT OF JUDGE B S TRAVIS

---

[1] The plaintiffs had filed claims in the Employment Relations Authority in late 2007. A preliminary matter was determined by the Authority on 19 December 2007 (CA 157/07), which restricted its investigation into events up to the time of one of

the plaintiffs resignations. The investigation meeting was scheduled to commence on 21 April 2008.

[2] On 15 April 2008, shortly after the plaintiffs had received the defendant's briefs of evidence, the plaintiffs applied to the Authority to have some of the defendant's evidence struck out. By memorandum dated 15 April 2008 the Authority declined that application.

[3] The following day the plaintiff filed in the Employment Court an election to have reheard the two procedural matters which had been decided by the Authority, together with leave to challenge out of time, an abridgement of time and an application for urgency. A challenge was not filed concerning the Authority's refusal to grant an adjournment as the plaintiffs' solicitors considered that was a procedural matter which could not be challenged at that point.

[4] I arranged for a telephone conference the following day to discuss the applications. In his memorandum as to costs, counsel for the defendant stated that he had taken the view that the application for urgency could not reasonably be resisted and prudence required the defendant to be able to deal with the other issues during the telephone conference. Accordingly counsel researched and prepared an appearance under protest to jurisdiction, relying on ss179(5) and 188(4) of the Employment Relations Act 2000.

[5] Section 179(5) provides that the Court has no jurisdiction to hear a challenge to a procedural determination of the Authority. Under s188(4) the Court may not direct the Authority on its procedure or its investigative role. There was also an issue as to whether or not the election in respect of the December determination was out of time because it had not been made within 28 days after the Authority's determination, as required by s179(2).

[6] The plaintiffs' counsel was prepared to argue that these were not purely matters relating to procedure and did not accept that the plaintiffs had no chance of success. The decision to withdraw the applications was made when it became apparent that the chances of success were limited and that even if the challenges

were heard by the Court it could not order an adjournment of the Authority hearing. The challenges were therefore abandoned.

[7] The defendant now seeks costs on the basis that these challenges ought not to have been made and that the university has been put to unnecessary expense. He contends that the challenges filed with the Court had no chance of success and should never have been brought, that the plaintiffs should have been aware of the statutory difficulties the challenges faced and should have been prepared with reasonable argument as to why the Court should accept jurisdiction. When no reasonable argument could be constructed it should have become clear that the challenges would not succeed and they should not have been filed.

[8] Counsel for the defendant submitted that it would be appropriate for the Court to make an award of costs that reflects both the Court's disapproval of applications being filed which have no hope of success, and which reimburses the cost to the defendant of opposing such applications. Costs were sought on a solicitor/client basis for the research on the challenges, the appearances under protest, the telephone conference and the drafting of submissions, to a total of $2,233. Counsel for the defendant submits that it is for the plaintiffs to determine how any costs award should be allocated between them and that the award should be made against them jointly and severally.

[9] Counsel for the plaintiffs did not accept that the plaintiffs had no chance of success and submitted the matter was not as obvious as the defendant had submitted, as the defendant's costs for researching the matter for some 5 hours demonstrated. She submitted that the Court has jurisdiction under Schedule 3, clause 19 of the Employment Relations Act to award such costs as the Court thinks reasonable. She referred to *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA), which requires the Court to determine whether the costs incurred by the successful party were reasonably incurred and then decide, after an appraisal of the relevant factors, at what level it would be reasonable for the unsuccessful party to contribute to those costs. A starting point of 66 percent is generally regarded as helpful. She also referred to *Davis v Bank of New Zealand* WC 4/05, 18 February 2005 where the Employment Court noted that the costs principles from *Binnie* do not necessarily

apply to challenges to interlocutory determinations which do not require evidence or the appearance of counsel. In that case the costs of $2,633 were sought, being two-thirds of the actual costs incurred in successfully defending a challenge to an interlocutory determination, but the Court found that as the matter was conducted efficiently and dealt with on the papers an award of $500 plus $50 disbursements was appropriate.

[10] Counsel for the plaintiffs also refered to a costs application in the Authority in the present case but that is not a matter to which I can have regard. Counsel for the plaintiffs relied on *Counties Manukau Health Ltd t/a South Auckland Health v Pack* AC 72A/00, 25 October 2000 where Chief Judge Goddard noted that solicitor/client costs should be reserved for a case where the case or defence was without merit and was pursued in a way that could be regarded as reprehensible. She submitted that the applications would not have been brought but for the defendant's unexplained failure to disclose a vital letter prior to the scheduled Authority meeting.

[11] The applications made in this case were unlikely to succeed and in order to avoid the parties further expense I drew that to their attention at the telephone conference. The plaintiffs' proper response was therefore to withdraw those proceedings.

[12] I accept that the defendant has been put to expense as a result of the applications and, as a public body, is obliged to pursue those costs even on an indemnity basis. Such a basis is not appropriate in the present case for there were arguable issues and I am not satisfied that solicitor/client costs ought to be awarded. However, the costs incurred were reasonable and the normal two-thirds rule should apply. This is particularly so in the present case where the effect of the hearing was for the plaintiffs' challenges to be abandoned and the proceedings in the Court brought to an end.

[13] Rounding this figure up slightly I award the defendant $1,500 as a contribution towards the university's costs. Although this is effectively $500 each I make no order directing how those payments are to be made. I accept defendant

counsel's suggestion that they should be awarded jointly and severally against the three plaintiffs.

B S Travis
Judge

Costs judgment signed at 4.35pm on 23 May 2008