IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 6
ARC 60/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
AND IN THE MATTER OF	an application for leave to amend pleadings
BETWEEN	ORA LTD Plaintiff
AND	SONJA KIRKLEY Defendant

Hearing: By submissions filed on 6, 22 and 30 October, 19 November 4, 9 and 11 December 2009

Judgment: 25 January 2010

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] In my judgment of 4 September 2009 I made the following directions at the conclusion.

> [78] Mr Ponniah addressed the costs in the Employment Relations Authority and in the Court. He sought indemnity costs because of the conduct of the plaintiff. Indemnity costs cannot be justified on the basis asserted by Mr Ponniah. Where, as in the *IHC* case cited earlier in this judgment, one side has abandoned a challenge because it was without merit, a substantial costs order can be made to ensure that the successful defendant "should not have to suffer reduction in the quantum of remedies awarded by the Authority… by having to pay legal costs on the challenge".
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> [79] Mr Ponniah's submissions did not address the quantum of the costs he was seeking in either jurisdiction. From the exchange I had with counsel, Mr Brant sought to have costs reserved so there would be a final opportunity for the plaintiff to respond to Mrs Kirkley's claims in that

> regard. There was a further complication in that costs were awarded against Mrs Kirkley in the High Court, a matter with which I cannot deal, but that may be addressed in the submissions. These submissions should also deal with the monies held in trust which should be released to Mrs Kirkley, subject to any deduction for the High Court costs.
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> [80] If the parties cannot agree on the question of costs, then I invite Mr Ponniah to file submissions as to the quantum and reasonableness of the costs actually incurred, the disposition of monies in trust, and the way in which the High Court costs should be dealt with, within 30 days of this judgment. Mr Brant will have 30 days in which to respond on behalf of the plaintiff.

[2] On 6 October 2009 counsel for the defendant, Mr Ponniah, filed a memorandum dealing with a number of matters. The first was a claim that the Court had an inherent jurisdiction under the Judicature Act 1908 to award interest to the defendant and, as interest was not dealt with in the judgment, the defendant sought to recall the judgment.

[3] As to the reimbursement of High Court costs, Mr Ponniah relied on his closing submissions in which he had referred to plaintiff's counsel having brought to the Court's attention the costs awarded in the High Court to the plaintiff in respect of a statutory demand issued by the defendant. He stated that the defendant was suffering from financial difficulties, no payment had been received from the plaintiff and the issuing of a statutory demand was a step to try and secure payment. He submitted that this sum would not have been payable if it had not been for the plaintiff's abuse of process by lodging an unmeritorious challenge with the Court, which resulted in a stay of execution and the award of costs against the defendant. He therefore sought a sum equivalent to that of the High Court costs be ordered to be paid by the plaintiff to the defendant as a set off. He expanded upon his closing submissions by contending the challenge had resulted in unnecessary stress and expense to the defendant.

[4] Turning to the costs of the Employment Court challenge, he attached an invoice which showed that a fee of $36,400 plus GST of $4,550, office charges of $178 plus GST of $22.25 and disbursements of $37.74, making a total of $41,187.99, had been incurred by the defendant. Mr Ponniah summarised the attendances since the withdrawal of the defendant's cross-appeal and then listed the

following matters which he submitted were relevant to the Court's consideration of costs:

a) the plaintiff had refused to attend mediation in the Authority;

b) the plaintiff pursued an unmeritorious challenge knowing that the defendant was in financial difficulties and medically unwell;

c) the plaintiff refused to attend a judicial settlement conference as suggested by a Judge;

d) the plaintiff failed to accept an offer of settlement dated 20 February 2009;

e) Mr Cullen, a witness for the plaintiff, in his evidence acknowledged that he and his wife were affronted by the defendant's response to the allegations and sought to teach her a lesson;

f) following the defendant's breakdown on 27 February 2006, Mr and Mrs Cullen had not contacted the defendant to enquire as to her welfare;

g) the plaintiff had continued to pursue a challenge knowing that it would force the defendant to give evidence, instead of relying on the evidence that had been filed in the Authority;

h) the plaintiff had pursued an unmeritorious challenge knowing that the defendant had no funds for her defence or to properly pursue her cross-appeal for stress in the workplace.

[5] Mr Ponniah annexed a copy of the letter of 20 February 2009 which offered to settle the matter by a payment to her of $33,455.90 plus interest, which I understand represented the Authority's awards, plus $5,000 as a contribution towards costs. The letter was expressed to be an open letter and was "made bearing in mind the cost to both parties of the appeal process continuing". The defendant recovered a total of $111,730.50 thereby substantially exceeding the amount for

which she was prepared to settle. Mr Ponniah also sought costs in the Employment Relations Authority and if the Court was to deal with those costs, sought the opportunity to make submissions.

[6] Mr Ponniah filed a supplementary submission on 22 October. He submitted that the Court should regard the High Court costs award as a loss or expense incurred by the defendant as a result of the plaintiff's abuse of process. He substantially repeated his submissions on interest.

[7] As to costs in the Authority, Mr Ponniah submitted there had been two parts to the defendant's claim. One was for "wrongful dismissal", the other for stress in the workplace. The defendant was successful in the wrongful dismissal but not in the stress claim. Mr Ponniah then addressed what might be regarded as the merits of the stress claim to show that it was genuine and the defendant's illness and breakdown were also genuine. He referred in detail to the Authority's determination, the defendant's subsequent cross-appeal, which was withdrawn as a result of the defendant's illness, and submitted that all these matters should be taken into account in considering costs in the Authority. He contended that the only fair approach was to award costs in the Authority in favour of the defendant. He noted the Authority's "tariff based" approach of between $1,000-$3000 per day and claimed an average of $2,000 for each of the four days of the investigation meeting, plus disbursements to be fixed by the Registrar.

[8] Mr Brant, on behalf of the plaintiff, responded by memorandum filed on 30 October 2009. As to the claim for interest, he acknowledged the Employment Court had jurisdiction to award interest, but under clause 14 of Schedule 3 of the Employment Relations Act 2000 (the "Act") and not the Judicature Act. He observed that the remedies sought by the defendant in her statement of defence dated 17 April 2009 did not include interest. The prayer for relief did not include a general claim for such further or other relief as the Court might deem just. I also note that Mr Ponniah's final submissions, seeking extensive remedies on behalf of the defendant, did not include a claim for interest.

[9] Mr Brant submitted that it would be improper to recall the judgment because the Court has adjudicated on the matters on which it was asked to adjudicate and was therefore functus officio, citing *Nakhla v McCarthy*[1]. He also submitted that the Court's substantial award for loss of dignity, injury to feelings and humiliation of $27,000, an increase from the $15,000 awarded by the Authority, properly addressed issues of compensation.

[10] As to the High Court costs, which totalled $3,200, Mr Brant submitted that the plaintiff had been put to the costs and expense of defending an application for liquidation in circumstances where it should not have been brought. The debt was being disputed by the challenge and the monies were being held in a trust account. He submitted that the Employment Court has no jurisdiction to make an award defeating the High Court costs award or to recall that judgment or make any award equivalent to the costs awarded in the High Court. He submitted that there would be a set off by the plaintiff in paying out the ultimate amount it is required to pay to the defendant.

[11] Turning to the costs in the Employment Relations Authority, Mr Brant gave the Court the choice of either dealing with the matter or referring it back to the Authority. Mr Brant preferred to have the Court to deal with the matter. He observed that in her original claim before the Authority the defendant had sought compensation for the balance of her working life of some $1.8 million. This had been abandoned on the morning of 27 March 2007, during the investigation meeting. Her claim for work based stress, which was pursued and which was said to have taken up the substantial part of the investigation, was dismissed and this was not challenged. He therefore submitted that either the plaintiff should receive some costs in the Authority or, alternatively, costs should lie where they fell.

[12] Mr Brant accepted that in the Employment Court, costs followed the event, but contended that the challenge did not require substantial preparation of witness briefs and submissions as these had been prepared for the Authority.

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[1] [1978] 1 NZLR 291 (CA)

[13] In dealing with the factors Mr Ponniah had submitted the Court ought to take into account on the question of costs, Mr Brant drew attention to the two attempts at mediation in the Authority; the second, he alleged, being at the plaintiff's request. He submitted that the other matters, including the attitude the Cullens had to the defendant, their failing to enquire into her welfare and the fact that she might have to give evidence in the Court, could not be taken into account as punishment of the plaintiff and used to inflate costs.

[14] Mr Brant submitted that costs ought not be awarded on an indemnity basis and only a reasonable contribution to the costs actually and reasonably incurred should be ordered. He observed that the purpose of costs is not to punish or express disapproval, which is a function of damages not costs. Whilst accepting the Employment Court is not bound by the High Court scale he submitted that was a useful guide to what would be a reasonable contribution. On a 2B costs award basis he submitted the total would be:

Hearing	$4,800
Statement of Defence	$3,200
Preparation	$9,600
Total	$17,600

[15] Mr Brant submitted that even that figure overstated the costs sought by the defendant because of the work that had previously been done in the Authority.

[16] A telephone conference was convened on 5 November to deal with the defendant's claims. I advised Mr Ponniah that I had not been able to locate any place where the defendant had sought interest in either the pleadings or the final submissions. Mr Ponniah sought the opportunity to go through the material to ascertain whether the issue of interest had been raised and indicated that he would file and serve a memorandum within 14 days dealing with the issue and also indicating whether the defendant required a hearing.

[17] On 19 November the defendant filed a formal application for leave to file an amended statement of defence seeking interest, on the following grounds:

a) the amendment was necessary to determine the real controversy between the parties and did not result in injustice to others.

b) there would be no prejudice to the plaintiff;

c) any prejudice to the plaintiff would be less than the prejudice to the defendant if the amendment was not allowed.

[18] On 19 November Mr Ponniah filed a further memorandum addressing Mr Brant's submissions. Mr Ponniah acknowledged that no interest can be awarded on compensation awarded under s123(1)(c)(i) of the Act. He submitted that the Authority does not have the power to award interest and it was for that reason that interest was not sought in the original claim in the Authority. He submitted that the statement of defence did not require interest to be pleaded. He submitted that, as interest cannot be properly calculated until the date of judgment, it does not have to be pleaded until then. He cited *Nimon & Sons Ltd v Buckley*[2]. He submitted that cross-challenges do not require to have interest pleaded. However he submitted that it was appropriate to file an application for an amendment of the statement of defence to include interest. He cited *Corrections Association of NZ Inc v Chief Executive of the Department of Corrections*[3] where, at paragraph [9], the Court stated:

> Leave to amend proceedings at a late stage of them is a discretionary decision based on whether such an amendment is necessary to determine the real controversy between the parties and does not result in a injustice to the others of them.

[19] Mr Ponniah cited, to similar effect *Smith v Practical Plastics Ltd*[4], a case under the Employment Contracts Act 1991. In that case I stated that the Employment Court Regulations 1991 were similar in effect to the High Court Rules and that interest ought to be specifically pleaded and, in the absence of an application for amendment, could not be awarded. Mr Ponniah submitted that on that basis it was appropriate to amend the claim to include interest.

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[2] (2008) 8 NZELC 99,220
[3] [2004] 2 ERNZ 277
[4] AC 104/09, 9 December 1999

[20] Mr Ponniah submitted that the Court was not functus officio as interest can only be dealt with after a substantive award. He noted that in the *Corrections* case the Court did not consider itself functus officio, notwithstanding that a hearing had been held and it was already determined that there was a breach of the employment contract. Mr Ponniah sought to distinguish *Nakhla*. He submitted that for the Court to be functus officio the judgment in question must be sealed and there had been no sealing of the judgment in this case.

[21] The interest sought was some $17,641 together with $13 per day from 20 November 2009 until the date of full payment.

[22] On 4 December, Mr Brant filed a notice of opposition against the application for leave to file an amended statement of defence. The grounds were that the application was not necessary to determine the real controversy between the parties, the issues had been resolved and there was injustice to the plaintiff. On the same day Mr Brant filed a memorandum addressing the defendant's two applications, both of which were opposed. Mr Brant maintained that all the issues between the parties had been resolved in the judgment, with the exception of costs. Had interest been clearly claimed, the Court would have known at the time that this was a matter to be dealt with, although interest and costs cannot be finally resolved until after the Court has made its decision. Mr Brant contended that if the defendant's applications were refused there ought, in the interests of justice, to be a discount on the costs awarded in the Employment Court. Mr Brant was content to have the matter dealt with on the papers.

[23] On 9 December counsel for the defendant filed a final memorandum in which he accepted that the matters could be dealt with on the papers, contended there was a fundamental difference between an award for distress and humiliation and an award of interest, there was no possibility of a double payment, and set out in some detail the interest calculations which now totalled $13,263.24.

[24] Aside from dealing with the interest calculations, Mr Brant advised the Court on 11 December that he had nothing further to add.

Conclusion

[25] As I stated in my substantive judgment, this case took an unusual course. The plaintiff effectively abandoned its challenge and accepted the evidence filed by way of written briefs by the defendant without requiring the witnesses to be called or insisting upon cross-examination. If the plaintiff had formally discontinued its challenge the defendant would have been left in the difficult situation of not having pursued her cross-challenge and, in the absence of an application for leave to commence a challenge well out of time, would have simply been left with the Authority's awards.

[26] The course the plaintiff took allowed the defendant to pursue and obtain substantially greater awards. It is therefore somewhat difficult to be sympathetic to the defendant's claims that the plaintiff has acted unjustly and has caused her greater losses.

[27] The claim for interest falls into this category. Neither the plaintiff nor the Court had any notice that the defendant was seeking interest and that is why the matter was not dealt with in the judgment. There are no grounds to recall the judgment.

[28] The normal rule is that if a claim is not pleaded and no notice is given there is no basis for the Court to make an award. Because of the unusual course that this case took it was incumbent upon the defendant to ensure that the plaintiff was aware of all aspects of her claims before it made its decision to conduct itself in a way which permitted the defendant to pursue her remedies without opposition. I therefore accept Mr Brant's submissions that it would prejudice the plaintiff if the defendant was allowed to amend her pleadings after the judgment dealing with the remedies.

[29] I confess to some difficulty in following Mr Ponniah's reasons why the defendant did not seek interest in the Authority. He stated it was because the Authority cannot award interest. The Authority has parallel jurisdiction to that of the Court in clause 11 of the second Schedule to the Act. Further, although the

defendant made her claims for increased remedies in her statement of defence, by analogy she was making a claim. Regulation 11(1)(f) of the Employment Court Regulations 2000, dealing with statements of claim, provides for there to be specified "any claim for interest, including the method by which the interest is to be calculated".

[30] Whilst I accept the statement of principle in *Corrections*, the Court there was not functus officio, having reserved leave for the parties, if they could not resolve the problem themselves, to renew the application for a compliance order. There was no such reservation in relation to interest in the present case. Because I had reserved leave in relation to three of the remedies I ordered and costs in the High Court, Authority and in the Employment Court, I do not consider I am functus but that it would be unjust to the plaintiff to grant the defendant the leave she seeks.

[31] As to the matters which Mr Ponniah submitted should be taken into account both in awarding interest and in increasing the award of costs, I accept Mr Brant's submissions that these effectively amounted to attempts to punish the plaintiff, for conduct, which was irrelevant to both the claim for interest and costs. For all these reasons the amendment sought by the defendant and her application for leave to file an amended statement of defence are declined. The Court is therefore, not in a position to award interest.

[32] Turning to the costs in the High Court, a matter which I reserved in my substantive judgment for further submission, I accept Mr Brant's submission that the action of the defendant in pursuing an attempt to liquidate the plaintiff when it was challenging the Authority's determination and had paid monies into a trust account, are factors which would militate against the Court taking any steps to compensate the defendant for the costs award the High Court made against her. Although finally couched as claim for a loss and expense incurred, I am not satisfied that there is any link between that claim and any alleged abuse of process on the part of the plaintiff in having challenged and then decided eventually to abandon the challenge. The plaintiff was exercising a statutory right to challenge. The payment of the awards into a trust account was also relevant on this aspect. I therefore decline to make any further award to compensate the defendant for the costs she decided to incur by

attempting to liquidate the plaintiff in these circumstances. The amount of the High Court costs may be deducted by the plaintiff from the monies payable to the defendant.

[33] I consider, in light of s183 of the Act, it is appropriate to deal with the costs in the Authority. Although the defendant succeeded in her claim for unjustified dismissal and received awards from the Authority, she was entirely unsuccessful in her claims for substantial damages for stress related injuries. The latter claims took up the bulk of time in the Authority. I accept Mr Brant's submissions that an appropriate course is to view both parties as having succeeded and failed in the Authority and therefore costs should lie where they fell in the Authority.

[34] The defendant is entitled to costs in the Court for successfully defending the challenge and succeeding in having the remedies increased. At present the Court's wide jurisdiction as to costs is guided in its exercise by the three Court of Appeal decisions, well known in this area, namely *Victoria University of Wellington v Alton-Lee*[5], *Binnie v Pacific Health Limited*[6] and *Health Waikato v Elmsly*[7].

[35] In *Binnie* the Court was directed to consider, first, whether the costs actually incurred were reasonable and, second, to then determine what would be a reasonable contribution, where the starting point is normally two thirds.

[36] I accept Mr Brant's submission that a guide to the reasonableness of the costs actually incurred is to be found by comparison to the scale of costs in the High Court which represent broadly two-thirds of the rates that New Zealand practitioners in the relevant category currently charge to clients[8]. I would increase that figure to cover the final submissions by another two days, or $3,200 to a total of $20,800. Two thirds of the fee of the $36,400 exclusive of GST and disbursements, amounts to $24,266, which suggests the original fee was a little more than what the scale regards as reasonable.

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[5] [2001] ERNZ 305 (CA)
[6] [2002] 1 ERNZ 438 (CA)
[7] [2004] 1 ERNZ 172 (CA)
[8] *McGechan on Procedure* (looseleaf ed, Brookers) at [HCR14.4.01]

[37] The factors that Mr Ponniah relied on, for indemnity costs do not support such an award with one exception. As I have previously stated they amount to claims that the plaintiff should be punished for its actions. Where those actions have not increased costs they should not result in a higher award than normal.

[38] The one exception is the letter of 20 February 2009. Although it was not contended to be so by Mr Ponniah, on one view that letter could be regarded as a *Calderbank* offer. This would arguably place the burden of the defendant's actual and reasonable solicitor/client costs, following the plaintiff's rejection of the offer on the plaintiff, as the defendant obtained far more at trial.

[39] I consider that the letter does justify an uplifting of the two thirds award of the reasonably incurred costs. Although it is difficult to assess precisely the costs since the rejection of the offer, and because the issue was not expressly argued as a *Calderbank* offer, I have allowed two-thirds of the costs actually incurred, including GST and disbursements, even though that amount exceeds somewhat what would otherwise be reasonable. I start with an award of two-thirds of $41,187, namely $27,458.

[40] From this I deduct the amount of $1,500 to deal with the plaintiff's successful opposition to the defendant's application to amend the pleadings and, as will appear from the narrative above, the plaintiff's costs in the exchange of submissions in which the plaintiff has largely been upheld. I therefore order the plaintiff to pay to the defendant, as a contribution to towards her costs, the total sum of $25,958.

B S Travis
Judge

Judgment signed at 11.30am on 25 January 2010