IN THE EMPLOYMENT COURT
WELLINGTON

WC 1A/08
WRC 4/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	PROGRESSIVE MEATS LIMITED Plaintiff
AND	MEAT & RELATED TRADES WORKERS UNION OF AOTEAROA INC Defendant

Hearing: By memoranda of submissions filed on 6 March and 18 and 29 April 2008

Judgment: 9 May 2008

SUPPLEMENTARY COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] In the substantive judgment in this case and in which the plaintiff was successful, I allowed the company costs and timetabled memoranda from both parties dealing with this question. There is a preliminary issue about the permissible scope of submissions.

[2] Progressive Meats Limited ("Progressive") filed its submissions in support of costs but these were deficient in the sense that no proper detail supporting the claim was provided. When the defendant filed its submissions in reply, as it was entitled to, its counsel pointed out this deficiency and submitted that this should count against the plaintiff. Although no provision had been made for the plaintiff to file further submissions, it purported to do so, addressing two questions.

[3] Where, however, a timetable has been made, it should not be varied (including being added to) by a party unilaterally, at least without leave. The plaintiff did not seek leave, let alone set out why it should be permitted to file further submissions.

[4] In these circumstances I propose to permit the plaintiff to be heard on one element of its additional submissions but not the other. After the plaintiff had made its original submissions, a judgment was released by this Court that affects questions in this case. It was relied on by the defendant. It is only fair to permit the plaintiff an opportunity to make submissions on the effect of that judgment even though leave has not been sought.

[5] However, I do not think it is fair to allow the plaintiff to now seek to bolster its case by providing detail of the sort that it should have in the first place. This is a long-standing and well known requirement of applicants for costs in this Court and I consider it would be unfair to the defendant to allow the plaintiff a second bite at this cherry. Now to the merits of the claim for costs.

[6] This was a challenge heard in two parts. It was a dispute about the application to particular circumstances of a provision of the Holidays Act 2003. The dispute was first referred to a labour inspector who made a determination in the company's favour. The union challenged this in the Employment Relations Authority which came to a different conclusion from the inspector, finding in the union's favour. The company challenged that determination and, as a preliminary point, argued that the union had not been entitled to bring its dispute to the Employment Relations Authority once that had been determined by the inspector. That preliminary question was considered on the papers by a full Court that found against the plaintiff. I then heard the substantive challenge at a hearing occupying less than a full day in Napier, but which included relevant evidence and submissions. The Authority's determination was found to have been wrong and was set aside. So the plaintiff was successful.

[7] The plaintiff says its actual costs of legal representation were $13,549.51 and that it incurred disbursements of $708.56 covering airfares, accommodation and

incidental costs. These costs include ones relating to the preliminary issue determined separately by the full Court.

[8] Mr Cleary, counsel for the plaintiff, makes the point that his client was not charged for the time of junior counsel. He says the Court should find that the actual costs incurred were reasonable and the company should have two-thirds of these, rounded down to $9,000. The plaintiff submits there are no factors tending to justify any increase or decrease from that level. So, the plaintiff says, it should have costs and disbursements of $9,708.56.

[9] The defendant does not oppose any award at all but says that in all the circumstances a contribution to the plaintiff's costs of $1,500 would be reasonable.

[10] I accept the defendant's submissions that this was a genuine dispute and, indeed, this is not contested by the plaintiff. I accept also that its decision has implications, not only for the immediate parties but also for the meat industry generally and even, perhaps, seasonal operations. I agree that the plaintiff should not be entitled to its costs in respect of that part of the dispute in which it was unsuccessful and was dealt with by the full Court.

[11] I accept, also, that for the reasons set out in the recent decision of *Maritime Union of New Zealand Inc v TLNZ Ltd* AC 7/08, 10 April 2008, the starting point for determining a reasonable contribution to costs is not two-thirds of costs actually and reasonably incurred. For this reason, judgments such as *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 and *Health Waikato Limited v Elmsly* [2004] 1 ERNZ 172 in the Court of Appeal can be distinguished as having involved different sorts of claims by individual employees against their employers. This, by contrast, is in the nature of a dispute between a union and an employer, resolution of which required intervention by the Court and will benefit more than the immediate parties.

[12] Accepting, also, Mr Mitchell's submissions about the dearth of supporting material justifying the actual fees incurred by the plaintiff, I nevertheless consider that a reasonable contribution to a reasonable fee for the plaintiff, reflecting its degree of success in the litigation, would be $3,000. That is the sum to which the

plaintiff is entitled as a contribution to legal costs. Upon the Registrar being satisfied that the disbursements claimed were reasonably incurred, the plaintiff may also have its disbursements up to a maximum of $708.56.

GL Colgan
Chief Judge

Judgment signed at 1 pm on Friday 9 May 2008