



[5] Amcor, through counsel, filed and served a notice of opposition to the application for leave. In March 2006 I directed that the application for leave be set down as a preliminary question given the substantial delay in its filing. Amcor filed and served an affidavit in opposition to the application for leave by its manufacturing manager. The Registry then set the application for leave down for hearing in early June 2006. That application was withdrawn on the date scheduled for its hearing.

[6] Amcor sought costs in a memorandum filed on 14 February 2007. It had incurred the costs of preparation to oppose the application for leave. Amcor says that Mr Talakai's challenge was entirely devoid of merit and was so found by the Employment Relations Authority. The delay in seeking leave to file the challenge (43 days out of time) was gross and was not adequately explained. Amcor relies on the judgment in this Court in *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38, in which it was held that where a losing party has brought an unmeritorious claim and has persisted in it after clear warnings given sufficiently in advance, further prosecution of the claim can involve the opposite party in greater additional expense for which it should be compensated. In this case there was evidence of written advice from Mr Talakai's union's solicitor immediately after unsuccessful mediation in November 2003 that he would be unlikely to succeed and recommending acceptance of the employer's offer of settlement.

[7] Amcor's bills of costs are attached to its submissions and although these do not coincide precisely with the period from the service of the application for leave upon the company, and do not detail the work performed but simply set out the number of hours that a lawyer was engaged, I have sufficient information to determine this claim.

[8] The three bills of costs cover accident compensation matters for which a deduction will have to be made. There is no breakdown of the division between employment and ACC matters and in these circumstances I propose to treat them as contributing equally to the solicitor's account. This results in a figure of about \$1,500 for Amcor's legal expenses in connection with this challenge, which seems reasonable for what was done by it leading up to a defended application for leave abandoned on the day of hearing.

[9] Opposing Amcor's application for costs, counsel for Mr Talakai submits that the costs claimed are "*extraordinarily high for a straightforward matter*". Mr Pa'u submits that there was nothing unduly complicated about the matter which would have required extensive preparation. Counsel points out that the Employment Relations Authority has recently made an order of costs against Mr Talakai of \$1,500 which is a standard award for an investigation meeting in that forum. Mr Pa'u submits that Mr Talakai's claim was abandoned only when he was refused legal aid, having been unemployed at the time the challenge was made. Finally, Mr Pa'u submits that if any order was to be made, \$500 would be appropriate.

[10] In a case such as this, the Court has considerable discretion to award costs in a range from nil to full indemnity although the notional starting point is usually two-thirds of costs actually and reasonably incurred. I consider that the defendant's legal costs of \$1,500 for this matter were reasonably incurred. I am not persuaded that there should be either any reduction or uplift from the two-thirds starting point. The Employment Relations Authority was not persuaded to award indemnity costs and I fix the amount payable by Mr Talakai to Amcor for proceedings in this Court at \$1,000.

G L Colgan  
Chief Judge

Judgment signed at 11.30 am on Monday 26 March 2007