IN THE EMPLOYMENT COURT
WELLINGTON

WC 9A/08

WRC 14/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION First Plaintiff
AND	BRUCE IRVINE Second Plaintiff
AND	GARY LUFF Third Plaintiff
AND	THE NEW ZEALAND FIRE SERVICE COMMISSION First Defendant
AND	ROSS DITMER Second Defendant
AND	MARK BOERE Third Defendant

WRC 15/08

AND BETWEEN	THE NEW ZEALAND CHIEF AND DEPUTY CHIEF FIRE OFFICERS' SOCIETY Plaintiff
AND	THE NEW ZEALAND FIRE SERVICE COMMISSION First Defendant
AND	ROSS DITMER Second Defendant
AND	MARK BOERE Third Defendant

Hearing: Submissions received 19 June, 20 June, 11 July, 15 July, 19 August, 22 August, 25 August and 27 August 2008

Appearances: Peter Cranney, Counsel for Plaintiffs in WRC 14/08
B A Corkhill QC, Counsel for plaintiff in WRC 15/08
C H Toogood QC and Paul McBride, Counsel for First Defendants
Andrew Marsh, Counsel for Second and Third Defendants

Judgment: 3 October 2008

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] I gave my substantive judgment in these two matters on 29 May 2008 (WC 9/08). As the matters before the Court were challenges to an interlocutory determination of the Employment Relations Authority and the substantive proceeding remained before the Authority, the proceedings before the Court are concluded and it is appropriate to fix costs.

[2] After receiving initial memoranda from counsel, I issued a minute on 7 August 2008. In that minute I said:

> *[1] Following my judgment dated 29 May 2008, counsel for all parties have filed memoranda relating to costs and disbursements.*
>
> *[2] In short, the New Zealand Fire Service Commission seeks 80% of costs amounting to $39,550.00 and full reimbursement of disbursements totalling $1,130.70*
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> *[3] An issue I must have regard to is the extent to which those costs were actually and reasonably incurred. On the face of it, the amount of costs said to have been incurred is very large, particularly in light of Mr McBride's entirely proper statement that an award of costs is sought only in respect of the proceedings before the Court.*
>
> *[4] There is very little information provided in counsel's memoranda to assist me in determining the extent to which those costs were reasonable. While it would be open to me to simply fix a figure which I regard as reasonable, that would be potentially unfair to the Commission. Through counsel, it ought to have an opportunity to justify its claim more fully.*

[3] In the same minute I also made the observation that, to a much lesser extent, there were similar issues with the submissions made on behalf of Mr Ditmer and Mr Boere.

[4] A further issue was that, in my judgment of 29 May 2008, I asked counsel to discuss the disposition of $3,000 which had been paid into Court on account of possible damages and to either advise the Registrar of any agreement or deal with the matter in their submissions. Counsel had done neither.

[5] I gave counsel an opportunity to file further memoranda to address these issues. They have now all done so.

[6] Clause 19(1) of Schedule 3 of the Employment Relations Act 2000 provides that:

> *(1) The Court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the Court thinks reasonable.*

[7] This confers a broad discretion on the Court but, as with all such discretions, it must be exercised judicially and in accordance with principle. The key principles applicable to the Court's discretion to award costs have been set out by the Court of Appeal in three very well known decisions: *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305, *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.

[8] The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel or an advocate. A useful starting point is two-thirds of the costs actually and reasonably incurred by that party but that proportion may be adjusted up or down according to the circumstances of the case and the manner in which it was conducted. Ability to pay is also a factor to be taken into account.

[9] The successful parties in this case were the defendants and so the focus must be on the costs of representation they incurred. In this context, the costs to be taken into account are those for which invoices have been rendered and which have either

been paid or are expected to be paid. Claims for costs cannot properly be based on calculations of what might be charged or on pro forma invoices.

[10] In this case, the material provided by counsel in their memoranda establishes to my satisfaction what costs the defendants actually incurred. The Fire Service Commission's costs, excluding GST, totalled $39,550. This comprised costs relating to solicitors and junior counsel of $9,050 in relation to WRC 14/08 and $7,000 in relation to WRC 15/08 together with senior counsel's fee of $23,500 relating to both matters. The costs incurred by Mr Ditmer and Mr Boere jointly were $7,000 plus GST in relation to both matters.

[11] Applying the principles set out above, I must now decide the extent to which those costs actually incurred were reasonable. I deal first with the Fire Service Commission.

The Fire Service Commission

[12] The issues before the Court had already been the subject of a hearing by the Authority. The costs incurred by the Commission for representation before the Authority totalled $24,100 plus GST. In light of that, the costs incurred by the Commission in relation to the proceedings before the Court were surprisingly high and therefore required a good deal of explanation and justification. Mr McBride's original memoranda fell well short of doing either. There was only a general description of the work done. It was said that 43.5 hours of work were done in relation to WRC 14/08 and 27 hours in relation to WRC 15/08 but there was no indication of how much time was spent in carrying out any particular aspect of the work. Although the memoranda were relatively lengthy, they contained a great deal of rhetoric and little information. It was for this reason that I identified the issue in my minute of 7 August 2008 and gave Mr McBride a further opportunity to provide information which would enable me to assess the extent to which the costs incurred were reasonable.

[13] In his subsequent memorandum, Mr McBride provided copies of the invoices rendered to the Commission. By way of further information about the work done, Mr McBride noted:

a) The two proceedings required the Commission to plead to each separately.

b) The union adduced further evidence which required two additional affidavits to be prepared on behalf of the Commission.

c) The proceedings involved questions of jurisdiction as well as of fact and therefore required legal submissions to be prepared.

d) He and Mr Ballara devoted 70.5 hours' work to the matter between Sunday 24 May and Friday 30 May 2008. This included the hearing on 29 May 2008 which took some 7 hours.

e) The rate charged per hour was $280 plus GST for Mr McBride and $220 plus GST for Mr Ballara.

f) In addition to the time spent on the matter by Mr McBride and Mr Ballara, Mr Toogood devoted a further 34 hours to the matter over a period of 4 days.

[14] The issues involved in this matter were undoubtedly important to the Commission. The proceedings sought to delay and/or invalidate appointments to relatively senior positions. I accept, therefore, that the Commission was justified in instructing counsel to prepare and present a thorough case on its behalf. I also accept that the Commission was justified in retaining experienced counsel.

[15] This was, however, a case which had already been prepared for and presented to the Authority. A great deal of the preliminary work necessary had been done in the course of the proceedings before the Authority. That included most of the affidavits and much of the legal research. Further, as Mr Cranney observed, the plaintiffs elected hearings de novo and, as a result the statements of claim and

statements of defence were not complex. Only one additional issue was before the Court which had not been before the Authority.

[16] Having heard and decided the matter, I have a good understanding of the issues and of the submissions presented by the parties. I am also aware from the file of the nature and extent of additional documents prepared after the matter moved from the Authority to the Court. Against that background, I am not persuaded by the information provided in memoranda filed on behalf of the Commission that 104.5 hours of work was reasonably required to advise and represent the Commission in the proceedings before the Court over and above the 80 or more hours of work done when the proceedings were before the Authority. On the information available, I am not persuaded that any more than half that time was reasonably required and possibly less.

[17] In the absence of the detailed information necessary to systematically assess the reasonableness of the costs actually incurred by the Commission, an alternative means of determining an appropriate award of costs is to apply the High Court Rules. Given the significance of the issues, both to the parties and potentially to other members of the fire service, the proceedings may be regarded as category 3 for the purposes of rule 48. The proceedings certainly required counsel with special skill and experience in the Employment Court.

[18] The two proceedings were closely connected and were heard together. For the purposes of rule 48B, therefore, the determination of reasonable time can be a single process taking into account both proceedings. On that basis, an appropriate allowance of time would be that in band B of Schedule 3. Although there were substantive proceedings before the Authority, the subject of the challenges was only the application for interim relief. The appropriate time allocations in Schedule 3 are therefore those for interlocutory applications. On that basis, the times allowed by the Schedule for the relevant events would be:

Preparing and filing statements of defence and further affidavits	0.6
Appearance at telephone conference	0.2

Preparation for hearing	1.0
Appearance	1.0
Allowance for second counsel	0.5
Total	3.3 days

[19] To reflect the time reasonably required to carry out the work actually involved in this case, there should be a modest increase in the time for preparing further affidavits and a significant increase in the time allowed for preparation for hearing. In total, the time allowed should be increased by 1 day. That would make a total of 4.3 days which, at the rate for category 3 of $2,370 per day, would suggest an award of costs of $10,191.

[20] The rates provided for in the High Court Rules are set at two-thirds of the rate considered reasonable for the work in question. Mr McBride submits, however, that the circumstances of this case warrant an award of costs greater than two-thirds of costs actually and reasonably incurred. On behalf of the Commission, he seeks an award of 80 percent of those costs. In support of this position, Mr McBride submits that the plaintiffs actually knew, or ought to have known, that their challenge was unmeritorious. Where a plaintiff persists in pursuing a case which is plainly hopeless or is vexatious, that may justify a greater than usual award of costs. Otherwise, the Court should observe the principle that the purpose of an award of costs is to compensate the successful party, not to punish the unsuccessful party. In my view, this case was responsibly brought. It was neither plainly hopeless nor vexatious. I therefore do not accept Mr McBride's submission that a greater award of costs should be made for this reason. No other reason to award a higher than normal rate was suggested by counsel and I see none.

[21] Rounding up the figure produced by applying the High Court Rules, I conclude that the Commission should receive a contribution to its costs of $10,200.

[22] That sum needs to be apportioned as between the union in WRC 14/08 and the society in WRC 15/08. In his memorandum, Mr Cranney submitted on behalf of the union that the awards of costs made should be payable equally by the union and the society. In his memorandum, Mr Corkill adopted this part of Mr Cranney's

submissions. The plaintiffs being agreed on the point, I accept that submission. There will be orders that the union and the society each pay the Commission $5,100 by way of costs.

Mr Ditmer and Mr Boere

[23] The position of Mr Ditmer and Mr Boere is quite different to that of the Commission. They were not parties to the proceedings before the Authority and were added as defendants only at my direction. It was reasonable that they be separately advised and represented as their interests were not identical to those of the Commission. Their counsel, Mr Marsh, had to become familiar with the facts and the issues entirely in the context of the proceedings before the Court.

[24] In his second memorandum, Mr Marsh sets out a summary of the specific work he did on behalf of his clients, including the time devoted to each aspect of that work. While it could have been more detailed, this is an appropriate and helpful way of providing the Court with the sort of information necessary to assess in a structured way the extent to which costs were reasonably incurred.

[25] What this information establishes is that Mr Marsh did approximately 20 hours of work advising and representing Mr Ditmer and Mr Boere. The actual costs incurred amounted to $7,000 plus GST, suggesting an hourly rate of $350 plus GST. This is a higher rate than is reasonably justifiable for the work in question. On the other hand, the time spent was relatively modest for the amount and quality of the work done. Overall, I find the costs incurred by Mr Ditmer and Mr Boere were reasonably incurred to the extent of $6,000.

[26] Mr Marsh also submits that an award of 80 percent of the costs actually incurred should be made. He does so on grounds similar to those relied on by Mr McBride. I reject this submission for the same reasons as I rejected Mr McBride's submission to like effect.

[27] Although it was not the subject of a submission by Mr Marsh, I have considered whether the fact that Mr Ditmer and Mr Boere were joined as parties by

order of the Court and no remedies were sought from them is a factor I should take into account. It seems to me that it is not. The purpose of joining them as parties was to give them an opportunity to be heard and to ensure that any orders the Court might make which affected them were binding on them. It would have been open to them to have taken no part in the hearing and simply abided the decision of the Court. Had they done so, they would not have incurred costs and would not have been exposed to an order for costs had the plaintiffs been successful. They chose to participate in the hearing and to incur costs in doing so. Having made that choice, they should be treated in the same way as other parties to the litigation.

[28] I find that Mr Ditmer and Mr Boere should receive a contribution of two-thirds of the costs they have reasonably incurred. That is $4,000. The plaintiffs were also agreed that the award in favour of Mr Ditmer and Mr Boere should be apportioned equally between them. There will therefore be orders that the union and the society each pay $2,000 by way of costs to Mr Ditmer and Mr Boere jointly.

Disbursements

[29] On behalf of the Commission, Mr McBride seeks an award for disbursements totalling $1,130.70. This is said to comprise Mr Toogood's travel expenses of $685.50 together with $445.20 for photocopying, taxis, telephone and fax charges and unspecified *"office disbursements"*. In the invoices rendered to the Commission, however, the sum recorded for disbursements other than travel is only $145.20. A party cannot be reimbursed for a cost greater than it has actually incurred. The Commission therefore cannot claim more than $830.70.

[30] I am not satisfied that all of the amounts claimed as disbursements may properly be claimed. When the matter came before the Court, the Commission was already represented by very experienced and capable counsel in Mr McBride. While the Commission was entitled to have senior counsel of its choice instructed to represent it as well, the cost of counsel travelling from and to Auckland ought not to be visited on the plaintiffs. I therefore decline to order reimbursement of Mr Toogood's travel costs.

[31] I am also concerned about a claim to recover as disbursements what are generally regarded as normal office overheads, such as telephone, fax and photocopying costs. Such claims should be limited to disbursements in the true sense of the term, involving the payment of money to a third party. With very few exceptions, each such claim should be able to be supported by a GST invoice if required.

[32] In this case, the only disbursements in that sense which were incurred and paid by the Commission were a courier fee of $13.50 and taxi fares of $62.90. The Commission should certainly be reimbursed for the courier fee but, in the absence of explanation, it is difficult to accept that taxi fares are a proper disbursement. The necessary travel costs of witnesses and, in proper cases, visiting counsel may be recoverable but not the costs of counsel or parties travelling within the city in which they practise or live. I decline to allow the claim for taxi fares.

[33] The union and the society are each to pay the Commission $6.75 for disbursements.

[34] On behalf of Mr Ditmer and Mr Boere, Mr Marsh seeks reimbursement of his airfare to and from the hearing in Wellington. As they live in Canterbury, it was reasonable that Mr Ditmer and Mr Boere engage local counsel. It was therefore necessary that Mr Marsh travel to the hearing. The union and the society are each to pay Mr Ditmer and Mr Boere $242 for disbursements.

Money paid into Court

[35] By order of the Authority, the union paid $3,000 into Court on account of damages which might be awarded against it resulting from the order preventing Mr Ditmer and Mr Boere taking up their appointments until the challenge was decided. In their second memoranda, Mr Cranney and Mr Marsh addressed what should be done with that money.

[36] It appears to be common ground that Mr Boere suffered no damage because he was not ready to take up his appointment immediately. On the other hand, Mr

Ditmer was ready to start work on 26 May 2008 and was prevented from doing so by the Authority's order. It is said that he has lost income as a result.

[37] There has been correspondence between counsel in an effort to resolve the payment of damages to Mr Ditmer. He wishes to be reimbursed for lost income but is unwilling to openly disclose his salary. On his behalf, Mr Marsh has sought agreement that an appropriate amount be determined by the Court and paid to Mr Ditmer without revealing the details to the union. This is unacceptable to the union.

[38] In the absence of agreement, the matter can only be resolved by order of the Court. If Mr Ditmer wishes to seek an award of damages, a suitable application, together with an affidavit in support, should be filed and served without further delay. If such an application is not received by the Court on or before Friday 24 October 2008, the money will be disbursed by the Registrar back to the union.

Summary of orders

[39] In summary, the following orders are made:

a) The New Zealand Professional Firefighters Union and the New Zealand Chief and Deputy Chief Fire Officers' Society are each ordered to pay $5,100 for costs and $6.75 for disbursements to the New Zealand Fire Service Commission.

b) The New Zealand Professional Firefighters Union and the New Zealand Chief and Deputy Chief Fire Officers' Society are each ordered to pay $2,000 for costs and $142 for disbursements to Mr Ditmer and Mr Boere jointly.

c) Mr Ditmer has until 4pm on Friday 24 October 2008 to file and serve any application he may wish to make for disposition of the $3,000 currently held by the Court on account of damages. If no application is made by that time, the Registrar is directed to repay the money,

together with all accumulated interest, to the New Zealand Professional Firefighters Union.

Comment

[40] As with any other claim, the responsibility to provide the Court with the information necessary to evaluate and decide a claim for costs lies with the party making that claim. In this case, the defendants were given two opportunities to provide that information but only the second and third defendants responded sufficiently. Had detailed information been provided on behalf of the first defendant, the order made may well have been different.

[41] I have made no order for costs against Mr Irvine or Mr Luff. Although they were unsuccessful parties, their position was identical to that of their union and they were not represented by separate counsel. Had the plaintiffs in WRC 14/08 been successful, I would not have made a separate award of costs in their favour.

A A Couch
Judge

Judgment signed at 3.00pm on 3 October 2008