IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 13
ARC 95/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CARTER HOLT HARVEY LIMITED Plaintiff
AND	EASTERN BAYS INDEPENDENT INDUSTRIAL WORKERS UNION Defendant
AND	JAMES MOENGAROA, KEVIN OHLSON, DAVID MOKOMOKO, BENJAMIN POMARE AND GLENN TAIT

Hearing: by memoranda filed on 30 November, 20 and 22 December 2010

Judgment: 21 February 2011

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The plaintiff has challenged a costs determination[1] of the Employment Relations Authority (the Authority) under which the Authority made an award of costs in favour of the defendants in the amount of $21,000. The plaintiff submits that the award of costs should have been in the sum of $9,000.

[2] The defendants seek to uphold the Authority's award and seek an additional sum of $890 on account of disbursements. They also suggest an alternative approach which would result in a slightly reduced figure.

[1] AA 282A/10, 23 August 2010.

[3] Prior to the Authority investigation meeting, the defendants had applied for interim reinstatement, which was declined. The defendants accept that as they were unsuccessful in seeking interim reinstatement, the plaintiff is entitled to a costs contribution in respect of that application which occupied a one-day hearing.

[4] At a telephone conference convened on 15 November 2010 before Chief Judge Colgan, Mr Erickson on behalf of the plaintiff and Ms Jones on behalf of the defendants agreed that the challenge would be dealt with on the papers without a hearing.

The substantive investigation meeting before the Authority

[5] In brief, at all material times the second defendants were saw doctors employed by the plaintiff company at its Kawerau Mill under an expired collective agreement. They were members of the first defendant Union. The Union initiated bargaining for a replacement collective agreement but in November 2008, sometime after bargaining had commenced, the company advised the Union that it was considering a restructure which would affect the work carried out by the saw doctors. Bargaining was then put on hold and a consultation process began regarding the possibility of fully outsourcing the saw doctor functions.

[6] An important side issue arose as to whether the employment protection provisions in the expired collective agreement, which governed the terms and conditions of employment of the second defendants, complied with the relevant provisions of the Employment Relations Act 2000 (the Act) and, if not, whether the company was free to proceed with its restructuring proposals. That issue was removed to the Employment Court for decision. The company undertook to delay implementing the outsourcing of the saw doctor functions pending the decision of the Employment Court. The subsequent decision[2] held that the employment protection provisions in the collective were not statute-compliant but that did not prevent the company from going ahead with the restructuring. The saw doctor

---

[2] *Eastern Bay Independent Industrial Workers Union Inc v Carter Hold Harvey Ltd* [2009] ERNZ 334.

positions were then disestablished but each of the saw doctors subsequently obtained other employment.

[7] Before the Authority, the second defendants claimed that they had been unjustifiably dismissed by the company on the grounds of redundancy and that the company had breached certain express and implied terms of the employment agreement. They sought various relief including compensation for economic and non-economic loss, payments for unjustified disadvantage, declarations and penalties. In its determination dated 14 June 2010,[3] the Authority concluded that the redundancies were genuine but the process by which the dismissals were effected was so severely flawed that the dismissals were unjustified. The second defendants were awarded lost remuneration in an amount to be resolved between the parties and compensation for non-economic loss in the sum of $12,000 each. The Authority declined to award any penalties.

Submissions before the Authority

[8] Before both this Court and the Authority, counsel were in agreement that the principles applicable to the exercise of the Authority's discretion in relation to costs are those set out by the Full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.[4]

[9] In her submissions on costs before the Authority, counsel for the defendants argued that this was not an appropriate case to adopt the usual daily tariff approach. Rather, an award should be made of full solicitor client costs or "one close to it". The defendants' legal costs were said to be $39,500 exclusive of GST and disbursements of $890. It was submitted that the costs were reasonably incurred in the conduct of the litigation given the complexity of the issues involved and the fact that the proceedings related to the union and individual employees who each had unique claims. The investigation meeting was said to have taken three days (spread over a week). Against that background, counsel submitted:

> The Applicants submit that in the circumstances it is appropriate to award 66% of the reasonable costs actually incurred (i.e. 66% of $39,500). This would result in an award of $26,000 plus GST and disbursements. Such an

[3] AA 282/10, 14 June 2010.
[4] [2005] ERNZ 808.

> award would be consistent with the established principles in relation to costs and would also ensure the award was not illusory.

[10] As an alternative, the defendants submitted that if the Authority considered that the tariff based approach was appropriate then costs should be assessed on the basis of $5,000 per day. It was contended that in addition to the three days hearing time, a further one day should be added to cover attendances prior to the investigation meeting "including disclosure, teleconferences, venue, compiling the bundle" and a further day for the "drafting of detailed and lengthy submissions" (making five days in total). On that basis, the award sought was $25,000 plus GST plus disbursements.

[11] On either approach, the defendants acknowledged that the plaintiff was entitled to costs in respect of the unsuccessful interim reinstatement application and they submitted that an appropriate sum in this regard to be offset against any final award of costs was $5,000.

[12] In his submission before the Authority, counsel for the plaintiff argued that there was no reason for the Authority to depart from the "usual daily tariff of $3,000 per day of hearing". On this basis, he submitted that an appropriate award of costs "would be $9,000, based on $3,000 per hearing day (four), with a reduction of one hearing day to reflect the unsuccessful application for interim reinstatement."

The Authority's award on costs

[13] The Authority acknowledged that the criteria for awards of costs was that set out in *Da Cruz*. It also accepted that the matter was complex and involved extensive documentation. The Authority referred to the two approaches suggested by counsel for the defendants and then proceeded to apply what counsel for the plaintiff has referred to as the "*Binnie* analysis", a reference to the approach sanctioned by the Court of Appeal in *Binnie v Pacific Health Ltd*.[5]

[14] Without making any express reference to the *Binnie* decision, the Authority rejected the daily tariff approach and proceeded to fix an award in the sum of

---

[5] [2002] 1 ERNZ 438.

$21,000 based upon 66 per cent of the fee actually charged to the defendants of $39,500 less a discount of $5,000 on account of the plaintiff's successful opposition to the interim reinstatement application.

[15] The actual wording of the award itself is somewhat confusing. The final two paragraphs read as follows:

> [15] Given the complexity of this case, and the extent of the preparation required, an award higher than that which would normally be given, is appropriate. The respondent is to pay the applicants the sum of $21,000 plus GST.
>
> [16] The applicant (sic) is to pay the respondent (sic) the sum of $21,000 in costs. In accordance with [reference to other cases], I will not allow GST as part of the costs of award.

No reference was made to the applicants' claim for disbursements of $890.

Submissions in this Court

[16] The thrust of Mr Erickson's submissions on behalf of the plaintiff was that the Authority had "erred in terms of applying the *Binnie* approach to costs rather than calculating a proper award on the basis of the *Da Cruz* principles." Counsel submitted:

> 5.7. It is submitted that in adopting this approach [the *Binnie* approach], the Authority Member has erred in law. The approach adopted fails to take into account the guidelines set out in *Da Cruz*. In particular, it has not taken into account this Court's guidance to the effect that costs [awards] should be modest, which formed the basis for its finding that the *Binnie* approach was not a proper one.
>
> 5.8. It is submitted that the Authority should instead have adopted the approach approved in *Da Cruz* and applied consistently since then of awarding costs based on a daily tariff. In particular, in the absence of a valid *Calderbank* offer and any behaviour on the part of the plaintiff that unnecessarily caused the parties to incur costs, the Authority should have adopted a starting point of $3,000 per day of investigation meeting, resulting in an award of $12,000, subject to reduction to account for the plaintiff's successful opposition to the interim reinstatement application.

[17] Mr Erickson accepted that the complexity of a particular case is a matter that can properly be taken into account in setting costs but he submitted that there was nothing unduly complicated about the present case. He submitted that no evidence

had been provided by the defendants in support of the submissions that a fee of $39,500 had been charged and that the amount in question was reasonable. He produced a set of statistics compiled by the Department of Labour which he claimed showed that, between 1 January 2009 and 30 June 2010, out of a total of 318 costs determinations made by the Authority only 11 awards were for $10,000 or greater.

[18] Counsel for the defendants provided copies of invoices rendered to the clients showing the actual amounts charged and submitted, given a number of factors itemised in her submissions, that the amount of $39,500 was a "reasonable starting point for the Authority to work from ...". Counsel went on to submit:

> 3.11 In the circumstances it was appropriate for the Authority to depart from the usual tariff approach and to award an amount of 66% of the reasonable costs incurred to ensure that the award was not illusory.
>
> 3.12 An approach to costs based on the actual costs incurred has been adopted by the Authority previously, especially where the setting of costs by reference to a notional daily rate at a modest level would visit a considerable injustice on the winning party.[6]
>
> 3.13 In the present case, setting costs by reference to a notional daily rate at a modest level would visit a considerable injustice on the Defendants."

[19] In the alternative, counsel for the defendants submitted that if a tariff based approach to the calculation of costs was adopted then, for the reasons touched upon in [9] above and other factors detailed in her submissions, a tariff of $5,000 per day would be appropriate. For reasons similar to those referred to in [10] above, counsel contended that the daily tariff of $5,000 should be applied to a total of five days "being 3 1/2 days of hearing and 1 1/2 days allowance for preparation and drafting submissions".

[20] In his submissions in reply, Mr Erickson accepted that the Authority has the discretion to depart from the daily tariff approach where appropriate but he submitted that there must be very good reason for doing so. He submitted that a departure from the daily tariff approach was not warranted on the grounds of any purported injustice. In relation to the claim for disbursements, Mr Erickson

---

[6] *Heffernan v Heffernan* CA 59A/06, 23 June 2006 and *Monk v Lotteries Commission* WA 21/06, 10 February 2006.

contended that as the Authority had made no order in relation to disbursements, that item could not form part of the current challenge.

[21] The Authority's power to award costs is governed by cl 15, sch 2 of the Act, which provides as follows:

> **15 Power to award costs**
>
> (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
>
> (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[22] As noted above, both counsel readily accepted the principles applicable to awards of costs in the Authority as set out in *Da Cruz*. Where they parted, however, was in relation to the application of the 66 per cent guideline approach recognised in *Binnie*. Counsel for the defendants submitted that it was open to the Authority to depart from the usual tariff approach and to award an amount based on 66 per cent of the reasonable costs incurred whereas the plaintiff submitted that this Court in *Da Cruz* had confirmed that the *Binnie* approach "was not a proper one" for investigations in the Authority.

[23] Relevantly, what the Full Court stated in *Da Cruz* in relation to the application of the *Binnie* principles to awards of costs in the Authority appears in the judgment immediately following on from its list of recognised general principles:

> [45] We hold that these principles [the general principles] are appropriate to the Authority and consistent with its functions and powers. They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. While these general principles are applicable also to the Court, the Authority is not bound by the *Binnie* principles which extend the range of costs which the Court may award beyond what could reasonably be labelled "modest."
>
> [46] We find there is nothing wrong in principle with the Authority's tariff based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case. For example, even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay or, on the other hand, the daily rate may not adequately reflect the conduct of the parties or the preparation required in a particularly complex matter. The danger that tariffs may be unduly rigid can

> be avoided by the adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.

[24] Earlier, the judgment dealt with the different roles and functions of the Court and the Authority and noted:

> [39] There is sufficient difference between the two institutions to warrant the Authority taking a different approach to the question of costs particularly because it, rather than the parties, conducts the investigation of the employment relationship problem brought to it.
>
> [40] In deciding costs, the Court has regard to costs reasonably incurred for the purposes of the Court hearing which is entirely adversarial in nature and, subject to judicial control, is conducted by and in a manner dictated by the parties. On the other hand, given its unique role in controlling its own investigations, the Authority must judge the reasonableness of the parties' costs in the light of whichever procedure has been adopted. It is apparent that the Authority's procedure may range from the formal to the informal and from at least part adversarial to inquisitorial and therefore the nature of the particular investigation meeting must be a relevant consideration to the exercise of the discretion to award costs.
>
> [41] Given this, we are in agreement with Judge Travis in *Harwood v Next Homes Ltd,*[7] that the legislative intent is that such considerations that are relevant to proceedings before the Court are not relevant to proceedings before the Authority. The unique nature of the Authority and its proceedings mean that parties to investigation meetings should not have the same expectations about procedure and costs as they have of the Court.
>
> [42] We conclude that, when the Court is considering a challenge to the Authority's award, it should not apply the same criteria as which applies to costs of the proceedings before the Court.

[25] It seems to me that what the Full Court is saying in that passage cited from *Da Cruz* is not only that the Authority is not bound by the *Binnie* principles but, in general, those principles are inappropriate to costs awards in the Authority as they were expounded in relation to costs incurred in the context of adversarial litigation proceedings in the Court, whereas an investigation meeting conducted by the Authority involves quite different considerations. For that reason, the Full Court proceeded to endorse the recognised daily tariff approach which proceeds on the basis of an accepted starting daily rate figure which can then be adjusted up or down, if necessary, "in a principled way" to meet the justice of the case.

---

[7] [2003] 2 ERNZ 433.

[26] Turning to the daily tariff approach, the issues to be determined are the appropriate tariff and the number of relevant days. Both factors are in issue in the present case.

[27] One of the firm findings made by the Authority Member was that the matter before her was complex, involving extensive documentation that required detailed analysis. The investigation involved six applicants altogether and both the applicants and the respondent were each represented by two counsel. Counsel for the plaintiff now challenges the finding that the investigation was complex.

[28] One of the conclusions in *Da Cruz* was that:

> The role of the Court on a challenge to costs is to stand in the shoes of the Authority and to assess de novo the evidence relating to the costs award in that forum in order to judge what is an appropriate award in light of all considerations which are relevant to the Authority."[8]

There is some difficulty, however, in applying that approach in a case like the present where the challenge has been dealt with on the papers without the hearing of any evidence.

[29] In *Coutts Cars Ltd v Baguley*,[9] Gault J, delivering the judgment of the majority of the Court of Appeal, made the point that while the Court should not be "constrained" by the determination of the Authority, that did not mean that the Court should deny itself the benefit of considered views expressed by an Authority Member following investigation of the matter. I have carefully considered the respective submissions of counsel and I have not been persuaded by counsel for the plaintiff that the Authority Member erred in reaching the conclusion that the complexity of the investigation required a higher award of costs than might otherwise be the case.

[30] In her alternative submission, counsel for the defendants argued for a daily tariff of $5,000. Although that figure is higher than the average daily tariff shown in the statistics produced, which would appear to be between $2,000 and $3,000, I am

---

[8] At [19].
[9] [2001] ERNZ 660 at [4].

prepared to accept, from my careful review of the respective submissions, both determinations of the Authority and the Employment Court judgment that in all the circumstances $5,000 is an appropriate daily tariff in the present case.

[31] I note that the $5,000 daily tariff figure is less than the amount awarded by the Full Court in *Da Cruz*. The Authority decision[10] in that case records that the hearing took one day. In assessing the award of costs on the successful challenge, the Court started with the Authority's figure of $2,000 but found that there were two good reasons for increasing the costs beyond that tariff to a sum of $7,000. In doing so, the Court stressed that the award was unique to the particular circumstances of that case and was not to be regarded as increasing the tariffs applied by the Authority.[11] The point is, however, that in adopting that approach the Full Court was clearly recognising that there is significant scope for doing justice between the parties in a given case simply by making a principled adjustment to the daily tariff.

[32] Turning to the number of relevant days in the present case, again there is a divergence in counsel's submissions. One of the points made by Mr Erickson was that it was not the generally accepted practice in the Authority for preparation time to be included in any award of costs and in support he cited the Authority determination in *Edwards v ERS New Zealand Ltd t/a Transpacific Industrial Solutions*.[12] I do not accept that submission. The Full Court in *Da Cruz* at [46] cited in [23] above recognised that preparation time can be taken into account in appropriate cases. *Wackrow v Fonterra Co-operative Group Ltd*[13] was another case where the Court allowed a higher range of daily rate, taking into account the degree of preparation which needed to be put into the case. I am prepared to allow for preparation time in the present case.

[33] Counsel for the defendants had claimed a daily tariff figure for a total of five days (being 3.5 days of hearing and 1.5 days for preparation and drafting submissions). In his submissions, Mr Erickson accepted that the investigation (without any allowance for preparation time) occupied four days. Allowing for

---

[10] AA 311A/04, 28 October 2004.
[11] At [61].
[12] AA 389A/10, 21 December 2010.
[13] [2006] ERNZ 375.

preparation time, I am prepared to accept that it is appropriate for the daily tariff to be applied over a five day period in total. As it turns out, therefore, in this particular case the tariff approach produces a similar outcome to the *Binnie* approach but that, of course, would not always be the situation.

Conclusions

[34] The defendants are awarded costs based on their alternative approach at a tariff of $5,000 per day for five days totalling $25,000 less the sum of $5,000 in recognition of their unsuccessful interim reinstatement application.

[35] There was no cross-challenge or reference in the statement of defence to the issue of disbursements and no disbursements are, therefore, awarded.

[36] As both parties have had some measure of success, I make no order as to costs in respect of the present challenge.

A D Ford
Judge

Judgment signed at 4.30 pm on 21 February 2010