

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2011] NZEmpC 14
WRC 20/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN NEW ZEALAND AMALGAMATED
ENGINEERING, PRINTING AND
MANUFACTURING UNION INC
Plaintiff

AND STEELFORT ENGINEERING
COMPANY LIMITED
Defendant

Hearing: by memorandum filed on 5, 25 and 26 November 2010

Judgment: 21 February 2011

COSTS JUDGMENT OF JUDGE A D FORD

Background

[1] In my substantive judgment¹ I dismissed the plaintiff's challenge to the Employment Relations Authority's (the Authority) determination and awarded costs to the defendant. I invited counsel, Mr Churchman for the defendant and Mr Lloyd for the plaintiff, to endeavour to reach agreement on costs, failing which I invited submissions.

[2] Far from being able to reach agreement, the submissions filed by counsel indicate that the parties have been far apart in their negotiations. Accordingly, the Court has been left to determine the issue of costs.

¹ [2010] NZEmpC 137.

[3] The defendant seeks an award of costs in the sum of \$13,000 being two thirds of \$19,588.65 which is said to be the actual and reasonable costs incurred. The plaintiff had offered \$4,000 as a contribution towards costs but, as that offer had not been accepted, it now invites the Court to order that each party should bear their own costs or, alternatively, make an award in the sum of \$2,000.

Costs principles

[4] Clause 19 of sch 3 of the Employment Relations Act 2000 (the Act) confers a broad discretion on the Court in making an award as to costs but, as with all discretions, it must be exercised in a considered and particularised manner in accordance with established principles. The key principles applicable to the Court's discretion are now well established. They were enunciated by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*², *Binnie v Pacific Health Ltd*³ and *Health Waikato Ltd v Elmsly*.⁴

[5] In *Elmsly*, William Young J delivering the judgment of the Court, stated:

[42] As good a starting point as any for fixing the costs in Employment Court litigation is the two step process identified by this Court in *Binnie v Pacific Health Ltd*:

[14] The first step is to decide whether the costs actually incurred by the plaintiff were reasonably incurred. Adjustment must be made if they were not. The second step is to decide, after an appraisal of all relevant factors, at what level it is reasonable for the defendant to contribute to the plaintiff's costs. Potentially that level can be anywhere from 100% to 0%. A starting point at 66% is generally regarded as helpful in ordinary cases. Mr Taylor reflected common practice when he referred to this as the two-thirds rule. If such a starting point is adopted, careful attention must be given to factors said to justify an increase or decrease.

[6] In *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Zeal 320 Ltd*,⁵ Judge Travis noted:

[26] In *Elmsly* the Court of Appeal also stated that it would be open to the Employment Court, if it chose, to adopt the High Court approach to costs, but as it has not yet done so, it was perfectly entitled to follow its existing

² [2001] ERNZ 305.

³ [2002] 1 ERNZ 438.

⁴ [2004] 1 ERNZ 172.

⁵ [2009] ERNZ 458.

practice of regarding costs actually and reasonably incurred as a relevant starting point. This is a matter which the Court of Appeal may review one day as the decision granting leave to the applicant in *Snowdon v Radio NZ Ltd*⁶ indicates.

[27] The High Court Rules, however, provide some helpful guidance as to whether the costs said to have been actually incurred were reasonably so incurred. If the costs incurred by the successful party are not reasonable they may be adjusted for the purpose of carrying out the next step of deciding whether a two-thirds contribution is appropriate.

The substantive hearing

[7] The issues involved in the plaintiff's challenge were relatively straightforward. In brief, the defendant company, which is based in Palmerston North, manufactures stainless steel products. At all material times it had a staff of 98, five of whom were members of the plaintiff union employed under a collective agreement which was about to expire. The plaintiff initiated bargaining for the renewal of the collective agreement and at one point it made a written request of the defendant, pursuant to s 34 of the Act, for disclosure of its most recent accounts and other financial information. The request was rejected by the defendant principally upon the grounds that, in terms of s 32(1)(e) of the Act, the requested information was not reasonably necessary to support or substantiate any response to claims made for the purposes of the bargaining.

[8] The Court found that the plaintiff's written request for the financial information it sought was "fatally flawed"⁷ in that s 34(2)(c) of the Act provides that any such request must specify the claim or the response to a claim in respect of which the information is requested but the defendant's letter failed to comply with this requirement.

[9] One development which assumed some significance in the defendant's case was that by the time the challenge came before the Court, the defendant's staff numbers had reduced to 86 employees, none of whom were members of the plaintiff. To that extent, as noted in my judgment, the challenge was somewhat academic but counsel for the plaintiff claimed that the case involved an important point of principle in relation to bargaining.

⁶ [2009] NZCA 557.

⁷ At [26].

Submissions on costs

[10] In his succinct submissions on behalf of the defendant, Mr Churchman claimed that the defendant's actual and reasonable costs amounted to \$19,588.65 and he sought an award of two thirds of that sum, namely \$13,000. Details of the costs were said to be "annexed and marked 'A'". Mr Churchman submitted that there were "no relevant factors which require an adjustment either side of the notional two-thirds principle." Annexure "A", however, was not attached to the submissions.

[11] Anticipating the plaintiff's submission that the Court should approach the question of costs on the basis that this was a test case, Mr Churchman submitted that this was not a case which fell within the criteria of a test case recognised by the Full Court in *Service & Food Workers Union v Vice Chancellor of the University of Otago (No 2)*.⁸ The other issue Mr Churchman touched upon, which he anticipated would be raised by the plaintiff, related to the defendant's solicitor appearing as junior counsel. It was submitted that looking "at the scenario in the round" it was an appropriate case for second counsel.

[12] In his submissions, Mr Lloyd did indeed claim that the case could fairly be regarded as a test case because this "was the first time a case dealing with the application of s 34(2) of the Act had come before the Employment Court". Mr Lloyd noted that shortly after the judgment was issued in this case, the Full Court issued a decision concerning the application of the same provisions of the Act – *Auckland District Health Board & 20 Ors v New Zealand Resident Doctors Association*⁹ and on the issue of costs, the Court stated: "Our preliminary view is that this is a test case in which no order for costs ought to be made."¹⁰

[13] Mr Lloyd also challenged the costs claim for junior counsel stating:

2.4 It is submitted that while the defendant is entitled to engage [whomsoever] it chooses, the plaintiff cannot be expected to meet the costs of gold-plated representation when it simply was not necessary."

⁸ [2003] 2 ERNZ 707.

⁹ [2010] NZEmpC 148.

¹⁰ At [57].

[14] Mr Lloyd stressed that the facts of the case had not been in dispute and he noted that the plaintiff had called one witness and the defendant had called two witnesses. Counsel also stated that his copy of the defendant's submissions had not had document "A" annexed. He stated: "Despite advising counsel for the defendant that no such document was provided the defendant has still failed to produce it."

[15] Mr Churchman then filed submissions in reply attaching document "A" explaining that it had inadvertently been omitted from his original submissions. At the same time, counsel proceeded to make further submissions taking exception to some of the assertions that had been made by Mr Lloyd. That prompted Mr Lloyd to file a memorandum pointing out in rather strong terms that leave of the Court had not been obtained for the filing of any submissions in reply and he submitted that the submissions in reply should not be read except in so far as they are relevant to the issue of whether document "A" should be admitted.

Discussion

[16] Dealing with the issue touched upon in the previous paragraph, I agree with Mr Lloyd's submissions. At the same time, I accept Mr Churchman's explanation for the oversight in not attaching document "A" to his original submissions and I allow its admission.

[17] Document "A" comprises six tax invoices from Mr Churchman in respect of his attendances as counsel between 24 June 2010 and 6 October 2010, including the hearing. They are for costs totalling \$12,002 (plus GST of \$1,587.65) at a charge out rate of \$380 per hour. Although there is a breakdown of the attendances, there is no corresponding breakdown of the time spent in relation to each particular matter. But as the Court of Appeal stated in *Binnie*, such information is not mandatory.¹¹ Document "A" also includes two invoices from Mr Churchman's instructing solicitors, Cooper Rapley, the first for \$1,500 with GST of \$187.50, the other for \$3,710 with GST of \$556.50 and "Office Expenses" of \$45. The total of these figures, namely \$19,588.65, is claimed to be the actual and reasonable costs incurred in defending the proceedings.

¹¹ At [27].

[18] I do not accept Mr Lloyd's submission that this was a "test case" as that term is understood in this Court. It did not involve a dispute over the interpretation of new legislation, for example. What the challenge was concerned with was the application of a clearly expressed statutory provision to the provisions of a self-serving letter produced by the plaintiff in the course of bargaining negotiations.

[19] In relation to the claim for solicitors' fees, the invoices from the defendant's solicitors provide no details at all of how they have been made up. The narration in the two accounts simply state: "Our fee for all attendances between the period [period stated]; including all matters incidental hereto". General descriptions of that nature do nothing to assist the defendant's claim.

[20] In relation to second counsel, I agree with Mr Lloyd that while the defendant was perfectly free to select its representation at the hearing, the case could reasonably have been handled by one counsel and the plaintiff should not have to meet the luxury of the defendant being represented by two counsel.

[21] Turning to the issue of whether, for the purposes of fixing an appropriate award, the defendant's actual costs in this case were reasonable, the Court of Appeal made the point in *Binnie* that, "in the end the Court, when considering whether actual costs are reasonable, has to make a judgment, bearing in mind the proper interest of the losing party in the question."¹² The Court of Appeal also highlighted the need for the Court to do "justice to all concerned."¹³

[22] Having carefully considered counsels' submissions and all other relevant circumstances, including the likely comparative costs award under the High Court Rules, I cannot accept that the actual costs incurred by the defendant were at a reasonable level. As I have indicated, the case was relatively straightforward. There was no real dispute on the facts and the hearing involved very limited cross-examination. The hearing itself occupied only half a day. I do acknowledge, however, that the witnesses' briefs and the respective submissions of both parties were comprehensive and of a high standard.

¹² At [27].

¹³ At [29].

[23] In all the circumstances, I consider it appropriate to adjust the costs figure to \$6,000 and I see no reason to depart from the two-thirds rule. Costs are, therefore, awarded to the defendant in the sum of \$4,000. The claim for “Office Expenses” of \$45 has not been established to my satisfaction and is disallowed.

Conclusions

[24] In conclusion, I feel compelled to express some concern over the fact that, when invited by the Court to reach agreement on costs, in what was a relatively straightforward challenge, two senior counsel, with considerable experience in this jurisdiction, have been unable to do so. Instead they have ended up, in colloquial terms, being poles apart in relation to the costs exercise. From my observations, I suspect that this may not be an isolated case.

[25] Given the additional time involved in preparing costs submissions and the inevitable additional costs consequences for the litigant, it may be timely for this Court to heed the suggestion made by the Court of Appeal in *Elmsly* and consider adopting the High Court approach to costs. I say no more on that point, however, because it was not raised before me.

[26] For the reasons stated, I order the plaintiff to pay the defendant \$4,000 by way of costs.

[27] In all the circumstances, and in the hope and expectation that it may encourage practitioners in this Court to reach agreement on costs, I decline to make any further award in relation to this aspect of the challenge.

A D Ford

Judge