

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**[2011] NZEmpC 2  
CRC 4/08**

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

AND

IN THE MATTER OF an application for costs

BETWEEN TRACEY JINKINSON  
Plaintiff

AND OCEANA GOLD (NZ) LIMITED  
Defendant

Hearing: on the papers  
plaintiff's memorandum received 1 November 2010  
defendant's memorandum received 26 November 2010

Judgment: 19 January 2011

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**COSTS JUDGMENT OF JUDGE A A COUCH**

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[1] This litigation has a long history involving three determinations by the Authority and three previous judgments of the Court. In my substantive judgment dated 4 August 2010,<sup>1</sup> I noted that there were potentially some aspects of the matter still to be resolved. I encouraged the parties to agree costs or, if they were unable to do so, to file memoranda within three months. Memoranda have now been filed.

[2] The defendant has been granted leave to appeal an aspect of my judgment relating to reimbursement of lost remuneration. I have considered whether I should delay fixing costs until that appeal has been decided but, as there would only be an effect on costs in this Court if the Court of Appeal were to allow the appeal and remit the matter back for further consideration, it is appropriate that I fix costs now and

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<sup>1</sup> [2010] NZEmpC 102.

issue a supplementary decision on costs should that be necessary. Otherwise, a decision on costs could be delayed for many months.

[3] As the plaintiff was successful in her challenge to the Authority's determination, it is appropriate to review the award of costs made by the Authority. For that reason, I invited counsel to address in their memoranda costs incurred in both in the Authority and in the Court. They have done so.

[4] In pursuing her claims before the Authority and the Court, the plaintiff incurred costs totalling \$75,208.50. That comprised \$12,771 relating to the proceedings before the Authority and \$62,437.50 attributable to the proceedings before the Court. In addition, she is said to have incurred disbursements of \$2,057.82. For the reasons set out in Ms Jarvis' memorandum, the plaintiff seeks full reimbursement of the disbursements and an award of \$62,181.70.

[5] For the defendant, Mrs Brook accepts that the plaintiff is entitled to an award of both costs and disbursements but not as much as the plaintiff seeks. She submits that the plaintiff is justly entitled to an award of \$31,556.26 for costs and \$1,330 for disbursements. Reflecting that concession, the defendant has already paid \$35,000 into the trust account of the plaintiff's solicitors on account of costs and disbursements. What I must now decide, therefore, is whether the defendant ought to make a contribution of more than \$35,000 to the plaintiff's costs and disbursements and, if so, how much.

### **Principles**

[6] The principles applicable to fixing costs in the Court are well settled and are not in dispute in this case. Any award should be based on the costs actually and reasonably incurred by the successful party. A useful starting point is two thirds but that sum may be adjusted up or down to reflect the particular circumstances of the case.

[7] Ms Jarvis proceeded on the basis that this approach should be used both in relation to costs incurred in the Court and in the Authority. That is inappropriate.

Where the Court is called on to fix costs in the Authority, it should do so according to the principles applicable to that jurisdiction.<sup>2</sup> Those principles were summarised by the full Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.<sup>3</sup> Costs should be modest and are usually based on a daily tariff of \$2,000 to \$3,000 per day of the investigation meeting.

### **Costs in the Authority**

[8] In the Authority, the plaintiff initially sought interim reinstatement. That was declined. When her substantive grievance was investigated, the Authority determined that the plaintiff had been unjustifiably disadvantaged and awarded her compensation of \$2,000 but otherwise dismissed her claims. In its costs determination, the Authority allowed the plaintiff costs of \$2,500 on the substantive aspects of the matter but offset against that an award of \$1,500 in favour of the defendant on the unsuccessful application for interim reinstatement. The Authority also ordered reimbursement of the filing fee of \$70 paid by the plaintiff. The net result was an award of \$1,070 in favour of the plaintiff. That sum has been paid.

[9] I must now decide the extent to which those awards made by the Authority ought to be altered in light of the Court's decisions. In doing so, I have regard to the reasons given by the Authority for its determinations.

[10] In considering the plaintiff's application for interim reinstatement, the Authority found that she had an arguable case of unjustifiable dismissal. The principal reason it declined the application was that the plaintiff delayed unduly in making it. The basis for the determination is therefore unaffected by the Court's decisions and I see no reason to disturb the award of costs made by the Authority in relation to that aspect of the matter.

[11] I note here that Ms Jarvis submitted that, in dismissing the application, the Authority relied significantly on the defendant's evidence suggesting that the plaintiff was not a team player and that this was subsequently rejected by the Court.

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<sup>2</sup> See, for example, *South Tranz Limited v Strait Freight Limited* CC3/08, 8 April 2008.

<sup>3</sup>[2005] 1 ERNZ 808.

That is not how I read the Authority's determination. While this was a factor the Authority took into account, it does not seem to have been the most important factor relied by the Authority in concluding that "the balance of convenience clearly favours Oceana Gold."

[12] In assessing costs on the balance of the proceedings before it, the Authority was of the view that \$4,000 would have been an appropriate award of costs in favour of the plaintiff had she been wholly successful in her claims. It then reduced that amount to \$2,500 to reflect the shorter investigation meeting which would have been necessary had the plaintiff pursued only those parts of her claim on which she was successful. As I have sustained the plaintiff's claim that she was unjustifiably dismissed, it is appropriate to increase the award made by the Authority to the level it would have awarded had it reached a similar conclusion, that is \$4,000. It follows that the plaintiff ought now to receive a further contribution of \$1,500 to her costs in the Authority. The plaintiff ought also to be reimbursed for the investigation meeting fee of \$150 she paid but which the Authority declined to award because it based costs on one day of hearing.

[13] Taking into account the sum of \$1,070 it has already paid, the defendant is ordered to pay the plaintiff a further \$1,500 for costs and \$150 for disbursements relating to the proceedings before the Authority.

### **Costs in the Court**

[14] I am satisfied by the evidence provided in Mr Mirkin's affidavit that the actual costs incurred by the plaintiff in relation to the Court proceedings were \$62,437.50 inclusive of GST. This comprised \$48,937.50 for work done up to the end of the hearing and \$13,500 for work done subsequently. What I must now decide, therefore, is the extent to which those costs were reasonably incurred and what proportion of them the defendant ought to be required to pay.

[15] When this matter first came before the Court, I directed the parties to further mediation as I was required to do by s 188(2) of the Employment Relations Act 2000. Mrs Brook's first submission is that, although she accepts that the plaintiff

reasonably incurred costs associated with that further mediation, the defendant ought not to be required to contribute to those costs “because the parties owe it to each other to put in some resource towards a genuine endeavour by way of mediation to settle the matter between them: *Trotter v Telecom Corporation of New Zealand*”<sup>4</sup>

[16] This statement of principle was made in the context of the Employment Contracts Act 1991 when mediation was voluntary and, with rare exceptions, was limited to one occasion. Under the Employment Relations Act 2000, the position is different. Mediation is virtually obligatory prior to investigation of an employment relationship problem by the Authority. If the parties do not attend voluntarily, they will usually be directed to attend by the Authority. It is reasonable to regard that first attendance at mediation as discharging the obligation referred to in the *Trotter* case. That having been done, it seems to me that costs incurred in further mediation directed by a Judge pursuant to a statutory requirement should be regarded as costs necessarily incurred in the proceedings before the Court and subject to the same considerations for recovery as other costs. I therefore do not accept Mrs Brook’s submission that costs incurred by the plaintiff in relation to further mediation ought to be excluded from consideration.

[17] In my first decision, which decided the nature of the employment relationship between the parties, I noted the deficiencies in the statement of claim and directed that an amended statement be filed which complied with the applicable regulation. Mrs Brook’s second submission is that the costs incurred by the plaintiff in that amended statement of claim being drafted, filed and served were not reasonably incurred because, had the plaintiff complied with the regulations in the first place, that work would not have been necessary. I agree. In Mr Mirkin’s affidavit, it is recorded that costs associated with the amended statement of claim were \$3,510 exclusive of GST. I disallow that amount. I find also that the plaintiff’s failure to file a proper statement of claim in the first instance put the defendant to the otherwise unnecessary cost of preparing and filing a statement of defence to the amended statement of claim. This is a factor I take into account later in deciding the extent to which the defendant should contribute to the plaintiff’s costs.

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<sup>4</sup> [1993] 2 ERNZ 935 at 937.

[18] Throughout the hearing before the Court, the plaintiff was represented by two counsel. Mrs Brook's third submission is that second counsel was not reasonably required and that, while it was open to the plaintiff to be represented by counsel of her choice, the defendant ought not to be required to contribute to the costs associated with second counsel. She refers to what I said on this issue generally in *Merchant v Chief Executive of the Department of Corrections*.<sup>5</sup> In response, Ms Jarvis says that her appearance at the hearing was "in the nature of an instructing solicitor to counsel, Ms Kelly." She suggests that this was "reasonable in the circumstances, given the last minute disgorgement of documents by the Defendant and the assistance required to deal with those new documents." I do not accept this response and agree with Mrs Brook's submission. While it may have been reasonable and an economical use of resources for Ms Jarvis to assist Ms Kelly in the analysis of documents by way of preparation for the hearing, the volume of documents was not so great that it required the attendance of second counsel throughout the three days of hearing. This response also does not justify the appearance of Ms Phillips as second counsel on the first two days of hearing. The actual costs associated with the appearance of second counsel are not separated out in Ms Jarvis' memorandum or in Mr Mirkin's affidavit. Making some allowance for essential work done by second counsel during the hearing, I disallow \$5,000 plus GST of the costs of counsel's appearance at the hearing.

[19] In Mr Mirkin's affidavit, it is recorded that the plaintiff incurred costs of \$7,056 exclusive of GST for preparing submissions in relation to the preliminary issue which was decided on the papers and \$17,447 exclusive of GST for preparation for the substantive hearing. These sums are said to reflect 36.4 hours and 74.7 hours of work respectively.

[20] Mrs Brook takes no issue with the time spent or cost incurred in relation to the preliminary issue. I agree that those costs were reasonably incurred in their entirety.

[21] As to preparation for hearing, Mrs Brook submits that the time devoted to it was excessive. She invites me to draw an analogy from the High Court Rules where

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<sup>5</sup> [2009] ERNZ 108 at [12].

the time allowed for preparation for hearing in a matter of complexity is two and a half times the hearing time. While I think there is merit in Mrs Brook's submission, I have reservations about drawing analogies directly from the High Court Rules in a case such as this. A de novo challenge in the Employment Court is unlike any proceeding in the High Court. Generally, both the time required to initiate a de novo challenge will be very much less than that required to commence High Court proceedings and the time required to prepare for a de novo hearing will be significantly less. That is because the parties will have already briefed most of the evidence and rehearsed most of their submissions in the course of the Authority's investigation.

[22] In this case, the only significant issue of law was dealt with in the preliminary phase of the proceedings. This was reflected in the fact that Ms Kelly's final submissions did not address any questions of law. Preparation for the substantive hearing ought to have involved only a modest amount of work consisting mainly of refining and supplementing the plaintiff's brief of evidence and preparing for cross examination of the defendant's witnesses. While it is true that further documents became available during the course of the hearing and they required considerable time to analyse, the costs associated with that work are separately itemised in Mr Mirkin's affidavit. I am inevitably left with the impression that a significant amount of the time spent in preparation for hearing was associated with Ms Kelly becoming familiar with a case in which she had previously not been involved. If that is so, the associated costs are not ones to which the defendant should be required to contribute. Alternatively, the time spent on preparation for the hearing was significantly greater than was reasonable. In my judgment, \$10,000 plus GST was the limit of costs which were reasonably incurred for preparation for hearing in the Court.

[23] As noted above, the costs incurred by the plaintiff for work done prior to the third day of hearing were separately itemised as being \$4,520 exclusive of GST, representing 18.5 hours of work. What was involved was analysis of additional aspects of Mr Davenport's diary and Mr Maw's notebook and preparation of further cross examination of Mr Maw. The costs incurred are surprisingly high for that limited work but, as Mrs Brook did not take issue with it, I am prepared to regard it as within the range of what was reasonable.

[24] For work done after the hearing in the Court, the plaintiff incurred costs of \$13,500, inclusive of GST representing 50.2 hours work. This appears to be the time involved in extensive correspondence between counsel about implementation of the remedy of reinstatement and calculation of the monetary remedies. A good deal of this correspondence was provided to the Court in the context of an application for stay which I heard on 22 October 2010 and in the materials attached to counsel's memoranda on costs. It seems to me that both parties took a robustly uncompromising approach to these issues and that this greatly increased the cost incurred by each of them. Mrs Brook notes that the defendant does not accept that the plaintiff reasonably incurred the costs she did and submits that \$4,500 inclusive of GST would be "more reasonable". While that may be so, it amounts to an attempt to fix the plaintiff's counsel with all of the responsibility for the protracted nature of the dispute between the parties over remedies. That is unrealistic. Based on my reading of the correspondence, I find that both parties, through their counsel, must take equal responsibility. I resolve this aspect of the matter by regarding \$9,000 inclusive of GST of the plaintiff's post hearing costs as having been reasonably incurred.

[25] Pulling these various figures together, I find the following costs actually incurred by the plaintiff in relation to the proceedings before the Court to have been reasonably incurred:

Commencement of proceedings	2,154.00
Mediation	550.00
Submissions on preliminary issue	7,056.00
Preparation for substantive hearing	10,000.00
Attendance at hearing	7,530.00
Preparation for third day of hearing	<u>4,520.00</u>
	31,810.00
Plus GST at 12.5%	<u>3,976.25</u>
	35,786.25
Post hearing costs (inclusive of GST)	<u>9,000.00</u>
	<u>\$44,786.25</u>

[26] Having decided what costs were reasonably incurred by the plaintiff, I must now decide what contribution the defendant ought to make to those costs. In accordance with the established principles, I take as a starting point two thirds of those costs. In deciding whether to depart from that starting point and, if so, to what extent, I bear in mind the principle that an award of costs is to recompense a party for expense incurred and not to express disapproval of the other party's conduct.

[27] Ms Jarvis submits that the manner in which the defendant's case was conducted unnecessarily increased the costs to the plaintiff to the extent that she ought to be fully reimbursed for some costs and the defendant ordered to pay 80 per cent of the other costs reasonably incurred. Mrs Brook submits that there is no good reason to depart from the two thirds starting point.

[28] In her submissions, Ms Jarvis makes three broad criticisms of the manner in which the defendant's case was conducted and several submissions in support of each. Mrs Brook has responded in similar detail.

[29] The hearing of this matter in the Court was originally set down for two days. In the course of the second day, it became apparent that important documents had not been fully disclosed by the defendant. As the original documents were at some distance from the courthouse, they could not be fetched until very late on the second day. As a result, I adjourned the hearing to a third day to give Ms Kelly time to prepare additional cross examination of Mr Maw. Ms Jarvis submits that if full disclosure been made prior to the start of the hearing, the additional preparation conducted by Ms Kelly between the second and third days of hearing and the third day of hearing itself would not have been required. On this basis, she submits that the plaintiff ought to be fully reimbursed for the costs associated with that additional preparation and the third day of hearing.

[30] While there is some force in that submission, I do not accept it entirely. As Mrs Brook observed, both counsel underestimated the time required for the hearing. I also accept her submission that the time devoted by counsel to preparing cross examination of Mr Maw on the contents of his notebook would have been spent regardless of when it was fully disclosed. On the other hand, I find that the time

required for preparation of that cross examination and for conducting it were increased by the need for Ms Kelly to go over some ground twice. Had the additional hearing time not been required, however, that would not have avoided the need for third day of hearing which comprised not only further evidence from Mr Maw but also submissions from both counsel which were detailed and took some time to present. Overall, I find that the plaintiff's costs were unnecessarily increased by this factor but not to a great extent.

[31] The second proposition advanced by Ms Jarvis is that, in the course of the litigation, the defendant did not cooperate with the plaintiff as effectively as it might have done and that, as a result, the plaintiff's costs were increased. In support of that proposition, Ms Jarvis relies on seven aspects of the litigation. I deal with these in turn.

[32] Firstly, it is said that the defendant refused three written requests to attend mediation prior to the plaintiff initiating proceedings in the Authority and that it only attended mediation when directed to do so by the Authority. This is an issue affecting costs before the Authority, not the Court and, as Mrs Brook points out, the Authority dealt with it in its costs determination.

[33] The second factor relied on is the defendant "failing to disclose documents requested by the Plaintiff." No detail is given of that very broad statement, nor is it explained how any such failure may have increased the costs incurred by the plaintiff.

[34] The third factor is the suggestion that the defendant delayed in providing copies of the documents I ordered to be disclosed on the second day of the hearing. Correspondence between counsel in the period between 15 and 24 February 2010 is relied on. What it shows is that the documents I ordered the defendant to provide were made available reasonably promptly and that what gave rise to the extensive correspondence was a request by the plaintiff for other documents.

[35] The fourth factor overlaps the third. It is said that the defendant delayed in providing draft calculations of wages in February 2010 and disputing calculations

done on behalf of the plaintiff after judgment. Having looked at the contemporary correspondence I find little substance in these criticisms.

[36] In my substantive judgment, I ordered the defendant to reinstate the plaintiff to a position as a level 2 mine technician. Rather than do so in the first instance, the defendant offered the plaintiff an alternative position as a mine operator. Ms Jarvis asserts that the defendant ought not to have made such an offer and relies on this as her fifth factor. While I was provided with the letter dated 12 August 2010 in which that offer was made, I was not provided with the response or any other indication that the plaintiff was put to unnecessary cost as a result of the offer being made. In any event, it was not unreasonable for the defendant to propose that the specific order I made be varied by consent. If that variation was not acceptable to the plaintiff, it required no more from her than a simple “no”.

[37] In my substantive judgment, I also ordered that the defendant reimburse the plaintiff for certain income she had lost as a result of her dismissal. That required calculation of what the plaintiff would have earned had she not been dismissed. It also required allowance to be made for income the plaintiff earned from other sources during the period in question. This was never going to be an easy task as the position the plaintiff had occupied was disestablished and her notional earnings had to be calculated by reference to an alternative position. The sixth factor relied on by Ms Jarvis is the suggestion that the defendant failed to cooperate in the calculation process and inappropriately asked the plaintiff provide evidence of efforts she had made to mitigate her loss of earnings during the period between the hearing and judgment being given. Having considered the extensive correspondence generated by these issues, I am satisfied that the defendant’s approach to calculation of the reimbursement sum was not unreasonable. Although the exchange between counsel was robust and initially uncompromising, there was ultimately give and take on both sides with the final calculation being done by the defendant. This is an issue I have already dealt with in deciding the extent to which the costs involved were reasonably incurred by the plaintiff. No further adjustment is required.

[38] I find it was also not unreasonable for the defendant to inquire about the plaintiff’s employment or efforts to obtain employment during the several months

after the hearing as my order included that period and it obviously could not have been the subject of evidence. Had that issue not been resolved by agreement, it would have been proper for the defendant to bring that issue back before the Court pursuant to the leave reserved.

[39] The final factor relied on by Ms Jarvis was that the defendant had failed to appoint the plaintiff to one of the positions it advertised and she applied for after her dismissal. This is an issue I dealt with in my substantive judgment.

[40] Overall, I find there is little or no reason to increase the award of costs to the plaintiff on this second ground.

[41] Ms Jarvis' other broad proposition is that the defendant did not make sufficient effort to resolve the plaintiff's claims by agreement at an early stage of the matter. She relies on a passage from the Court of Appeal's decision in *Victoria University of Wellington v Alton-Lee*:<sup>6</sup>

To the extent to which an 18-day trial might be thought to be disproportionate to the result reached, the apparent absence of a serious attempt on the part of the University to settle the dispute was a material (if not necessarily a decisive) consideration, particularly in a context where there was evidence before the Chief Judge indicating that there had been a genuine desire on the part of Dr Alton-Lee to seek an agreed resolution.

[42] This dictum must be understood in the context of the *Alton-Lee* case, the circumstances of which were unusual. An award of costs was made which exceeded by several times the monetary value of the remedies awarded. It is also significant that the observation was made as one of five factors the Court of Appeal took into account in deciding that it was inappropriate to depart from a starting point of two thirds of the costs actually and reasonably incurred by Dr Alton-Lee. It was not a statement of general principle that a party who is slow or reluctant to discuss settlement ought to pay a greater award of costs if ultimately unsuccessful. To do so would be to punish that party for its actions and that is not a proper function of an award of costs. It may be relevant, however, where it can be shown that the successful party's costs were increased by the other party's unreasonable attitude to settlement.

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<sup>6</sup> [2001] ERNZ 305 (CA) at [62.5].

[43] In support of this aspect of her submissions, Ms Jarvis appeared to rely very largely on the plaintiff's initial reluctance to attend mediation. As I have noted earlier, that was dealt with by the Authority. In addition to that initial mediation directed by the Authority, the parties engaged in further mediation at my direction and there is no suggestion that the defendant failed to take part in good faith. Following my first judgment, I held a telephone conference with counsel at which I raised the prospect of another attempt at settlement with mediation assistance but counsel were agreed that it would not assist them. I find no reason to conclude that the defendant unreasonably failed to make efforts to settle this matter during the period in which the matter was before the Court.

[44] The one factor I have found justifying an increased award of costs to the plaintiff is the additional work associated with the defendant's failure to fully disclose prior to the hearing Mr Maw's notebook, Mr Davenport's diary and documents relating to the selection process. I take account of that factor by awarding the plaintiff an additional \$1,500 in costs. That effectively increases the extent to which the defendant is required to contribute to those costs to nearly 100 per cent. Otherwise, I see no proper reason to depart from the starting point of two thirds of the costs actually and reasonably incurred by the plaintiff other than to round that sum up to \$30,000. The factors which might justify an increase in the award made to the plaintiff are effectively balanced by aspects of the manner in which the plaintiff's case was conducted which caused the defendant to incur increased costs.

### **Disbursements**

[45] The plaintiff seeks payment of \$2,057.82 comprising \$1,400 "filing and investigation fees" and \$657.82 of "office expenses such as photocopying and toll charges". No detail is provided of either amount.

[46] The defendant accepts that the fees claimed are genuine disbursements and says only that \$70 of the sum claimed, being the filing fee in the Authority, has already been paid. Including the investigation meeting fee of \$150 I have already

decided should be reimbursed, therefore, the plaintiff should be reimbursed for \$1,330.

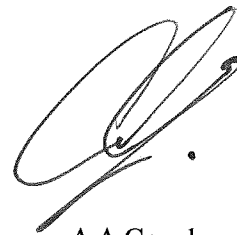
[47] In the absence of any detail, it does not seem to me that the "office expenses" are proper disbursements in the sense of sums of money paid out to third parties. Rather they appear to be part of the normal overheads of legal practice which are recovered through fees charged.

### **Conclusion**

[48] In summary, the defendant is ordered to pay the plaintiff:

- (a) A further \$1,500 for costs in the Authority.
- (b) \$31,500 for costs in the Court.
- (c) \$1,330 for disbursements.

[49] This makes a total of \$34,330 payable by the defendant to the plaintiff. I am informed by counsel that the defendant has already paid \$35,000 to the plaintiff on account of costs and disbursements. Assuming that to be correct, the defendant is not required to make any further payment to the plaintiff on account of costs and disbursements.

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a cursive 'Couch'.

A A Couch  
Judge

Signed at 11.30am on 19 January 2011