IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 52
ARC 7/10

IN THE MATTER OF	a challenge to a determination of the employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	C Plaintiff
AND	AIR NELSON LIMITED Defendant

Hearing: By memoranda of submissions filed by the plaintiff on 20 April, by the defendant on 6 May, and by the plaintiff in reply on 16 May 2011

Judgment: 26 May 2011

COSTS JUDGMENT OF JUDGE M E PERKINS

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[1] In a judgment dated 29 March 2011[1] I found in favour of the plaintiff and granted remedies of reinstatement along with financial entitlements. Insofar as contributing behaviour of the plaintiff was concerned, I made a finding which resulted in the level of compensation being reduced.[2] The other financial entitlements were left untouched.

[2] I reserved the issue of costs pending receipt of memoranda in the event that the parties could not resolve costs amicably. I have now been informed that no agreement could be reached. Memoranda have now been filed.

[3] The plaintiff seeks an order for costs in the sum of $145,622 being the total of:

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1 [2011] NZEmpC 27.
2 At [76].

(a) Fees of senior counsel;

(b) filing fees;

(c) meals, transport, accommodation and other disbursements;

(d) witness costs; and

(e) reimbursement of the sum of $10,000 paid to Air Nelson Limited (ANL) on behalf of the plaintiff being agreed costs on the plaintiff's unsuccessful claim before the Employment Relations Authority (the Authority). This claim is a consequence of the plaintiff's successful challenge in the Court and the determinations of the Authority being set aside.

[4] The plaintiff seeks an additional order for costs in respect of the proceedings in the Authority.

[5] The defendant submits in the first instance that any judgment on costs should await the outcome of the present application to the Court of Appeal for leave to appeal. Presumably if leave is granted the defendant would prefer that any order for costs in this Court should await the outcome of the appeal itself. If the defendant's submission in this regard is not accepted then the defendant disputes the quantum of costs claimed by the plaintiff. It submits that reasonable legal costs should be in the order of $36,000 with an award to represent a two thirds contribution amounting to $24,000. The defendant also disputes this Court's jurisdiction to review orders for costs in the Court of Appeal and Supreme Court awarded against the plaintiff in respect of interlocutory applications. Costs incurred by senior counsel in respect of those matters now appear to be sought by the plaintiff. Finally, in respect of the reimbursement of the Authority's determination for costs, the defendant submits that the appropriate course would be to refer the matter back to the Authority. However, if this Court is to determine the issue, the costs presently paid should be refunded and any award in favour of the plaintiff should be in the vicinity of $8,000 to $10,000.

[6] I consider that the issue of costs on the challenge should be dealt with now. On appeal any party disaffected by my judgment on costs can seek to have it

reviewed along with the substantive matters. In view of the nature of these proceedings and their history in, first, the Authority, and then this and appellate courts on the interlocutory matter prior to the substantive challenge being heard, if leave to appeal is granted my views on costs might be of assistance. Secondly, however, my warrant as a Judge of the Employment Court is due to expire. Certainly by the time the application for leave to appeal is heard, or the appeal itself if leave is granted, I will no longer have any jurisdiction to deal with costs if any such issue is referred back to this Court. It would be unreasonable to expect another Judge to have to become acquainted with all of the material in order to then appropriately deal with costs when I can more easily do so now.

[7] Dealing first with the determination on costs in the Authority, the effect of s 183 of the Employment Relations Act 2000 (the Act), means that the matter cannot be referred back to the Authority as suggested. As counsel have disclosed, the issue of costs in the Authority was resolved by an agreed position. There seems to be agreement now that with the plaintiff's challenge succeeding, the Authority's determination on costs be set aside and replaced with an order of the Court. That, in any event, is the effect of s 183 of the Act as I have mentioned. Part of the costs before the Authority related to the plaintiff's interlocutory application for interim reinstatement. The plaintiff was unsuccessful and eventually did not challenge that determination. It is reasonable therefore that the plaintiff makes a contribution to the defendant's costs on that application. In the memorandum of counsel for the defendant on costs it is submitted that of the agreed figure of $10,000 in the Authority, the sum of $3,000 related to the interlocutory application and $7,000 to the substantive investigation. That position is not disputed in the memorandum in reply of counsel for the plaintiff on costs.

[8] To deal with the matter as best I can by application of s 183 of the Act, I order that the determination on costs is indeed set aside. There is a further order that the plaintiff pay the defendant $3,000 in respect of the interlocutory proceedings for interim reinstatement and the defendant pay the plaintiff costs of $7,000 on the substantive investigation, which while unsuccessful for the plaintiff in the Authority was reversed following the challenge. Those orders are orders of this Court. That level of costs would also be in keeping with the tariff approach of the Authority

endorsed by this Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.[3] In practical terms this could mean that of the sum of $10,000 already received by the defendant, it could retain the sum of $3,000 and return the balance of $7,000 to the plaintiff. It would then be required to pay a further sum to the plaintiff of $7,000 to meet the order now made by this Court. However, I shall leave it to the parties to decide exactly how payments are arranged.

[9] Before dealing with the issue of costs on the plaintiff's successful challenge to this Court, I wish to deal with the costs issue now apparently raised by the plaintiff in respect of his application for interim prohibition on publication of his name to this Court.[4] The issue raised also includes costs on the subsequent applications for leave to appeal to the Court of Appeal[5] and the Supreme Court.[6]

[10] The applications to this Court and the appellate courts were unsuccessful insofar as the plaintiff was concerned. Nevertheless, the Supreme Court, having refused leave to appeal from the Court of Appeal's decision, left the matter open by way of an extended interim order to enable me, in the light of the evidence to be heard at the challenge, to reconsider the issue.[7] In the event, I decided to make a permanent order prohibiting publication of the plaintiff's name.[8] The fact is, however, that the plaintiff was unsuccessful in the interlocutory applications. Even if I had jurisdiction to consider costs in the appellate courts (and I accept counsel for the defendant's submission that I do not), I would not make any order for costs against the defendant in respect of the prohibition on publication issues. In any event, I have no such jurisdiction to award costs in respect of the applications for leave to appeal to the Court of Appeal and Supreme Court. To do so I would in effect need to set aside the Court of Appeal's order for costs against the plaintiff and replace it with one of my own. Counsel for the plaintiff does not provide any authority as to a basis for my acting in that way.

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[3] [2005] ERNZ 808.
[4] *C v Air Nelson Ltd* [2010] NZEmpC 18.
[5] *S v Airline Ltd* [2010] NZCA 263.
[6] *C v Air Nelson Ltd* [2010] NZSC 110.
[7] At [2].
[8] [2011] NZEmpC 27 at [78].

[11] Insofar as the issue of costs on the original application to this Court is concerned the application by the plaintiff was unsuccessful and costs should follow the event. Despite the fact that I effectively reversed the position in my substantive judgment and was able to do so by virtue of the window of opportunity left open by the Supreme Court, I nevertheless consider it would be unjust to now visit the defendant with an order for costs in respect of the original interlocutory application heard and rejected by Chief Judge Colgan. This is particularly so where leave to appeal from his decision was declined. My costs award on the challenge, therefore, must be considered in isolation from any costs incurred in respect of those interlocutory applications.

[12] In now dealing with the costs application in respect of the challenge, I am alert to the principles enumerated by Chief Judge Goddard in *Reid v New Zealand Fire Service Commission*,[9] when the Court exercises its discretion. One of those matters iterated by counsel for the plaintiff in his memorandum, which is the subject of comment by counsel for the defendant, is the fact that any order for costs I make will be for the benefit of the plaintiff's professional association, the New Zealand Airline Pilots' Association (the Association). It has clearly underwritten the plaintiff's costs in these proceedings. That fact, as enunciated in *Reid*[10] does not mean that the Court has to be satisfied that the person entitled to the costs must have personally expended them. That is a reasonable principle to apply in this jurisdiction where often, although not invariably, trade unions or professional associations are maintaining the proceedings on behalf of a member or members.

[13] Of course *Reid* was decided prior to the three Court of Appeal decisions dealing with the consideration and award of costs in this Court and from which the principles applying are now well established: *Victoria University of Wellington v Alton-Lee*;[11] *Binnie v Pacific Health Ltd*[12] and *Health Waikato Ltd v Elmsly*.[13]

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[9] [1995] 2 ERNZ 38.
[10] At [41].
[11] [2001] ERNZ 305.
[12] [2002] 1 ERNZ 438.
[13] [2004] 1 ERNZ 172.

[14] *Binnie* set out the process I must adopt in the consideration of costs in this case as follows:

> [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 percent to 0 percent. A starting point at 66 percent 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 a decrease.

[15] *Elmsly* established the principle, generally applying in any consideration of costs that costs usually follow the event.[14] I do not perceive there to be any dispute to that proposition from counsel in this case. Indeed I have already applied that principle in favour of the defendant in respect of the interlocutory proceedings, although technically the defendant may not have been a true adversary in the application for prohibition on publication, the Court independently considering the matter on wider principles of openness of justice.

[16] Applying these principles to the issue of costs on the challenge it is clear that costs should follow the event and an order be made in favour of the plaintiff. I am bound to agree with the submission of counsel for the defendant that the submissions contained in the memorandum of counsel for the plaintiff are somewhat tenuously linked to the plethora of documents apparently itemising expenses and other costs in the bundle which is attached. I have had to do the best I can to establish which matters actually relate to legal costs incurred or which might relate to reimbursement of witnesses' expenses. It is appropriate and proper, however, that no claim is made by the Association for reimbursement of costs for in-house counsel appearing as junior counsel to Mr Haigh QC at the hearings. His time was already clearly covered in normal overheads of the Association and would have been expended regardless.

[17] I have, accordingly, isolated from the bundle of documents, Mr Haigh's bills of costs, the expenses relating to the only witness for the plaintiff who appears to

[14] At [35].

feature in the bundle, and payments made for filing and hearing fees. A proportion of Mr Haigh's fees was incurred in the interlocutory proceedings and I have decided I can only consider those portions of his fees relating specifically to the challenge for the reasons already discussed.

[18] The first of Mr Haigh's bills to refer to the challenge is his bill of 21 June 2010. Only a proportion of the attendances specified in that bill relate to the challenge as opposed to the interlocutory matters. It is difficult to assess the proportion but, in the absence of a break-down, I shall proceed on the basis that one third of the fees relate to the challenge in its initial stages of pleadings, correspondence, attendances and the like. That amounts to $7,762.50 inclusive of GST. The disbursements contained in that bill, which I consider relate to the challenge, amount to $100.

[19] The next bill is dated 19 July 2010. The portion of fees relating to the challenge in that bill amount to $31,635, inclusive of GST together with disbursements of $100. The final bill to be considered is dated 29 September 2010. While the attendances partly relate to the Supreme Court decision, they are linked to that part of the issue of prohibition on publication I was left to consider by the Supreme Court. Accordingly, the entire fee, including GST, amounting to $20,925 would properly relate to the challenge. The bill includes disbursements of $50.

[20] Insofar as the witness, Ms Buschl, is concerned, cl 7 of Schedule 3 to the Act specifies that the Court shall approach witnesses' allowances and expenses on the basis of those provided in the Summary Proceedings Act 1957. The regulations incorporated into that Act are confusing and provide inadequate provision for proper remuneration of witnesses and their expenses, particularly when having to remain away from home overnight. For instance, it is debatable whether any allowance at all is made for reimbursement of overnight accommodation. I intend to proceed on the basis that the Association should be reimbursed for Ms Buschl's actual expenses incurred by them rather than trying to calculate witness fees and prescribed expenses from the Summary Proceedings Act and the regulations incorporated in it. Ms Buschl's overnight accommodation amounted to $201.50. Her airfares and taxi fares

amounted to $790.80. She was provided with a meal amounting to $45. The total of those sums is $1,037.30.

[21] There was another witness called by the plaintiff, apart from the plaintiff himself, but no costs for him appear in the bundle, nor do they feature specifically in counsel's memorandum. Certainly there was no claim isolated in respect of any other witness. I am therefore left in the position of being unable to consider any allowance for that witness.

[22] Filing and hearing fees incurred amount to $1,670.

[23] Counsel, in their memoranda, refer to *Calderbank* offers. The letters containing the offers are attached to the memorandum in support of counsel for the plaintiff. The letters are dated 18 June 2010 and 25 June 2010 respectively, shortly before the hearing of the challenge was to commence. So far as the defendant's letter is concerned, I detect a tone of tactical posturing prior to trial. The *Calderbank* offer from the plaintiff proposes reinstatement with waiver of all other remedies and costs. While reinstatement was proposed by the plaintiff in this way, this late in the proceedings, and with all that had previously transpired, realistically reinstatement was never going to be acceptable to the defendant. While the plaintiff succeeded in gaining more than mere reinstatement, the defendant was partially successful insofar as the reduction for contributing behaviour was concerned. This late in the proceedings both parties would have incurred substantial costs and would have been committed to trial. Preparation for trial should have been virtually completed. In the circumstances, I have decided to proceed to a consideration of costs on the basis that the award of costs should be unaffected by this exchange of correspondence.

[24] Mr Haigh's fees specifically relating to the challenge total $60,322.50. His disbursements total $250. Applying the process specified in the authorities referred to, were his fees reasonably incurred? Having regard to the fact that very senior counsel were briefed for both parties and the fact that three days of trial were involved with a further entire day for submissions, I consider these fees in total were reasonable. Substantial preparation and analysis was required. Serious issues and rights were at stake. Therefore, quite independently of time expended careful

consideration in balancing of the risks associated with proceeding to trial was required. This could only be properly made by counsel of this seniority and calibre. These are features which need to be considered and properly reimbursed beyond mere time and attendance factors. I think I am entitled to also surmise that similar costs were incurred by the defendant throughout a case of substantial importance to both parties.

[25] Going to the next step in the consideration, I do not consider that this is an appropriate case for the award of indemnity costs. There can be no suggestion made that the defendant was proceeding to defend the challenge without reasonable prospect of success. After all it was able to stand on the successful outcome in the Authority in defending the challenge. This was litigation conducted appropriately by both parties. There can be no basis to consider costs on an indemnity basis against the defendant. As indicated the starting point for ordinary cases is 66 percent of costs reasonably incurred or, in other words, an application of the two-thirds rule. I see no reason to depart from that starting point in this case. There are no factors which would justify an increase to, or decrease from that starting point. Counsel for the plaintiff has submitted that as the Association has borne the cost of junior counsel as part of its overhead, the costs of senior counsel should be recovered in full. I do not consider that is an appropriate or principled approach to the matter.

[26] In conclusion and summary the costs awards I make are as follows:

(a) The costs determination of the Authority is set aside. The defendant is to repay to the plaintiff the sum of $10,000 which the Association paid on his behalf to the defendant in discharge of that determination.

(b) The determination on costs, amounting to $3,000 in favour of the defendant in respect of the unsuccessful application by the plaintiff for interim reinstatement, becomes an order of this Court pursuant to s 183(2) of the Act. The plaintiff is to pay to the defendant that sum of $3,000.

(c) The defendant is ordered to pay to the plaintiff the sum of $7,000, being costs in respect of the substantive investigation by the Authority, now set aside.

(d) The defendant is to pay to the plaintiff the sum of $40,215 as a contribution towards the plaintiff's legal costs. This sum is two-thirds of the fees of senior counsel for the plaintiff in respect of the challenge.

(e) The defendant is to pay to the plaintiff the sum of $1,920 being disbursements, filing and hearing fees.

[27] Counsel for the plaintiff in his memorandum on costs categorises "meals, transportation and accommodation" and "witness costs" as being claimed. Apart from those items I have managed to locate in the bundle of documents as relating to Ms Buschl I have been unable to isolate any further expenses specifically related to witness expenses. Some of the invoices relate to the plaintiff personally but no basis has been put forward as to why those should be reimbursed. However, insofar as the expenses for Ms Buschl are concerned the defendant is ordered to pay to the plaintiff the sum of $1,037.30.

M E Perkins
Judge

Judgment signed at 2 pm on Thursday 26 May 2011