

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 195
ARC 88/10**

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

AND IN THE MATTER of an application for costs

BETWEEN STEPHEN DAVIS
Plaintiff

AND COMMISSIONER OF POLICE
Defendant

CRC 31/13

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN STEPHEN DAVIS
Plaintiff

AND COMMISSIONER OF POLICE
Defendant

Hearing: By memoranda filed on 10 September, 29 September, 7 October
and 21 October 2014

Appearances: J Goldstein and L Ryder, counsel for plaintiff
E Child and R Groot, counsel for defendant

Judgment: 23 October 2014

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] Mr Davis commenced two sets of proceedings in the Court. One was a challenge to a determination of the Employment Relations Authority.¹ The other was a personal grievance proceeding removed to the Employment Court.² Mr Davis was unsuccessful in both sets of proceedings. In a judgment dated 19 August 2014,³ I dismissed Mr Davis's claims. I reserved the issue of costs until the parties had time to make submissions. These have now been received.

[2] These proceedings involved hearings in both Whangarei and Christchurch, lasting eleven days in total. The hearings were spread over a period of weeks. While heard in July 2014, the challenge to the determination was filed in 2010.⁴ Substantial attendances were required by counsel for the defendant, mainly as a result of Mr Davis representing himself initially, and also because of the way that he pleaded his claims at that time.

[3] The Commissioner of Police now claims costs against Mr Davis. The Commissioner did not seek costs in respect of the Authority's investigation, in which he was successful in defending Mr Davis's claims.

[4] Mr Child, counsel for the Commissioner, in his submissions on costs, summarises the attendances required as follows:

- a) case management of the files over a period of almost four years from September 2010, when the challenge was filed in the Employment Court, until the conclusion of the hearing in July 2014;
- b) an 11 day substantive hearing conducted in two different locations and over a period of three calendar weeks;
- c) briefing and calling 11 witnesses for the defence;
- d) preparing the bundle of documents for the Northland hearing;

¹ *Davis v Commissioner of Police* ERA Auckland, AA 313/10, 5 July 2010.

² *Davis v Commissioner of Police* [2013] NZERA Christchurch 134.

³ *Davis v Commissioner of Police* [2014] NZEmpC 152.

⁴ ARC 88/10.

- e) dealing with numerous requests for information or disclosure by or on behalf of the plaintiff;
- f) settlement initiatives;
- g) dealing with the late application for adjournment by Mr Davis.

[5] In addition to the costs now claimed, the Commissioner also seeks reimbursement for disbursements incurred in the usual way. Travel and accommodation costs for both counsel and witnesses are included in these disbursements. In addition, as one of the main defence witnesses was on leave in Europe, her evidence was required to be given by video link from London and expenses were associated with that.

[6] The Commissioner seeks a contribution of \$115,272 towards his legal fees. This sum represents two-thirds of actual fees invoiced by counsel inclusive of GST. In addition, the sum of \$22,109 is claimed as disbursements incurred. Mr Child's hourly rate was charged at \$210 per hour. Recovery for the time expended by junior counsel for the Commissioner while she was employed at the Crown Law Office was substantially discounted. No fees are claimed for her time following her departure from the Crown Law Office and commencement of employment with the New Zealand Police.

[7] In addition to summarising the overall attendances, in his submissions Mr Child has annexed a further itemised summary of attendances with fees charged at various stages of the proceedings together with the respective disbursements incurred at each stage and including GST. Another annexure includes a list of disbursements relating to the witnesses called by the Commissioner and travel and accommodation costs for junior counsel.

[8] Mr Goldstein and Ms Ryder as counsel for Mr Davis, submit that costs should lie where they fall. The reasons for this submission can be summarised as follows:

- a) the proceedings were brought in the wider interests of the public and the Police and involved important issues in the nature of a test case;
- b) in the alternative, the submission is made that the fees charged were excessive;
- c) insufficient detail has been provided as to the charges made to the Commissioner;
- d) the fees charged are out of proportion to fees charged to the plaintiff;
- e) that charges made for junior counsel are unreasonable;
- f) the fees charged for settlement initiatives are contrary to principle;
- g) that the disbursements are excessive and unreasonable.

[9] Mr Goldstein and Ms Ryder have also submitted that the excessive charges made to the Commissioner are highlighted by the fact that, whereas the Commissioner has been charged \$151,873.65, Mr Davis was only charged \$100,000. However, that overlooks the fact that Crown Law Office was employed in the matter for a longer period, which included the period when Mr Davis was representing himself. The submission is also made by Mr Child that the rounded fee of \$100,000 charged to Mr Davis may indicate a pre-agreed total fee. Neither Mr Davis's counsel, nor Mr Davis in his own later submissions, has answered that assertion.

[10] It is further submitted on behalf of Mr Davis that in the event that costs do not lie where they fall, Mr Davis's financial position is such that any award of costs against him should be limited.

[11] In exercising its discretion in the matter of costs, the Court primarily relies upon three decisions of the Court of Appeal; *Victoria University of Wellington v*

Alton-Lee,⁵ *Binnie v Pacific Health Ltd*,⁶ and *Health Waikato Ltd v Elmsly*.⁷

[12] Costs will normally follow the event and while all matters pertinent to the issue of costs are to be taken into account, the Court will generally make an award equating to two-thirds of actual and reasonable costs incurred by the successful party. Those principles can of course be departed from where circumstances, including the defendant's financial position, provide justification.

[13] Having analysed all items in the breakdown of attendances and disbursements contained in Mr Child's submissions, I reach the conclusion that the fees charged between October 2010 and August 2014 are fair and reasonable. The hourly rate which Mr Child has charged is a substantially reduced hourly rate from that which would be charged by counsel with his experience in private practice. The charges, which have been made to the Commissioner for a period of nearly four years, compare more than favourably with the sum of \$100,000 charged to Mr Davis by his counsel for a shorter period of time.

[14] Despite the submission made on behalf of Mr Davis, this was not a test case. Nor was there anything about it which was in the public interest or which might settle issues for the benefit of other police officers. This was a matter capable of being confined to its own set of facts. Accordingly, I do not accept the submission made by Mr Goldstein and Ms Ryder in that regard.

[15] Mr Davis is clearly now in a difficult situation so far as his own financial means are concerned. He has used all of his savings and assets to pay legal fees incurred in the proceedings and continues to have substantial liabilities in that regard. Nevertheless, he has throughout remained in employment with the New Zealand Police and will continue to do so. He will be receiving a good income. While he has commitments to his family, he will still have the ability to meet his obligations now arising in respect of costs.

⁵ *Victoria University of Wellington v Alton-Lee*, [2001] ERNZ 305 (CA).

⁶ *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA).

⁷ *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

[16] Mr Davis chose to pursue these proceedings to the extent that he did. There were attempts along the way to resolve matters with him. His rejection of such attempts at settlement would not justify a consideration of indemnity costs. However, rejection by him of attempts to resolve this matter reinforces the view that there is no basis for declining the Commissioner's claims to costs.

[17] There is in this case, no reason why usual principles should not apply. Accordingly, Mr Davis is ordered to make a contribution towards the Commissioner's costs amounting to \$115,000.

[18] As far as disbursements are concerned Mr Davis is to reimburse the Commissioner for the disbursements claimed apart from photocopying and toll calls, which are part of normal overheads covered by the hourly rate. The disbursements need to be supported by invoices. Copies of all invoices are to be provided to the Court and Mr Davis and a further judgment will then be issued. The video conferencing and taxi charges for the witness Gibson are to be included in any award of disbursements. The alternative would have been to cover the costs of the witness returning to New Zealand to give evidence at a far greater cost.

M E Perkins
Judge

Judgment signed at 2:30 pm on 23 October 2014