IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY

[2015] NZEmpC 16
CRC 41/12

IN THE MATTER OF	a matter referred to the Court by the Employment Relations Authority
BETWEEN	NEW ZEALAND MEATWORKERS & RELATED TRADES UNION INCORPORATED Plaintiff
AND	ALLIANCE GROUP LIMITED Defendant

Hearing: on the papers; submissions received 8 and 25 May 2014

Appearances: P B Churchman QC, counsel for the plaintiff
K G Smith, counsel for the defendant

Judgment: 11 February 2015

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] The issue in this case was the interpretation and application of certain annual holidays provisions of a collective agreement between the parties. The dispute arose following the increase in the minimum entitlement to annual holidays from three to four weeks on 1 April 2007. In my substantive decision, I found for the defendant. As costs were not agreed, memoranda were filed.

[2] The principles applicable to the award of costs in this Court are well established and well known. A useful starting point is two thirds of the costs actually and reasonably incurred by the successful party. The Court may then have regard to a number of factors relating to the case before it including the manner in which the litigation was conducted, any offers of settlement made, the nature of the issue and the ability of the unsuccessful party to pay.

[3] In his memorandum, Mr Smith informed the Court that the defendant's actual costs were $125,731 (inclusive of GST), comprising $117,287.50 for legal services, $2,393.21 for disbursements and $2,608.25 for unspecified "service charges". These amounts were confirmed by extracts from the invoices rendered and I have no reason to doubt that the defendant actually paid that amount.

[4] Mr Smith made detailed submissions to the effect that these costs were entirely reasonable but only sought an award of costs of "55%-65%" of the costs actually incurred. Why a reduction from a starting point of two thirds was conceded was not explained.

[5] For the plaintiff, Mr Churchman's principal submission was that the costs actually incurred by the defendant were far in excess of what was reasonable. He also submitted that the issue before the Court was in the nature of a "test case" and, for that reason, no award of costs should be made or any award of costs should be reduced.

To what extent were the defendant's costs reasonable?

[6] In support of his submission that the defendant's costs were entirely reasonable, Mr Smith helpfully supplied detailed information about how those costs were incurred. This included summaries of the time spent by each of the lawyers involved in providing services to the defendant and the overall amount of time spent on each aspect of the matter. That was supplemented by copies of time records showing the time spent on each particular task carried out.

[7] In total, the defendant was charged for 409 hours of work, comprising 252.4 hours by Mr Brookes at rates between $160 and $240 per hour, 152.4 hours by Mr Smith at rates between $425 and $450 per hour and 4.2 hours by other practitioners at an average rate of $244 per hour.

[8] Mr Churchman strongly challenged the proposition that this was reasonable. He challenged both the amount of time spent and the rates charged. By way of comparison, he provided details of the costs incurred by the plaintiff. In total, the

plaintiff's costs were $31,830, comprising legal fees of $29,001.68 (inclusive of GST) and disbursements of $2,827.87. The legal fees were based on 82.8 hours at $300 per hour.

[9] I must be cautious in drawing conclusions from a comparison of the plaintiff's costs with those of the defendant, particularly given that the plaintiff was unsuccessful. Having a thorough knowledge of the issues, evidence and documents involved in this case, however, I am satisfied that it is a proper and useful comparison to make.

[10] I accept Mr Churchman's submission that the matter was neither very complex nor extensive in its scope. The key issue was clear from the outset. The disclosure of documents sought was relatively constrained. There were no interlocutory issues. The evidence was not complex or particularly extensive. There was no expert evidence. The legal issues were important but not particularly complex. The hearing, including submissions, was completed in three days. The cases for both parties were presented fully and professionally. Although the plaintiff was unsuccessful, that was not due to any lack of preparation or presentation of its case.

[11] This leads me to the obvious conclusion that the costs actually incurred by the defendant were much greater than necessary to properly prepare and present the defendant's case. In saying that, I am not being critical of the lawyers who advised and represented the defendant, nor do I make any judgment about the value of their services. It is for each party to decide the level of representation they wish to have but, as I have said previously:[1]

> Parties to litigation are entitled to engage competent counsel of their choice and it is appropriate that a successful party be recompensed for the reasonable cost of such representation. Equally, it is open to a party to engage more experienced or skilful counsel than the case might warrant or to devote additional resources to the matter over and above that reasonably required. Where a party chooses to do that, however, it cannot expect to recover from an unsuccessful opponent the additional cost incurred.

[1] *Merchant v Department of Corrections* [2009] ERNZ 108 at [12].

[12] In addition to this general conclusion, I note two particular points raised by Mr Churchman. The first is whether it is appropriate to have regard to the costs incurred by the parties in attending mediation. I agree with the view expressed by many Judges of this Court that the scheme and purposes of the Employment Relations Act 2000 require parties in most cases to make a proper attempt to resolve their differences by agreement and that the costs associated with that process ought to be borne by them. In this case, the parties attended mediation voluntarily and I disregard the costs of $3,145 said by Mr Smith to have been associated with mediation.

[13] The defendant's costs included both the fees and disbursements incurred in having Mr Smith assisted throughout the hearing by Mr Brookes as junior counsel. Given that Mr Smith's time was being charged at $450 per hour and Mr Brooke's time at $240 per hour, that makes a total of $690 per hour plus GST for representation of the defendant. On any view of the matter, that was unreasonable. Having heard this case and thereby having a thorough understanding of what it involved, it seems to me that it could readily have been conducted for the defendant by a single experienced and capable representative. Thus, while it was undoubtedly convenient and helpful to Mr Smith to have the assistance of Mr Brookes, I do not find that it was reasonable in the sense that the plaintiff ought to contribute to the cost of his appearance. For this reason, I disregard fees of $4,800 and the disbursements for Mr Brookes' travel and accommodation.

[14] A further issue, raised by both counsel, was comparison with costs which might have been awarded had this litigation been conducted in the High Court and subject to the scale of costs provided for in the High Court Rules. Mr Smith submitted that the case would have been categorised as 3B with some aspects of preparation for hearing regarded as 3C. I disagree and accept Mr Churchman's submission that an appropriate category would be 2B. The matter was not unduly complex and was within the scope of a practitioner of average experience in the Employment Court. On that basis, the High Court Rules would suggest an award of costs of about $38,000. I treat this figure with caution, however, as proceedings in this Court and those in the High Court are not directly analogous.

[15] Having regard to all factors, I conclude that no more than $45,000 plus GST of the costs actually incurred by the defendant can properly be regarded as reasonable.

Proportion of reasonable costs which the plaintiff ought to pay

[16] In accordance with the guidelines set by the Court of Appeal, I take as a starting point an award of costs of two thirds of $45,000, that is $30,000. I disregard GST on the assumption that the defendant is GST registered and will already have recovered the whole of the GST component of its costs. The remaining step is to consider whether there were any aspects of this case which warrant movement up or down from that point.

[17] There is no suggestion by either counsel that the litigation was not conducted efficiently or that any costs were unnecessarily incurred by one party as a result of the conduct of the other. Equally, there is no suggestion that the plaintiff is unable to pay any award which might be made.

[18] That leaves as the only consideration Mr Churchman's submission that this case was in the nature of a "test case" and that costs should lie where they have fallen. In support of this submission, he cited *Hansells (NZ) Ltd v Ma*,[2] *Maritime Union of New Zealand v C3 Ltd*[3] and, in particular, *New Zealand Meatworkers Union v Alliance Group Ltd*[4]. In each of these cases, the Court recognised that the issue before it was a genuine dispute about the terms of a collective agreement which affected both the parties and the numerous employees covered by it. As such, the parties had a mutual interest in having their dispute resolved in an orderly and authoritative manner by the Court.

[19] While this case had those attributes, it was at or near the end of a long line of cases about the impact on collective agreements of the increase in the statutory minimum entitlement to annual holidays which took effect on 1 April 2007. Although the Authority was persuaded to refer the matter to the Court on the basis

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[2] AC 53A/07.
[3] [2012] NZEmpC 13.
[4] CC10/07.

that it involved an important question of law, my decision turned very largely on the facts and the application of settled principles of interpretation to the collective agreement in question. In saying this, I am not unmindful of the observation I made in my substantive judgement that the positions of both parties were arguable and the submissions made in support of them were persuasive.[5] That conveyed my view that the case had been properly brought and well presented by counsel. Overall, this is a factor I take into account but not to the extent that no award of costs should be made.

[20] I conclude that a just award of costs is $20,000.

Disbursements

[21] Mr Smith acknowledged in his memorandum that the "service charges" incurred by the defendant could not be recovered as a disbursement. That leaves as the only disbursements which may be recovered the cost of travel and accommodation for Mr Smith associated with the hearing. They are itemised on an invoice to the defendant as $483.48 and $370 respectively, a total of $853.48. The defendant should be reimbursed for that sum.

Summary

[22] The plaintiff is ordered to pay the defendant $20,000 for costs and $853.48 for disbursements,

A A Couch
Judge

Signed at 2.30pm on 11 February 2015.

[5] At [36].