IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 25
EMPC 314/2014

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PRI FLIGHT CATERING LIMITED First Plaintiff
AND	PACIFIC FLIGHT CATERING LIMITED Second Plaintiff
AND	DEBASISH SAHA Defendant

Hearing:	On written submissions filed on 23 January and 18 February 2015
Appearances:	AF Drake and B Nicholson, counsel for plaintiffs No appearance entered for defendant
Judgment:	4 March 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] Despite having been served with the plaintiffs' challenge, and service on him having been proved to the Court's satisfaction, Debasish Saha has taken no step to defend this challenge to the Employment Relations Authority's costs determination.[1]

[2] The plaintiffs' application for judgment by default for indemnity of costs against the defendant was refused but the Court has considered the challenge on papers filed by the plaintiffs without the requirement of a hearing.

[3] The plaintiffs have provided to the Court the memoranda of both parties in relation to costs which were filed in the Authority, its costs determination, and the

[1] *Saha v Pacific Flight Catering Limited* [2014] NZERA Auckland 458.

plaintiffs' invoices rendered by their solicitors for both the Authority proceedings and the costs on this challenge.

[4] Mr Saha commenced proceedings against the plaintiffs in the Authority in mid-February 2014. He withdrew those proceedings on 5 September 2014. After considering submissions filed, on 10 November 2014 the Authority declined to make an order for costs in favour of the companies. It directed that costs should lie where they fell, that is that all parties should meet their own costs of legal representation without contribution from others.

[5] That determination was challenged on 28 November 2014 and the plaintiffs' statement of claim was served on the defendant in early December 2014. The period during which the defendant was entitled to file a statement of defence expired in mid-January 2015.

[6] The issues for determination by the Court on the challenge are: first, whether costs should be awarded to the companies in the Authority proceedings; second, if so, whether these should be indemnity costs or otherwise; and third, the Court must decide whether the plaintiffs should have costs on the challenge and, if so, how much.

[7] The plaintiffs invoke the principle that costs should follow the event, although the event in this case is the withdrawal of proceedings by a party rather than the more usual conclusion of them by a determination on merits. The plaintiffs challenge the Authority's conclusion at [40] of its determination that because the litigation had been settled in or with the assistance of mediation, costs should not follow the event. The Authority's reasoning in this regard was as follows:

> Directed mediation resulted in the successful resolution of the matter without the intervention of the Authority. It is not usual in such cases that costs be awarded as a result of the resolution of the matter through the appropriate statutory mechanism prior to any investigation meeting.

[8] The plaintiffs submit that the matter was not settled with them in mediation; rather, any settlement was achieved only with the third respondent in the Authority proceedings, LSG Sky Chefs New Zealand Limited (LSG), and that this settlement

was without reference to the plaintiffs. They say that at the conclusion of the mediation, the defendant's claims against them remained alive and the plaintiffs' understanding was that these would be continued against them.

[9] The plaintiffs say that on 21 August 2014, following the mediation, they filed a memorandum with the Authority asking it to strike out the defendant's application against them, and that it was only on 5 September 2014 that the defendant finally withdrew his claims against the plaintiffs in the Authority.

[10] The plaintiffs rely on the judgment of this Court in *RHB Chartered Accountants v Rawcliffe* for what I consider to be the uncontroversial proposition that where a claim is withdrawn against a defendant in the absence of a settlement between those parties relating to costs, and the defendant has incurred costs associated with the proceedings, the defendant may be entitled to a contribution towards those costs incurred.[2]

[11] The plaintiffs rely also on the recent judgment of the Court of Appeal in *Powell v Hally Labels Ltd.*[3] This judgment relates, however, to civil litigation practices in the High Court, so that its affirmation that the High Court "… guards its discretion over costs, but as a matter of practice it does not lightly allow a plaintiff to displace the presumption that costs follow discontinuance",[4] must be considered in that light. So, too, must the Court of Appeal's conclusion that:[5]

> … absent agreement or order, a plaintiff who discontinues must pay the defendant's costs of the proceeding to that point. The rule's rationale is that discontinuance is ordinarily tantamount to judgment for the defendant. It elevates to a presumption the principle that costs follow the result.

[12] The question in this case is governed not by the High Court Rules but by cl 15 of sch 2 to the Employment Relations Act 2000 (the Act) which, allowing the Authority a very broad discretion, provides:

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[2] *RHB Chartered Accountants v Rawcliffe* [2012] NZEmpC 31.
[3] *Powell v Hally Labels Ltd* [2013] NZCA 572.
[4] At [20].
[5] At [19].

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[13] Also applicable is s 157(3) of the Act (Role of Authority) which provides:

> The Authority must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with—
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> (a) this Act; or
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> (b) any regulations made under this Act; or
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> (c) the relevant employment agreement.

[14] For these reasons, the judgment of the Court of Appeal in *Hally Labels* is neither binding nor helpful to the decision of this challenge. Rather, the leading and authoritative, albeit longstanding, case on Authority costs is *PBO Limited (formerly Rush Security Limited)* v *Da Cruz*, the principles set out[6] in which I propose to apply with modifications appropriate to the particular circumstances of the case.

[15] The plaintiffs say that their legal costs for the Authority proceedings totalled $15,680.60 (exclusive of GST) for the preparation of two statements in reply, attending two telephone conferences with the Authority, the preparation of a memorandum seeking to have the claims against them struck out, and attending a mediation as directed by the Authority.

[16] As to the principles governing awards of indemnity costs, the plaintiffs submit that the Authority was, and the Court now is, entitled to consider the parties' conduct in assessing whether this justified increased or full indemnity costs. In this regard, counsel refer the Court to r 14.6 of the High Court Rules which allows for an award of indemnity costs where an unsuccessful party's conduct in the proceedings contributed unnecessarily to the time and expense of them or where such a party acted vexatiously, frivolously, improperly, or unnecessarily in commencing and continuing the proceeding.

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[6] *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808.

[17] Again, recourse to the High Court Rules is inappropriate for determining costs issues in the Authority. That is not to say, however, that similar principles may not apply to an application for an award of indemnity costs in the Authority but these must be subject to the overarching requirements of cl 15 of sch 2, s 157(3), and the jurisprudence established by cases such as *Da Cruz*.

[18] The plaintiffs submit that the defendant in this case did act vexatiously, frivolously, improperly, and unnecessarily in commencing and continuing proceedings against them in the Authority, which added unnecessarily and needlessly to their costs of defending them.

[19] The plaintiffs submit that the defendant's claim was both improper and flawed from the outset and despite having been made aware of this in correspondence, the defendant persisted with his proceedings against the plaintiffs vexatiously and frivolously.

[20] The Authority concluded that it could not be sure that the defendant's claim was flawed from the outset and, therefore, could and would not conclude that it ought never to have been commenced. In the Authority's view, this would have been an unsafe conclusion to reach in view of the absence of any substantive investigation of the merits of the proceeding.

[21] In support of their contention that the institution and prosecution of the defendant's claim in the Authority is vexatious and frivolous, the plaintiffs point to a number of features. First, they say that the personal grievance was only raised by the defendant more than two years after the transfer between employers. Next, they say that the defendant did not ever advise them that his transfer had not been accepted by his previous employer, LSG. The plaintiffs say that the defendant claimed originally that he was employed under an individual employment agreement but subsequently changed his position to assert that he was employed under the coverage of a collective agreement.

[22] Next, the plaintiffs say that it was impossible for the defendant's claim to succeed if he was employed under a collective agreement because that agreement

extended only to food catering assistants or supervisors who were entitled to transfer their employment under Part 6A of the Act. Therefore, the plaintiffs say that the former employer, LSG, would have been required to accept his transfer if he was employed under the collective agreement. Then the plaintiffs say that both relevant agreements (the individual and the collective) contained what are called technical redundancy provisions which would have prevented the defendant from recovering redundancy compensation as he claimed. The plaintiffs say that if a technical redundancy situation did not arise, even then there was no entitlement to redundancy compensation under the individual agreement, although there was such an entitlement under the collective agreement.

[23] Penultimately, the plaintiffs say that LSG claimed against them (in proceedings in the High Court) for the value of the defendant's accrued leave on the basis that it had already been paid to him by LSG. Finally, the plaintiffs claim that LSG's records produced in the High Court litigation showed that the defendant was paid his outstanding holiday pay.

[24] The plaintiffs submit that the defendant's eventual withdrawal of his claim against them is a clear indication of the correctness of their consistent stance that the claim should not have been brought and continued, and that the correct party was LSG alone. The plaintiffs say that they advised the defendant of this from the outset, that the settlement at mediation between the defendant and LSG was without reference to the plaintiffs, and it was only after an application by the plaintiffs to the Authority to dismiss the proceedings that the defendant withdrew his claims against them.

[25] Counsel for the plaintiffs submits that the Authority interpreted and applied incorrectly the recent judgment of the Supreme Court in proceedings involving the plaintiffs and LSG under pt 6A of the Act.[7] Counsel submits that the Authority suggested that the Supreme Court had found LSG liable for the transferred leave entitlements of the employees.[8] The plaintiffs say that the judgment of the Supreme Court determined which, between the two commercial entities, was responsible for

[7] *LSG Sky Chefs Ltd v Pacific Flight Catering Ltd & PRI Flight Catering Ltd* [2014] NZSC 158.
[8] *Saha v Pacific Flight Catering Limited*, above n 1, at [37]-[38].

payment of the accrued leave balances of transferring staff. The plaintiffs say that, from the outset of that litigation, LSG admitted it was responsible for paying the transferring employees for their accrued leave entitlements but argued that it was entitled to recover these sums from the first plaintiff, PRI Flight Catering Limited (PRI). In these circumstances, the plaintiffs say, it has always been clear that the defendant, as transferring employee, had to look to LSG for payment of his accrued leave entitlements irrespective of any question of liability for reimbursement of these between the commercial entities.

[26] The plaintiffs go so far as to say that the defendant's proceedings appear to have had an ulterior and even improper motive. They say that the defendant has worked for LSG since late February 2011 and continues to do so.

[27] If the Court declines to award indemnity costs, the plaintiffs say that the Authority's daily tariff of $3,500 should be increased to take into account the factors outlined above in respect of indemnity. The plaintiffs emphasise that they were required to file two statements in reply, to attend two telephone conferences, and to prepare a memorandum seeking to strike out the defendant's claim. They seek an uplift of 50 per cent of a one day tariff fee, amounting to a total of $5,250. In addition, the plaintiffs seek what they describe as a "modest award" towards their costs of attendance at mediation, $3,345 (plus GST), being 66 per cent of what they say were their actual and reasonable costs of legal assistance for mediation, $6,690.15 (excluding GST).

[28] Finally, the plaintiffs seek a contribution towards their costs in this proceeding. They say that their actual costs are $6,198.75 (excluding GST). They seek 66 per cent of those actual and reasonable costs, that is $4,091.18 (plus GST).

[29] Addressing the defendant's known circumstances and, therefore, ability to pay an award, the plaintiffs rely on the judgment of the Court in *Patel v OCS Ltd* where the Court said that to assess a claim of undue hardship to the recipient of a costs order, the claim must be supported by acceptable evidence including details of a party's assets, liabilities, income, and expenditure.[9] Here, however, the defendant's

[9] *Patel v OCS Ltd* [2014] NZEmpC 131 at [16].

failure to defend the proceedings means, in the plaintiffs' submission, that the Court has no acceptable evidence to consider whether an award will cause undue hardship. Counsel for the plaintiffs submits that the only evidence before the Court is that the defendant remains employed by LSG, at whose premises he was served with this challenge, and in these circumstances, the plaintiffs say that the Court should be satisfied that the defendant would be able to meet "any award of costs".

A contribution to costs of mediation?

[30] Requiring a party to contribute to the costs of another for attending mediation is a not entirely settled question in this jurisdiction. The position has been summarised in *Rawcliffe*[10] and *Naturex Ltd v Rogers.*[11]

[31] The judicial consensus illustrated by these judgments is that it is open to the Court to award costs in respect of mediation that has been directed by the Authority or the Court as a step in the litigation before them. Such uncertainty as there continues to be is in relation to mediation undergone voluntarily before proceedings are issued or, potentially also, mediation undergone voluntarily as opposed to being directed, in the course of proceedings issued. In this case, mediation was directed by the Authority and I agree that this allows the Court to consider making an order contributing to the costs of mediation.

[32] This is consistent with the position summarised by Judge Inglis in the *Rawcliffe* case where she identified cases in which costs had been allowed for mediation which was directed but which the party subject to the order refused to attend.[12] Such cases have included *Open Systems Ltd v Pontifex*[13] (approved by the Court of Appeal in *Gallagher Group Ltd v Walley*)[14] and *Real Cool Ltd v Gunfield.*[15] I do not understand the Judge to have confined her conclusion of an entitlement to costs to cases where there had been disobedience of a direction to attend mediation. By using such cases as examples, I do not understand the Judge to have confined her

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[10] *RHB Chartered Accountants v Rawcliffe*, above n 2 at [19].
[11] *Naturex Ltd v Rogers* [2011] NZEmpC 9 at [22]-[29].
[12] At [30].
[13] *Open Systems Ltd v Pontifex* [1995] 2 ERNZ 211.
[14] *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 at [37].
[15] *Real Cool Ltd v Gunfield,* AC 37A/09, 10 December 2009

conclusion regarding entitlement to costs to cases where there had been non-compliance with a direction to attend mediation. I do not consider that a refusal to attend a directed mediation is a pre-condition to an award of costs of mediation and I do not understand Judge Inglis to have so decided. Because of its confidential nature, it is not possible to attribute responsibility for mediation's lack of success in any case; but this too does not preclude the making of a contributory costs' order if that may be otherwise warranted

Indemnity costs?

[33] The relevant circumstances of the case do not warrant an order for indemnity costs against Mr Saha. In view of the uncertainties surrounding liabilities under Part 6A of the Act, it was not unreasonable in my assessment for the defendant to have nominated the plaintiffs as respondents in the Authority. The commencement and prosecution of the defendant's claims were not frivolous and vexatious and the plaintiffs' attribution of an ulterior motive in doing so is simply not made out beyond allegation. With the exception of writing to the Authority to ask it to strike out the defendant's claims, no costs were incurred by the plaintiffs after the settlement of the proceeding in mediation. Although it would have been better to have included the plaintiffs in the settlement in mediation that the defendant reached with LSG, not having done so, Mr Saha cannot be said to have moved slowly in discontinuing his claims against the plaintiffs. The extraordinary circumstances warranting an award of indemnity Authority costs do not exist in this case.

Are the plaintiffs entitled to a contribution to their costs in the Authority?

[34] I consider that, in all the circumstances, the plaintiffs are entitled to a contribution towards their reasonable costs to the point of discontinuation of the plaintiff's claim in the Authority. Those costs should include a reasonable contribution to the plaintiffs' costs of appropriate representation in mediation. Mediation was directed by the Authority as a part of its dispute resolution function between the parties. The plaintiffs had no choice about attending mediation and participating in it. There is no information before the Court as to the extent of the

plaintiffs' attendance at mediation and how Mr Saha's claims were settled with LSG but not with the plaintiffs.

[35] However, I would not allow the same level of contribution towards legal costs for mediation as I would for legal advice and representation in the litigation, that is for alternate dispute resolution work as opposed to forensic representation.

[36] Speaking generally, mediation is intended to be a forum which has the objective of achieving an agreed resolution of issues between parties other than by an assessment and allocation of legal rights and obligations. Given such intention, it is sometimes unnecessary, even inappropriate, for parties to be accompanied by lawyers at mediation, especially if legal advice is readily available, for example by telephone. However, human nature being what it is, parties are frequently 'lawyered up' (as it is sometimes described colloquially) for mediations and the Court must take account of that reality. Good representation sometimes enables a just settlement to be achieved which could not have been in its absence. That said, however, the full panoply of representation by a senior practitioner with a junior may well not be warranted at mediation if a more junior adviser is able to attend or be available to give advice. The award in this case will take account of this factor as I understand the plaintiffs to have accepted it should.

[37] The involvement of the plaintiffs' lawyers included taking instructions, giving advice on the litigation, preparing, filing, and serving the statements in reply, attending at mediation, attending two telephone directions conferences, and drafting and filing a memorandum seeking to strike out the defendant's claim.

[38] Because there was no investigation meeting by the Authority, it is not appropriate to apply its notional daily rate to such attendances. I consider, nevertheless, that a reasonable fee for those attendances would have been in the region of $3,000. A reasonable contribution to those notional costs would be two-thirds of them, namely $2,000. There is no suggestion of either of the plaintiffs having incurred separate legal costs so that the award will be for both together.

[39] The Authority's determination declining to make any award of costs is set aside and, in substitution, the defendant is directed to pay a contribution towards the plaintiffs' costs of legal representation for the Authority proceedings in the sum of $2,000.

Costs on the challenge

[40] The plaintiffs are entitled to a reasonable contribution to reasonable legal fees. The lawyers' attendances have included drafting, filing, and serving the statement of claim, proving service thereof, participating in preliminary submissions with the Court as to how the challenge is to be dealt with, and filing written submissions in support of it. I assess a reasonable fee for these attendances, in all the circumstances, to be $4,000, and accept that the defendant's contribution to this should be set at two-thirds or $2,667. In addition (although I note not sought expressly), the plaintiffs are entitled to the filing fee on the challenge and the reasonable costs of the process server in effecting service on the defendant, which disbursements should be set by the Registrar.

[41] Although the proceeding in the Authority was brought by Mr Saha in his own name, and so the challenge was served on him, it would be unrealistic to ignore the fact that his case was championed by the Service & Food Workers Union Nga Ringa Tota Inc and that he was represented in the Authority by counsel, Ms Maria Urlich. In these circumstances, the Registrar should send copies of this judgment to both the Union and Ms Urlich.

GL Colgan
Chief Judge

Judgment signed at 11.30 am on Wednesday 4 March 2015