IN THE EMPLOYMENT COURT
AUCKLAND

AC 74/06
ARC 30/04

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PAUL VINCENT SANDIFER Plaintiff
AND	PLUMBERS GASFITTERS & DRAINLAYERS BOARD NZ Defendant

Hearing: Submissions and letters received on 25 November 2005, 21 June and 7 August 2006 for the defendant
and 4 August, 19 October and 27 November 2006 for the plaintiff

Judgment: 18 December 2006

COSTS JUDGMENT OF JUDGE B S TRAVIS

---

[1] The defendant successfully defended the plaintiff's de novo challenge against a determination of the Employment Relations Authority. The determination dismissed his personal grievance claim that he had been unjustifiably dismissed. Costs were reserved to allow the parties time to resolve that issue between themselves in the first instance. The parties were unable to agree.

[2] The defendant now seeks a contribution towards its costs citing the well known principles in *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 and *Victoria University of Wellington v Alton-Lee* [2001] 1 ERNZ 305. The Court of Appeal decisions indicate that a figure of 66 percent of actual and reasonably incurred costs provides a useful starting point in calculating the appropriate contribution of the losing party to the successful party's costs. They also endorse the principle that costs should normally follow the event. The defendant submits the fact that the

employer rather than the employee was successful should not change the Court's approach to costs issues.

[3] The defendant states that it has incurred $8,505 excluding GST, as its total legal costs in defence of the plaintiff's challenge. This was based on counsel's hourly rate of $175, excluding GST, for 48.6 hours of preparation and attendance time.

[4] In addition witnesses expenses for 2 witnesses are sought totalling $2,363. This is based on the daily allowance paid to the Board chair for two days at $950, his travel between Hokitika and Auckland of $823, the CEO's travel between Wellington and Auckland, and taxis to and from airports.

[5] In support of the claim that the costs were reasonably and actually incurred the following matters were advanced by the defendant:

- That counsel's hourly rate is a reasonable and modest one in comparison with other representation costs within the Auckland legal fraternity;
- Further particulars of the statement of claim and an additional amended statement of defence were required;
- The briefs of evidence of the two witnesses required reworking given that the plaintiff was pursued only part of his original claim;
- While one witness was based in Wellington, the other was in Hokitika and additional effort made to ensure that he was properly prepared for the hearing;
- Additional evidence in the form of medical information was put before the Court and briefs and submissions had to address that new information, which was not placed before the Authority.
- The defendant's submissions were required to be lengthy to address the various matters raised by the plaintiff, many of which were without legal foundation.

- The amounts claimed by way of remedy were high - $100,000 (compensation and one year's salary) and required substantial research.

[6] The following additional factors were advanced in support of the defendant's claim for at least 60 percent of its actual and reasonably incurred costs.

[7] On 5 October 2004 the defendant made an offer of settlement without prejudice as to costs. The defendant offered to settle the matter by allowing costs to fall where they lay at that time and not to enforce the $4,000 costs award obtained against the plaintiff in the Employment Relations Authority. The offer was rejected by the plaintiff on 7 October 2004. The plaintiff received no awards in the Employment Court. The defendant submits that had the offer been accepted it would have avoided the need for the bulk of costs and witnesses expenses incurred.

[8] The plaintiff's claim was entirely unsuccessful before the Authority. The Authority member's determination was comprehensive and detailed and should have provided the plaintiff with a strong indication that his de novo challenge would similarly be unsuccessful.

[9] The defendant had no choice but to defend the proceedings, and made reasonable and genuine attempts to settle the matter.

[10] The defendant is a regulatory board funded solely by its trade licensing activities and has a lower level of resources than other employers. The defendant exists to regulate the plumbing, gasfitting and drainlaying trades for the ultimate benefit of all who live in New Zealand and is not in the business of making a profit. These Court proceedings have constituted a significant financial burden.

[11] The defendant then addressed the plaintiff's ability to pay because the plaintiff had, in correspondence with counsel for the defendant, indicated an intention to raise impecuniosity in response to any costs application. The defendant acknowledged that a party's ability to pay is a factor to which the Court is obliged to have regard in appropriate cases, in the exercise of its equity and good conscience, citing the *Order of St John Midland Regional Trust Board v Greig* [2004] 2 ERNZ 137. The defendant advanced similar factors to those set out above and submitted that this was not an appropriate case in which to reduce any contribution towards the

defendant's costs on the grounds of the inability of the plaintiff to pay, noting that he had appeared in person before the Court and therefore did not have the added expense of meeting his own representatives costs.

[12] The defendant therefore sought an amount at least equal to 60 percent of actual costs reasonably incurred of $5,100, plus an appropriate contribution to the total witness expenses of $2,363.

[13] The plaintiff did not file a reply and the defendant was required to seek a timetable requiring a response in order to resolve the issues.

[14] On 26 July 2006 the plaintiff wrote to the Court stating that he was still in negotiations with the defendant, that he would be unable to pay the costs sought because he was unemployed as a result of the defendant's actions and had no means to pay because of his lack of registration as a gasfitter. He referred to the failure of the Board to provide him with a useable reference and the fact that there was a new Board which could have a different attitude to the matter.

[15] By a minute of 7 August I invited the defendant's solicitors to obtain instructions as to whether the claim for costs was still being pursued in view of the plaintiff's claim of impecuniosity. I advised the parties that if the matter of the plaintiff's ability to pay was in dispute it might be necessary for the plaintiff to file an affidavit setting out his means.

[16] On 3 October the defendant advised that it wished to pursue the application for costs and contested the plaintiff's claim of impecuniosity. It claimed the plaintiff had undertaken investigation work for the Energy Safety Service and had been able to travel overseas. It also contested the plaintiff's claim that he has no earning ability and that his career has been destroyed because of the defendant's actions affecting his registration as a gasfitter. The defendant stated the plaintiff is registered as a craftsman gasfitter and registered plumber for life. It stated that if the plaintiff wishes to carry out gasfitting or "sanitary plumbing" work then provided he meets the defendant's current requirements he could uplift the necessary license for a fee of some $90 although he has not chosen that option. The defendant requested the plaintiff file an affidavit addressing these contested matters.

[17] The plaintiff was invited to file an affidavit as to his means. Instead he filed what he described as "tax returns for the last two years" which he said represented his total income for the total period. He also requested that any communication purportedly from the defendant be signed by current members of its board.

[18] I issued a minute on 25 October observing that the plaintiff's response to the defendant's request for an affidavit was unsatisfactory and therefore ordered him to file and serve an affidavit setting out his financial means by 24 November 2006. As to his request that any future communications be signed by current Board members, I pointed out the provisions of s236 of the Employment Relations Act 2000 which provides that either an employer or an employee may choose any person to represent that person in any matter before the Court.

[19] The plaintiff has responded saying that he will not be complying with the order requiring him to file an affidavit. He states he is sure that this refusal will be used against him in some way and his concern is that the defendant has ultimately used against him personal information that had been provided to it during the process. He did not explain what information had been used against him or the way it was so allegedly used by the defendant. After expressing dissatisfaction with the Court, the plaintiff asked it to make a determination on the information that it had, and stated that he would endeavour to comply with it.

Conclusion

[20] This was a case that took approximately one day of hearing in the Court. The plaintiff's dismissal arose out of a redundancy which the Court found to be substantively justified and carried out in a procedurally fair manner. The Authority had reached the same conclusion after its investigation. The costs sought are not excessive although I am not satisfied that the plaintiff should inevitably bear the whole of the disbursements that have been incurred, especially those relating to the payments made to the Chair of the defendant's board.

[21] The main feature which mitigates against the normal starting point of a contribution of approximately 66 percent of actual and reasonable costs incurred by the successful defendant, is the plaintiff's current financial situation. The material filed by the plaintiff purported to be his tax returns but are in fact a Notice of

Assessment for himself for the year ending 31 March 2006, a Return Acknowledgment for the 2005 year and two Return Acknowledgements for a company described as DIGIVID LIMITED for the same two years. No information has been supplied by the plaintiff as to the relationship between himself and that company. On that scant information it does however, appear that the plaintiff is personally in receipt of very little income.

[22] Because of the plaintiff's refusal to file an affidavit as to means, I am left in some doubt as to the extent of his ability to pay an award at the level sought by the defendant of $5,100 plus disbursements. I must also assume that the allegations made by the defendant as to the plaintiff's ability to work are of some substance because the plaintiff has not taken the opportunity extended to him of refuting them.

[23] However because of the indication of the lack of income disclosed by the tax forms I am prepared to reduce the amount of the award sought by the defendant in order to provide some realistic response to the plaintiff's claims of impecuniosity. I therefore order the plaintiff to pay $4,000 as a contribution towards the defendant's legal costs and disbursements. The award can, I direct, be paid by instalments of $100 per month. If that payment regime causes the plaintiff any difficulty then, upon his filing an affidavit as to his means, the Court may reassess the rate of repayment. If the plaintiff's economic situation improves he may be able to pay the amount owing in full or by larger instalments. I therefore reserve leave for either party to address the Court further if the plaintiff's circumstances change.

B S Travis
Judge

Judgment signed at 12.15pm on 18 December 2006