IN THE EMPLOYMENT COURT
AUCKLAND

AC 47/07
ARC 50/05
ARC 51/05

IN THE MATTER OF	an application for stay of proceedings and execution filed by the Defendant
AND IN THE MATTER OF	an application for costs
BETWEEN	ARC 50/05 BRIAN CLIFF ARC 51/05 ALLAN WILLIAM GROOM Plaintiffs
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing: Written Submissions received 23 and 27 July 2007

Judgment: 10 August 2007

COSTS JUDGMENT OF JUDGE C M SHAW

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[1] Both Air New Zealand and the plaintiffs have applied for costs in relation to Air New Zealand's application for stay of proceedings and execution.

[2] Following the Employment Court's judgment of 23 August 2006 in favour of the plaintiffs, the parties were left to calculate the amount of lost earnings due to each plaintiff on the basis that this would involve nothing more than an arithmetical exercise. Unfortunately, this was not easily achieved. The relevant chronology is as follows:

- On 18 September 2006 Air New Zealand filed an application for leave to appeal to the Court of Appeal against the Employment Court judgment.

- On 21 December 2006 Air New Zealand filed an application for stay of proceedings pending the outcome of the appeal.

- The Court of Appeal heard the leave application on 19 February 2007.

- On 23 March 2007 the application for stay was set down to be heard in the Employment Court but, because no amount for lost remuneration had been established, by agreement between the parties the application was adjourned for the parties to attend mediation where a measure of agreement appears to have been reached.

- On 8 May 2007 the Court of Appeal issued its judgment declining leave to Air New Zealand to appeal against the Employment Court judgment.

[3] The effect of the Court of Appeal declining of leave was that the application for stay was no longer necessary. No further steps were taken to prosecute it after that.

[4] In June 2007, Mr Thompson wrote to Mr Roberts and said:

> *In relation to the stay application which did not proceed, the proposals put forward by the Company to pay the money into the Employment Court trust account were reasonable and ought to have been accepted, thereby avoiding the need for the stay application altogether. However, in the spirit of trying to resolve all outstanding matters between the parties, and bearing in mind that the stay application never proceeded to a hearing, the Company is prepared to offer $500 to resolve that matter. Please treat this proposal as a Calderbank type offer and in the event that it is not accepted and there is a need to file submissions on costs then I would propose referring to this offer and also the Company's earlier suggestions which would have avoided the need for the application altogether.*

[5] In support of Air New Zealand's application for costs, Mr Thompson submitted that the reason for the application for stay in the first place was the unreasonable stance of the plaintiffs in response to repeated reasonable proposals by the defendant to secure any amounts which would be determined as payable to the plaintiffs. He says the application for stay was a proper and necessary application.

[6] He next submitted that the Calderbank type offer had not been made out of any sense that the plaintiffs had such an entitlement but because the defendant wished to bring this longstanding litigation to an end. The plaintiffs appeared not to share that goal and rejected the offer. In Air New Zealand's view, the plaintiffs must now be prepared to address the consequences which he suggests should be an award of costs of $1500 in total.

[7] For the plaintiffs, Mr Roberts says that if there has been any difficulty in reaching an agreement about lost earnings that is solely as a result of Air New Zealand ignoring the plaintiffs' repeated requests for information abut wages that it is required to provide under the Employment Relations Act 2000. On behalf of the plaintiffs he seeks indemnity costs of $11,250 against Air New Zealand in respect of the stay application.

Decision

[8] The common law Calderbank offer has been overtaken by rule 48G of the High Court Rules. This refers to written offers without prejudice except as to costs. Rule 48G provides that the offer is to expressly state that it is without prejudice except as to costs. Importantly for this case the offer must relate to an issue in the proceedings.

[9] Air New Zealand's reliance on its offer in the present context has an air of unreality about it. It was made even though the stay application did not proceed. It was made even though the parties had reached a mediated settlement of the payments owing to the plaintiffs which was the subject matter of the stay.

[10] The offer did not relate and could not have related to an issue in the proceedings because the application for stay was defunct once the Court of Appeal refused leave for it to appeal on 8 May 2007.

[11] In these unusual circumstances I decline to take the offer into account in deciding costs.

[12] Having said that, I also decline to make any order for costs on the application for stay. Each side is very critical of the behaviour of the other but it is not possible, on the basis of the increasingly fraught correspondence between counsel for the parties, to apportion blame for the delays in resolving the question of monies owing to the plaintiffs. In any event, the conduct of the parties is only one consideration for the Court in fixing costs. It is most unfortunate that the parties did not have recourse to mediation well before March 2007 as this could have settled the issue of what was owed by the plaintiff months earlier and obviated the need for the stay application.

[13] However, the principal reason for not making an order is that the application for stay did not proceed. It did not have an outcome which is the usual starting point for deciding which party is entitled to seek costs. There is therefore no basis on which the Court could begin properly to calculate costs to either side.

[14] Accordingly, costs on the application for stay will lie where they fall.

C M Shaw
JUDGE

Judgment signed at 12.00pm on 10 August 2007