

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 42A/07
ARC 53/06**

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

AND IN THE MATTER OF an application for costs

BETWEEN MATAJON OTENE
Plaintiff

AND A G WALTERS & SONS LIMITED
Defendant

Hearing: By memorandum of submissions filed on 9 July 2007

Appearances: No appearance for Plaintiff
Parvez Akbar, Counsel for Defendant

Judgment: 30 July 2007

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] On 3 July 2007 Matajon Otene's challenge was dismissed for want of prosecution. I reserved costs, allowing the defendant to apply by memorandum, on notice to Mr Otene, to permit him an opportunity to be heard on that question even although he had failed to do so on the question of the dismissal of his appeal. I gave him the period of two weeks after service on him of the defendant's submissions on costs within which to file and serve his own submissions in reply. Mr Otene has failed to make any submissions on costs and so I will now determine them.

[2] Mr Otene challenged the determination of the Employment Relations Authority given on 26 June 2006, finding that his grievance arising out of his dismissal had been resolved by his union organiser. Mr Otene was out of time to

challenge that determination and although the defendant initially opposed the application for leave to proceed out of time, it soon withdrew that opposition.

[3] A telephone conference call was held with a Judge on 2 November 2006 at which, among other things, the issue of security for costs was discussed. The defendant filed and served a statement of defence on 4 December 2006. The parties having agreed to participate in a judicial settlement conference, the defendant presented its memorandum for this conference on 14 March 2007. Nothing further was heard from the plaintiff and so the matter was set down for a callover on 3 July when it was dismissed.

[4] The defendant is entitled to a reasonable contribution in all the circumstances to its reasonable costs of legal representation. Where speculative claims or ones without merit are pursued, a party might be considered to have incurred unnecessarily costs to the other party, pointing to a higher proportion of costs to be awarded. The defendant's costs from 26 September 2006 to 3 July 2007 total \$2,452.50 including disbursements and GST. That included taking instructions, preparing and filing the notice in opposition, attending the telephone conference call, preparing and filing the statement of defence and serving these documents, research into the issues arising out of the claim, preparing and filing the judicial settlement conference memorandum and all correspondence. Counsel has calculated the fee element to be \$2,100 plus GST (a total of \$2,362.50) based on 12 hours' work by counsel at \$175 per hour. The disbursements of courier and administration fees totalling \$90 bring the total to \$2,452.50. That is a reasonable fee for the services provided to the defendant.

[5] Mr Akbar for the defendant submits that the Court should move upwards from a 60 percent starting point of \$1,471.50 because Mr Otene failed to prosecute his claim and has treated the proceedings (indeed his proceedings) with disdain from the outset. Mr Akbar submits that Mr Otene really had no intention of pursuing his claim and simply commenced the proceedings to put the defendant to unnecessary expense and inconvenience. Although I accept that the defendant may believe so, there is insufficient material to persuade me to come to that conclusion. It is equally possible that Mr Otene may have filed his appeal out of genuine concern and simply

not prosecuted it thereafter. It would be improper to speculate about Mr Otene's reasons in the absence of evidence about them.

[6] So although I do not think it is a case for full indemnity, despite the reasonableness of the amount involved, the defendant is nevertheless entitled to a substantial contribution reflecting the strength of the finding of the Authority against him and the apparently futile nature of the challenge.

[7] The defendant may have an award of costs of \$2,000 plus disbursements of \$90, being a total of \$2,090.

GL Colgan
Chief Judge

Judgment signed at 2.45 pm on Monday 30 July 2007