

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 4/07
ARC 71/05**

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

AND IN THE MATTER OF an application for costs

BETWEEN MELISSA WILLIAMS
Plaintiff

AND KIMBERLEYS FASHIONS LIMITED
Defendant

Hearing: by memoranda of submissions filed on 26 January 2007
(Heard at Auckland)

Judgment: 5 February 2007

COSTS JUDGMENT OF JUDGE ME PERKINS

[1] The issue of costs was reserved in a judgment delivered by me on 12 December 2006. The plaintiff, Ms Williams, successfully challenged a determination of the Employment Relations Authority.

[2] I have now received submissions from counsel (Mr E Telle for the plaintiff and Ms P Shaw for the defendant) on the issue of costs.

[3] In the proceedings before the Authority, the solicitors for the plaintiff acted for her on a contingency basis. She was unsuccessful in those proceedings and the Authority awarded the sum of \$2,000 as costs against her.

[4] Ms Williams was in receipt of a grant of legal aid for the challenge in this Court.

[5] Prior to the hearing before the Authority and following an unsuccessful mediation, counsel for Ms Williams wrote a *Calderbank* letter offering settlement for less than the total sum now awarded against the defendant employer.

[6] Mr Telle, counsel for Ms Williams, has submitted that in view of the offer of settlement, she should receive an award of costs on an indemnity basis. Alternatively, he seeks on her behalf:

- (a) the total sum advanced by the Legal Services Agency amounting to \$10,127.75;
- (b) \$8,544 for costs and disbursements up to the determination in the Authority;
- (c) \$2,812.50 for costs relating to submissions on costs and stay of proceedings in the Authority following the determination;
- (d) costs for all steps relating to the obtaining of legal aid amounting to \$1,968.75; and
- (e) costs for drafting the submissions in support of costs in the Employment Court amounting to \$3,150.

[7] In reserving costs on the challenge, I asked counsel to provide a calculation based on category 2B of the High Court scales. Mr Telle has provided such a calculation. This shows a total of \$15,680 for costs and a further sum of \$1,761.45 for disbursements.

[8] Mr Telle also referred to me to the decision of Master Faire (as he then was) in *Kawhia Offshore Services Limited v AJ Rutherford & Anor*, High Court Hamilton, 10 July 2002, CP 61/99. This authority was cited for the proposition that costs may be awarded beyond the grant provided by the Legal Services Agency. However, the features of the present case distinguish it from the consideration of the Master in that case.

[9] I am informed by Mr Telle that the Legal Services Agency has reduced the total grant to \$10,127.75 from the total amount originally sought of \$15,000. The reason for that reduction was that the total sought included costs before the Authority when Ms Williams was represented by her solicitors on an agreed contingency basis.

[10] Ms Shaw, counsel for Kimberleys Fashions Limited, refers in her submissions to the contingency basis as evidence that Ms Williams in fact incurred no costs in the proceedings before the Authority. Further, she submits that the Authority awarded costs to Kimberleys and that was not the subject of challenge. In any event, she submits the total costs incurred by Ms Williams have been fixed by the Legal Services Agency at \$10,127.75. Any further charges levied would be in breach of the Legal Services Act. She submits that an appropriate award would be two-thirds of the actual costs incurred and allowed by the Agency.

[11] While it is clear that the solicitors for Ms Williams have been generous in relation to her fees, the fact remains that the Authority proceedings were conducted on a contingency basis. As she was not successful, no fees were incurred by her. I cannot see how the Court can now be asked to order a contribution in such circumstances.

[12] So far as the Employment Court proceedings are concerned, the solicitors for Ms Williams elected to represent her on the basis of a grant of legal aid. That has been limited by the Legal Services Agency to \$10,127.75 and that sum is therefore the extent of costs incurred by Ms Williams in the entire matter.

[13] In the circumstances Ms Williams should not suffer diminution in reimbursement and compensation awarded to her. The sum of \$10,127.75 is clearly a modest sum for costs having regard to the nature of these proceedings.

[14] Accordingly, I exercise my discretion not to reduce costs from the total incurred of \$10,127.75. There will be an order that the defendant pay the plaintiff costs in such sum, which I note includes disbursements allowed by the Agency.

[15] While the costs awarded by the Authority were not specifically the subject of the challenge to the Court, it follows, as a matter of common sense and logic, that such costs should not be sustained in the view of Ms Williams's success in the Court. The costs order of the Authority is therefore set aside.

ME Perkins
Judge

Judgment signed at 9 am on Monday 5 February 2007