IN THE EMPLOYMENT COURT
AUCKLAND

AC 42/06
ARC 42/05

IN THE MATTER OF	an application for declaration whether a person or persons are employees
AND IN THE MATTER OF	an application for costs
BETWEEN	MURRAY MILLS Plaintiff
AND	MACKS SEAFOODS (1997) LIMITED Defendant

Court: Judge B S Travis

Hearing: By submissions filed on 1, 8 and 9 June 2006

Judgment: 3 August 2006 at 4.15 pm

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff filed an application for declaration under s(6)(v) of the Employment Relations Act 2000 on 8 June 2005 claiming that he was an employee of the defendant. The defendant had previously denied in correspondence that the plaintiff was an employee and this denial was repeated in a statement of defence and counter claim filed on 30 June 2005 and in submissions filed by counsel for the defendant in relation to the defendant's application for disclosure.

[2] The plaintiff sought disclosure documents from the defendant and claimed that the defendant did not fully comply with his request and that this required the plaintiff to apply to the Court for an order of disclosure. The plaintiff's application was set down for hearing on 21 October 2005.

[3] Following negotiations on the morning of the allocated hearing date the additional documents were provided with an undertaking to seek other documents. On this advice immediately prior to the intended hearing time the case was adjourned by consent.

[4] On 12 October 2005, the defendant issued a notice to the plaintiff requiring disclosure. Although this was partly complied with the plaintiff claimed that some of the material requested was irrelevant. The defendant subsequently filed an application with the Court seeking an order of disclosure which was opposed by the plaintiff.

[5] At the disclosure hearing on 6 December 2005, after hearing counsel and considering their submissions, I made an order requiring the plaintiff to comply with the notice requiring disclosure but in a modified form. This reduced the period for which the defendant had been seeking disclosure. I noted there was still a claim by the plaintiff that there were outstanding matters of disclosure by the defendant and advised the parties that, once they had completed disclosure and any outstanding interlocutory matters, they could apply for a fixture. I reserved costs. The plaintiff applied for a fixture and on 11 April the defendant responded suggesting a timetable.

[6] On 18 May 2006, counsel for the defendant filed a memorandum referring to a minute of Chief Judge Colgan, issued on 28 September 2005, in which he had noted that the Court had no original jurisdiction to entertain a personal grievance claim, as the plaintiff's statement of claim in support of his application purported to do or any counter-claim arising out of that and that these must first be commenced in the Employment Relations Authority.

[7] The memorandum also referred to the process of disclosure and claimed that the defendant had discovered through that process that during the relevant time the plaintiff had held the office of director for various other companies during the time of his alleged employment. Notwithstanding this discovery the defendant conceded that the plaintiff was an employee of it as defined in the Employment Relations Act 2005. Counsel submitted that the other claims the plaintiff made in his statement of claim should properly be first heard by the Authority, and requested that the matter be transferred by the Court to the Authority for determination on its merits. It

contended that by having applied for a declaration as to his employment status before the Court, rather than in the Authority, and then unsuccessfully resisting a discovery application, the plaintiff had increased the cost for both parties but the defendant had avoided additional costs by conceding that the plaintiff was an employee.

[8] In a minute dated 18 May 2006 the Chief Judge noted that as the plaintiff's status as an employee had been formally conceded the plaintiff should now discontinue his application, the only residual issue being costs. There was no question of transferring any proceedings to the Authority, which was the place where the plaintiff's claims against the defendant and any counter-claims against the plaintiff should have been dealt with at first instance. If the plaintiff was seeking costs he was directed to do so within one month.

[9] The plaintiff discontinued his application, save as to costs and applied for costs in a memorandum dated 1 June. The memorandum referred to the defendant's denial that the plaintiff was an employee, canvassed the two applications for disclosure, noted my comment during the course of argument that the defendant's application had been seeking a wide ranging disclosure in the nature of a "fishing expedition", and that the order finally made by the Court required the disclosure of information for a period significantly shorter than the period that had been requested by the defendant. Counsel for the plaintiff contended that if the defendant had conceded the plaintiff was an employee when the personal grievance was first raised then the following actions on behalf of the plaintiff would not have been required:

(a) the plaintiff would not have had to have been forced to research the relevant law as to whether or not the plaintiff was an employee;

(b) the plaintiff would not have had to have drafted and filed a statement of claim in the Employment Court;

(c) the plaintiff would not have had to have issued a notice requiring disclosure and be involved in the numerous correspondences and attendances relating to discussions with the defendant's solicitor;

(d) the plaintiff would not have had to have drafted further particulars of the statement of claim;

(e) the plaintiff would not have had to have responded to the defendant's request for disclosure;

(f) the plaintiff would not have had to have be involved in numerous correspondences and attendances relating to his disclosure;

(g) the plaintiff would not have had to have opposed the defendant's application for disclosure in Court;

(h) the plaintiff would not have had to have drafted and sworn an affidavit and drafted submissions relating to the disclosure hearing;

(i) the plaintiff would not have had to have appeared in Court to argue against the disclosure order;

(j) the plaintiff would not have had to have perused a substantial number of documents relating to his affairs to determine what was relevant and provide the same to the defendant.

[10] The memorandum claims that the plaintiff's solicitors and counsel have spent in excess of 155 hours on the application before the Court together with all the surrounding disclosure issues, with the total cost to the client in excess of $28,000 plus GST and disbursements. The plaintiff sought full reimbursement of those costs by the defendant for the reasons set out above.

[11] A subsequent memorandum of counsel for the plaintiff, filed on 9 June, summarised the invoices paid by the plaintiff said to relate to this matter and which totalled $41,601.78. The memorandum concluded:

> *The costs claimed by the plaintiff by memorandum of counsel dated 1 June 2006 only seek costs relating to the application before the Court and no costs relating to the mediation have been claimed.*

[12] Counsel for the defendant had responded by memorandum dated 6 June and contended that if the plaintiff had not applied for leave to have the substantive matters and remedies determined by the Court in the first instance, there being no

special question of law involved, all the matters could have been brought before the Authority, which would have saved on costs. It referred to Chief Judge Colgan's minute stating that although the plaintiff could seek a declaration from the Court that he was an employee, he was obliged to first bring his personal grievance claim before the Authority. It also canvassed the respective efforts of the parties in relation to disclosure of documents and concluded that the defendant had saved on costs for both parties by avoiding the need for hearing by its concession as to the plaintiff's employment status. It observed that the plaintiff has now brought his personal grievance claim against the defendant in the Authority, but contended that by continuing the claim before the Court and unsuccessfully resisting the discovery application and then subsequently going to the Authority the plaintiff had increased the cost for both parties unnecessarily. It denied that there were any sufficient grounds for awarding full reimbursement of such costs and submitted that plaintiff ought not to recover any costs for his application for a declaration when the initial and less expensive venue of the Authority was the appropriate forum to hear the claim.

[13] I found difficulty in reconciling the two memoranda filed by counsel for the plaintiff as to the quantum of costs sought. The summaries of the individual invoices rendered to the plaintiff do not provide any detail of the work done or of the dates of that work. Nor do they give any indication of the nature of the disbursements incurred. The total of the seven invoices, including GST and disbursements is $41,601.78. There has been no attempt to explain the difference between that sum and the precise sum of $28,000 that was claimed for in the first memorandum. Considering the matters before the Court have been limited to disclosure and pleadings and a subsequent application for a fixture it is difficult to see how, in the absence of detailed invoices, costs in excess of $28,000 plus GST and disbursements, let alone in excess of $41,600, could reasonably have been incurred. No basis for the recovery of full indemnity costs has been suggested and in view of the concession of the defendant it is difficult to see how solicitor/client costs could be justified.

[14] Viewing the matter in totality, without going into detail, it appears that both the plaintiff and the defendant had been successful in applications for disclosure, the

defendant's partly successful application going to a defended hearing at which costs were reserved.

[15] I also accept the submissions of counsel for the defendant that this is a matter which could have more economically have been brought in the first instance to the Authority, although there may have been some advantage in the use of the general disclosure procedure available in the Court but not in the Authority. The material disclosed is, I presume, relevant to both the personal grievance and the counterclaim in the Authority and, pending the outcome of these matters, it would normally be too early to award costs for the disclosure activities. However as the defendant was required to seek an order from the plaintiff in a partly successful hearing and the plaintiff's similar application did not proceed to a hearing because of an agreement reached with the defendant. In those circumstances I would have awarded the defendant a modest contribution towards the costs it had incurred in its partly successful application. Balanced against this are the plaintiff's costs of filing his application, dealing with the defence and seeking a fixture, before the defendant made its concession after disclosure. In these circumstances where the merits of the claim and counterclaim are yet to be determined by the Authority and taking into account the respective successes of both sides in the matters before the Court, I consider that costs should lie where they fall and therefore make no order.

B S Travis
Judge

Judgment signed at 4.15pm on Thursday, 3 August 2006

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