IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 14/06
CRC 5/05

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application to strike out proceedings
AND IN THE MATTER OF	an application for costs
BETWEEN	STACEY KEYS Plaintiff
AND	FLIGHT CENTRE (NZ) LTD First Defendant
AND	EMPLOYMENT RELATIONS AUTHORITY Second Defendant

Hearing: Submissions received on 22 July, 3 November, 17 May and 20 October 2006 for the first defendant
23 November 2006 for the plaintiff
No submissions received from the second defendant

Judgment: 13 December 2006

COSTS JUDGMENT OF THE FULL COURT

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[1] The first defendant has applied for costs as a result of the interlocutory judgment of the full Court dated 22 June 2005 ([2005] 1 ERNZ 471). This was a successful interlocutory application by the first defendant for an order striking out the plaintiff's application for judicial review of an Employment Relations Authority determination in which it granted an Anton Piller order against the plaintiff on the first defendant's ex parte application.

[2] The first defendant says that it has incurred actual costs of $4,434.75 inclusive of GST and is seeking a contribution of $3,500 from the plaintiff or

alternatively from the House of Travel Ltd which it alleges is a non-party funder of the plaintiff. The first defendant also seeks a further $565.25 associated with preparing submissions and applying for costs.

[3] Counsel for the first defendant addressed the course of the proceedings and referred to a *Calderbank* offer made to the plaintiff through her solicitors on 31 March 2005. He observed that the Employment Court's recognition of *Calderbank* offers is expressly set out in regulation 68(2)(a) of the Employment Court Regulations 2000. The letter stated that the first defendant wished to give the plaintiff the opportunity to mitigate her exposure to an adverse costs award because her application was flawed. It was pointed out that this was not the appropriate case for having the Authority's power to grant Anton Piller orders cancelled by the Court and that a full Court was due to consider the issue later in the case *Axiom Rolle PRP Valuations Services Ltd v Kapadia* (2006) 3 NZELR 390. The first defendant offered to accept payment of $850 plus GST associated with the review application in full settlement. If that sum was not accepted then, without prejudice save as to costs, the first defendant reserved the right to show a copy of this letter to the Court in support of its costs application.

[4] The plaintiff's solicitors were of the view that *Calderbank* offers are distinctly unhelpful in resolution of genuine disputes relating to statutory interpretation unless there was an intention to pressure a meritorious plaintiff into submission and rejected the offer.

[5] The first defendant submits that the offer was fair and reasonable as the first defendant had made a conscientious attempt to minimise the costs of an otherwise unmeritorious claim. The first defendant held genuine concerns that the application was flawed which it says was accepted in part by the Court in its interlocutory judgment when it struck out the application.

[6] The first defendant's submissions refer to the principles to be applied in the exercise of the discretion to award costs. It then makes a substantial submission on the Court's discretion to award costs against a non-party funder, applying the High Court Rules by analogy. The reasons for seeking such an order are not made

clear as there is no suggestion the plaintiff is unable to meet any costs order that may be made.

[7] In addition to costs based on the *Calderbank* offer and, as an alternative, the first defendant seeks an award of increased costs due to the complexity of the application. Reference was also helpfully made to the High Court scale of costs and a submission was made that the amount the first defendant sought of $3,500 was not unreasonable in terms of the High Court Rules based on a category 3 proceeding. The amended memorandum sought additional costs in relation to the preparation of the costs claim because of the necessity to make the application.

[8] Counsel for the plaintiff initially contended that costs should remain reserved until the full Court's decision in *Axiom Rolle*. In our substantive decision on the strike out application we had determined that there was a right of challenge and the plaintiff duly applied for leave to extend the time in which to file a challenge. That application was granted by consent on 28 July 2005 (file number CRC 19/05), but the challenge was stayed until the release of the full Court's decision in the *Axiom Rolle* case. Leave was given to the first defendant to file and serve its statement of defence 30 days after the full Court's decision in that case In the event, the *Axiom Rolle* decision determined that the Authority did not have the power to issue Anton Piller orders.

[9] In response to the first defendant's memoranda, counsel for the plaintiff accepted that a reasonable contribution towards costs is usually approximately 66 percent, but submitted that if there was to be an award of costs at all it should be significantly reduced in this case. He contended that the purported *Calderbank* letter was of little relevance and traditionally used when monetary compensation was sought. The plaintiff submitted that this was an unprecedented issue as to jurisdiction which did not fit the traditional scope of *Calderbank* offers. The plaintiff submitted that all issues have remained alive on the merits, albeit under a different section of the Employment Relations Act 2000, and contended that the challenge is bound to be successful in light of the full Court's decision in *Axiom Rolle*.

[10] Counsel for the plaintiff also submitted that the arguments put forward in respect of the strike out application by the first defendant were almost completely

unsuccessful, other than the finding that there was a privative provision which prevented the application for review being brought.

[11] As to contribution from a non-party, we consider we are without power to make such an order under clause 19 of Schedule 3 to the Employment Relations Act 2000. To be liable in costs, a person must be either an original or a joined party to a proceeding. House of Travel Ltd does not have that status.

[12] The plaintiff's principal submission is that costs should lie where they fall. We agree. This was very much in the nature of a test case dealing not only with the controversial issue of whether or not the Authority had the jurisdiction to issue ex parte Anton Piller orders, but also whether the purported exercise of such jurisdiction could be challenged by way of judicial review in light of the very recent amendments to the Act.

[13] In view of the full Court's decision on the issue, when the challenge has been properly brought before the Court by payment of the fee, it would appear that it will inevitably be successful and thus the situation is one in which both sides will have succeeded, the plaintiff on the underlying issue of the Authority's jurisdiction and no award for costs is therefore made.

B S Travis
Judge
For the full Court

Judgment signed at 4.10pm on Wednesday, 13 December 2006