IN THE EMPLOYMENT COURT
AUCKLAND

AC 24A/06
ARC 63/04

IN THE MATTER	of a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	DESIGNLINK LIMITED T/A RODNEY WAYNE HAIRDRESSING WHANGAPARAOA First Plaintiff
AND	ANTHONY TERENCE PIPES AND CHERYL PIPES Second Plaintiffs
AND	BRENDA RAYMOND Defendant

Hearing: by memoranda of submissions filed on 26 May, 21, 22, 23 June and 4 July 2006

Judgment: 18 August 2006

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The defendant, Brenda Raymond, seeks costs as a result of the Court's finding in her favour in a judgment delivered on 1 May 2006. Ms Raymond claims full solicitor-client or indemnity costs totalling a little over $29,000.

[2] However, Mr and Mrs Pipes (the liable plaintiffs) have asked, first, that I recall and amend the judgment because they say there was an error in calculating the remuneration loss for which I directed Ms Raymond be compensated. This first question has been dealt with after receiving submissions in writing from counsel for the parties.

[3] At paragraph [76] of the principal judgment I found that Ms Raymond's annual income at the time of her dismissal was $48,000. I awarded her compensation for remuneration loss for three months less a reduction of 10 percent for contributory conduct. That was in reliance on s128, subs (2) of which provides that if the Court is satisfied that Ms Raymond lost remuneration as a result of her unjustified dismissal, the Court *"must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration"*. Section 124 is that which requires a reduction for contributory conduct that I took into account. Ms Raymond had lost more than three months' remuneration as a result of her unjustified dismissal.

[4] The plaintiffs argue that because the defendant was paid a sum equivalent to one month's salary after a mediation of the case in October 2004, this should be deducted from the three months ordered by the Court. This would reduce the compensation for lost remuneration from $10,800 to $8,000.

[5] I decline to recall and amend the judgment for the following reasons.

[6] Whatever sums were paid to Ms Raymond after mediation, they were not in settlement of her personal grievance being her unjustified dismissal. I found, at paragraph [68] of the principal judgment, that the monies paid by the plaintiffs to Ms Raymond following mediation related to remuneration due before the end of her employment. The plaintiffs did not concede that she had been unjustifiably dismissed. The statute provides for a minimum of three months' remuneration in the circumstances that pertained in this case subject to any reduction for contribution that has been made. If there was an unjustified dismissal that resulted in remuneration loss of more than three months, the Court is bound to award a sum equivalent to that minimum subject to reduction for contribution. I do not accept there was a slip or other error in the calculation of this compensation.

[7] I move now to Ms Raymond's claim for costs.

[8] The Employment Relations Authority found that Ms Raymond had been unjustifiably constructively dismissed and awarded her monetary remedies. With some minor adjustments to the amount of those remedies, Ms Raymond's position was vindicated on the plaintiffs' challenge to this Court. Also dealt with were

ancillary questions of the true identity of the employer and whether Ms Raymond's grievances had been settled in mediation. The other significant feature of the case, so far as costs are concerned, was a counterclaim for substantial damages against Ms Raymond that was abandoned by the plaintiff only on the proverbial eve of the trial. There had also been an earlier hearing in November 2004 on the plaintiffs' application for a stay of proceedings. When determining that application I reserved the issue of costs.

[9] The most significant feature of the case relevant to whether indemnity costs should be awarded rather than contributory costs, was Mr Pipes's reprehensible conduct in seeking to bring undue influence to bear upon a witness for Ms Raymond shortly before the Employment Relations Authority's investigation upon which I commented in the judgment. Although I declined to award a penalty against Mr Pipes for this feature of the case, I nevertheless consider that it may properly be addressed by way of costs. It was conduct that affected, or may have affected, the hearing of Ms Raymond's case from which this was an appeal.

[10] In *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438, the Court of Appeal commented upon indemnity costs in Employment Court litigation giving, as an example, the conduct of a losing party as a relevant factor in determining whether indemnity costs should be awarded against that party.

[11] The hearing of the challenge occupied six days. There is nothing to suggest that this period could not reasonably have been reduced by better conduct of the case for either party. There was a myriad of issues and the case was very important to the plaintiffs who spared nothing to ensure that all relevant witnesses gave evidence. Ms Raymond was obliged to defend the challenge accordingly. It follows that I accept that her costs of a little more than $29,000 were reasonable costs of legal representation in all the circumstances.

[12] In early April 2005, after the Authority's determination was issued but before the challenge to this Court was heard, the parties attempted again to resolve their dispute in mediation. There followed an offer of settlement by the plaintiffs *"without prejudice save as to costs"* in which Ms Raymond was offered $12,000 in full and final settlement of her claims. She, however, wanted a payment of $25,000 in full and final settlement and no agreement was reached. The outcome of the

challenge has been awards of compensation to Ms Raymond exceeding the plaintiffs' *Calderbank* offer, but being exceeded by her offer.

[13] They were not the only offers of settlement made that have now been revealed to the Court. While the case was part-heard in this Court, and following my recommendation to the parties to consider again the possibilities of settlement, the plaintiffs made a further "without prejudice" offer to Ms Raymond that she take in full settlement the monies that had then been paid into Court totalling $16,720 being the amalgamation of the Authority's compensatory and costs award. This offer was also in the form of a *Calderbank* offer in the sense that it was made without prejudice except as to costs.

[14] This second offer of settlement was likewise responded to by a counter offer made by Ms Raymond. She proposed to settle the matter at that stage, fully and finally, upon payment to her of the sum of $28,000.

[15] That counter offer was not accepted but heralded a further counter offer by the plaintiffs in a letter dated 26 May 2005. Mr Harrison for the plaintiffs disagreed with Mr Ryan's assessment of the amount awarded by the Authority which the defendant had asserted was $20,200 (exclusive of tax). The plaintiffs' counter offer of 26 May 2005 was for the original sum of $16,720 paid into Court but then together with an allowance towards the defendant's costs incurred to that date of $2,000. Because the resumption of the hearing in this Court was imminent, the offer was open to Ms Raymond for only one day. It was not accepted.

[16] Excluding costs in the Employment Relations Authority, Ms Raymond recovered compensation totalling $15,800 in this Court, less than the $17,000 awarded to her by the Employment Relations Authority. The difference between the compensation levels reflects the reduction for contributory conduct that I applied but the Authority did not.

[17] Counsel for the plaintiffs, Mr Harrison, submits that the circumstances of the case do not come within those set out in r48C of the High Court Rules dealing with increased and indemnity costs. That is not, however, applicable to this Court's decisions on costs. They are to be determined by applying the broad discretion given by Parliament in clause 19 of Schedule 3 to the Act and according to the principles expounded in relevant cases and, in particular, by the Court of Appeal when recently

addressing this issue. In *Binnie v Pacific Health* just cited, the Court of Appeal declined to follow the strict test that this Court had previously applied exemplified in judgments such as *Counties Manukau Health Ltd (t/a South Auckland Health) v Pack* [2000] 1 ERNZ 518. Although conduct of a case that is vexatious, frivolous, improper or unnecessary may well constitute grounds for ordering indemnity costs, such serious behaviours are not necessarily to be established before an order will be made. So, too, the other considerations set out in r48C of the High Court Rules will be relevant but, unlike in that Court, will not necessarily be decisive of the decision to award indemnity costs.

[18] Although I declined in the principal judgment to order the plaintiffs to pay a penalty to reflect Mr Pipes's unconscionable conduct towards a witness for Ms Raymond in the Employment Relations Authority, I consider that this conduct and Mr Pipes's continued defence of it at the hearing of the challenge is sufficiently connected to the grievance that it should be reflected in the costs award that the Court makes.

[19] Mr Harrison for the plaintiffs contends not only that there should be no indemnity or increased costs, but indeed that the award in the defendant's favour should be only "*modest*". I do not agree in principle, but accept the accuracy of some of Mr Harrison's criticisms of the makeup of the amount claimed.

[20] The plaintiffs criticise the makeup of the defendant's legal fees and disbursements as follows. It is correct, as Mr Harrison points out, that the first three bills of costs, going to make up the total of about $29,000 in legal expenses, deal with Ms Raymond's representation in the Employment Relations Authority which has already been the subject of a costs determination in that forum. These Authority related costs together amount to $8,204.11. The fourth bill of costs relates in part to proceedings in the Authority and in part to preliminary Court proceedings. I propose to allow one-half of that account of 31 August 2004 in calculation of reasonable legal expenses for the challenge.

[21] The next bill of costs of 29 October 2004 deals also with a combination of Court and Authority related attendances. I propose to allow two-thirds of that account as part of the defendant's reasonable costs in respect of the challenge.

[22] Therefore, I accept Mr Harrison's submission that legal costs relating to the challenge in this Court appear to amount to approximately $20,500.

[23] Counsel for the plaintiffs submits that deducted from this sum should be the costs associated with the application by the plaintiff for an order staying execution of the Authority's remedies. That was dealt with in an interlocutory judgment dated 17 November 2004 in which I recorded that the hearing time in Court had totalled 1½ hours.

[24] Next, Mr Harrison submits that the Court has already set and awarded costs in respect of the hearing on 2 June 2005 of $2,660 that I assume has been paid to Ms Raymond as was directed at the time.

[25] In these circumstances, Mr Harrison calculates that the defendant's reasonable costs now at issue should be found to total $17,740.30. I accept this as the starting point for calculating the award.

[26] Next, the plaintiffs say that they incurred costs on the challenge amounting to $25,095.88 although these did not take into account all of their incidental legal costs. They should be given some credit for their attempts to settle what became a particularly acrimonious dispute. Mr Harrison reminded me that early initiatives proposing mediation came from the plaintiffs including for a meeting shortly after the dismissal that Ms Raymond failed to attend. It was again the plaintiff that organised an urgent mediation of the employment relationship problem before the proceedings were brought to the Authority. As Mr Harrison reminded me, I directed further mediation which was held on 17 March 2005 although this did not achieve a resolution. Mr Harrison says that although the plaintiffs were legally represented at this mediation, it was Ms Raymond's choice to attend unrepresented that precluded what Mr Harrison described as any realistic chance of a resolution of the problem that was then before the Court. Finally in this regard, Mr Harrison points to the plaintiffs' offers to settle the proceeding although these were consistently for sums less than those which Ms Raymond has recovered, at least after deducting her reasonable costs to those points.

[27] Finally, the plaintiffs ask the Court to take into account their financial position including the effect of Ms Raymond's departure from the salon. I accept that Mr and Mrs Pipes were recently declined a home loan by their bank based on their

company's results. I have also been provided with draft business accounts for the year ended 31 March 2006. Mr Harrison has instructions that Mr and Mrs Pipes are in difficult financial circumstances because of poor business performance of the salon coupled with a number of other unrelated circumstances. This has resulted in significant bank borrowings that cannot now be repeated.

[28] Taking all of these factors into account, and while I do not propose to order indemnity costs, I think the justice of the case warrants a substantial contributory order. That reflects in part my view of Mr Pipes's reprehensible conduct towards one of Ms Raymond's witnesses as already described. I set this at $16,000 that must be paid by Mr and Mrs Pipes to Ms Raymond.

GL Colgan
Chief Judge

Judgment signed at 2 pm on Friday 18 August 2006

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