IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 26
ARC 40/04

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	LINDA GATES Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing: Memoranda received 20 October and 30 November 2009

Judgment: 24 March 2010

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] In my substantive judgment dated 11 September 2009[1], I dismissed all of Mrs Gates' claims and invited the parties to discuss the issue of costs with the alternative of filing memoranda if they were unable to agree.

[2] On behalf of Air New Zealand, Mr Thompson has filed a detailed memorandum seeking an award of costs. Mrs Gates did not respond to this within the time allowed. Rather, after time had expired, she sought an extension of time to prepare submissions. No explanation was given of the failure to comply in time and no reasons were given for seeking an extension of time. In a minute dated 23 November 2009, I refused the application but gave Mrs Gates an opportunity to renew it with reasons by 1 December 2009. Mrs Gates chose not to do that. On 30 November 2009, she filed a document entitled in part "*Plaintiff's memorandum of*

[1] AC 33/09.

objection to defendants costs". That consisted largely of an attempt to relitigate issues of fact I had decided in my substantive judgment. The only statement she made relating to costs was her final paragraph:

> *"11. The Plaintiff is not responsible for the Defendants' costs. The Plaintiffs costs are* ***attached****"*.

[3] It is unfortunate that Mrs Gates has chosen to take this attitude of denial. She is well aware that she is at risk of a very substantial award of costs being made against her. The amount sought and the basis on which it is sought are clearly set out in Mr Thompson's memorandum which has been served on Mrs Gates. That memorandum also contains an accurate summary of the principles governing the Court's discretion to award costs and cites the three decisions of the Court of Appeal from which those principles are derived. This proceeding has now been before the Court for more than 5 years. For the last 4 years or so, Mrs Gates has been a litigant in person. During that time, she has been granted numerous indulgences in recognition of that status. The issues before the Court and the principles applicable to them have been explained to her. She has been granted many extensions of time in which to comply with orders made. Overall, it may fairly be said that the Court has given her all the assistance it can without being patronising. The time has come, however, when this matter must be brought to an end. Mrs Gates has had ample opportunity to respond to Mr Thompson's memorandum as to costs. She has chosen to reply only in the brief manner set out above. I now decide the matter on the basis that this is all Mrs Gates wishes to say.

[4] Clause 19(1) of Schedule 3 to the Employment Relations Act 2000 confers on the Court a broad discretion to make orders as to costs but, as with all such discretions, it must be exercised judicially and in accordance with principle. The key principles applicable to that discretion have been set out by the Court of Appeal in the three very well known decisions to which Mr Thompson has referred: *Victoria University of Wellington v Alton-Lee*[2], *Binnie v Pacific Health Ltd*[3] and *Health Waikato Ltd v Elmsly*[4].

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[2] [2001] ERNZ 305.
[3] [2002] 1 ERNZ 438.
[4] [2004] 1 ERNZ 172.

[5] The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel or an advocate. A useful starting point is two-thirds of the costs actually and reasonably incurred by that party but that proportion may be adjusted up or down according to the circumstances of the case and the manner in which it was conducted. Ability to pay is also a factor to be taken into account.

[6] In his memorandum, Mr Thompson records that the actual legal costs incurred by the defendant in responding to the plaintiff's challenge were $88,787.60. That statement was verified by copies of 18 invoices rendered to the defendant at regular intervals between October 2004 and November 2008. I am satisfied from these documents that the costs were actually incurred.

[7] The next issue is the extent to which those costs were reasonably incurred. The costs incurred by the defendant consisted entirely of counsel's fees. Mr Thompson devoted 312.4 hours to the matter at a charge out rate which was initially $250 plus GST per hour and later $275 plus GST per hour.

[8] Mr Thompson's charge out rates were entirely reasonable. Indeed, for counsel of his experience and ability, such rates were significantly less than he might reasonably have charged for conducting litigation of this nature.

[9] The time Mr Thompson devoted to the matter was spread over a period of more than four and a half years from the time the proceedings were commenced in the Court until the conclusion of the substantive hearing. Much of that time was occupied by numerous interlocutory procedures which included two court hearings and at least eight chambers hearings. The substantive hearing occupied three and a half days. In his memorandum, Mr Thompson has summarised the nature of the work involved in the interlocutory stage of the matter. I have also gone through, in detail, the narration included in Mr Thompson's invoices and considered the time spent in relation to the work described in each of them. I am satisfied from this material that, at each stage of the matter and on an overall assessment, the time spent by Mr Thompson was reasonable and, in many cases, distinctly economical.

[10] The only aspect of the case in which the costs incurred were not reasonable was in relation to the defendant's unsuccessful application for an order that the plaintiff give security for costs. Mr Thompson acknowledges this in his memorandum and submits that an appropriate deduction is $1,000. I agree.

[11] It follows that I am satisfied that the defendant actually and reasonably incurred costs totalling $87,787.60.

[12] The remaining issue is the extent to which the plaintiff should contribute to the defendant's costs. In accordance with the guidelines given by the Court of Appeal, I take a starting point of two thirds, which is close to $58,500. I must consider whether that sum ought to be adjusted up or down in all the circumstances of the case and in light of the manner in which it was conducted. In this regard, I take two factors into account.

[13] There can be no doubt that the manner in which the plaintiff's case was presented and conducted was inefficient and added significantly to the costs incurred by the defendant in responding to it. That was very largely the result of the plaintiff's decision to appear in person. Her unfamiliarity with legal concepts and Court procedures prolonged many of the interlocutory procedures. While that was understandable and largely acceptable, the plaintiff also prolonged the proceedings at times by her unwillingness to accept what she was told by the Court or what was obvious as a matter of logic.

[14] In his memorandum, Mr Thompson disclosed that the defendant had made a *Calderbank* offer of $30,000 in a letter dated 17 March 2008. As the plaintiff was entirely unsuccessful in her claim, the principles associated with *Calderbank* offers are not directly applicable in this case but the fact that such an offer was made should properly be taken into account as part of the overall circumstances of the case and in accordance with regulation 68 of the Employment Court Regulations 2000 which provides:

> **68 Discretion as to costs**
> (1) In exercising the Court's discretion under the Act to make orders as to costs, the Court may have regard to any conduct of the parties tending to increase or contain costs, including any offer made by

either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.

(2) Under subclause (1), the Court—

(a) may have regard to an offer despite that offer being expressed to be without prejudice except as to costs; but

(b) may not have regard to anything that was done in the course of the provision of mediation services.

[15] This offer was made some eight months prior to the substantive hearing and therefore at a time when the parties had yet to begin preparation for hearing. In his letter, Mr Thompson fully and accurately described the principles generally applicable to *Calderbank* offers and therefore put the plaintiff on notice of the potential consequences of refusing it. In particular, Mr Thompson noted that, if the matter went to trial, the defendant may incur additional costs of $50,000 or more and that, if she was unsuccessful in getting remedies exceeding the offer, the plaintiff may be required to contribute to those costs.

[16] On the basis of these two factors, I accept Mr Thompson's submission that the proportion of the defendant's costs which the plaintiff ought to pay should be increased from two thirds to three quarters. That amounts to $65,840.70, which I round down to $65,000.

[17] This figure is based on the costs incurred by the defendant exclusive of GST. That is the proper basis for calculation where the party which has incurred the costs is registered for GST, as I presume the defendant is. Although the defendant will have paid GST to Mr Thompson, it will have effectively recovered that money through its GST returns to Inland Revenue.

[18] In addition to a contribution to its costs, the defendant also seeks reimbursement of disbursements and witnesses' fees.

[19] I allow the disbursements for couriers, photocopying and a fee for research conducted by the Auckland District Law Society. As best I can separate these out from the global figures provided, I assess them at $340 inclusive of GST. In the absence of explanation, I disallow the claim for reimbursement of taxi fares and parking charges.

[20] Witnesses expenses of $325 are also sought. That figure is based on the fees provided for in the Witnesses and Interpreters Fees Regulations 1974. The obligation to pay those fees, however, arises under cl 7 of Schedule 2 to the Employment Relations Act 2000 which provides that the fees are to be paid in the first instance by the party calling each witness. In this case, all the witnesses in respect of whom witness fees are sought were called by the defendant. There is no evidence that fees have been paid to them. It is therefore not proper to order reimbursement and I decline to do so.

[21] A factor which must be considered in the overall exercise of my discretion to award costs is the ability of the plaintiff to pay. The established principle is that a party ought not to be ordered to pay costs to the extent that doing so would cause undue hardship. What this principle allows for is that payment of any substantial sum will cause a measure of hardship to some litigants, particularly individuals. That is to be expected and is considered to be an acceptable consequence of unsuccessfully engaging in litigation. It also recognises that the primary focus of an award of costs should be on compensation of the successful party. It is only when payment of an award which achieves the purpose of justly compensating the successful party would cause a degree of hardship which is excessive or disproportionate that the interests of the unsuccessful party must be recognised by reducing the award which would otherwise be appropriate.

[22] The starting point is that a party is presumed to be able to pay any award of costs the Court might make and it is for that party to raise any issue of hardship. When it is raised, a claim that undue hardship would result must be supported by acceptable and sufficient evidence. In this case, the plaintiff has made no issue of her ability to pay. Notwithstanding that, I have regard to information about the plaintiff's means which emerged in the course of the substantive hearing. The plaintiff owns two residential properties, one in which she lives and another which appears to be an investment. One property is subject to a mortgage securing a loan but the other is debt free. The plaintiff receives the rent from one of those properties together with about $2,000 per month from an income replacement insurance policy supplemented by an invalid's benefit. I infer from this information that, while it is

unlikely that the plaintiff would have funds immediately available to pay an award of costs of $65,000, she could raise that sum without undue hardship.

Comment

[23] When I completed my substantive judgment, I suggested that the defendant may wish to compromise its right to seek a substantial award of costs against the plaintiff. That observation was made without knowledge of the *Calderbank* offer made in Mr Thompson's letter of 17 March 2008. In light of that letter and the plaintiff's unqualified rejection of it, it is entirely understandable that the defendant now seeks to recover all of the contribution to costs to which it is justly entitled.

[24] To most people, $65,000 is a large sum of money. In the circumstances of this case, however, it should not come as a great surprise to the plaintiff that she is ordered to pay that amount. From her experience in the early part of this proceeding when she was represented by counsel, and from her experience of civil proceedings in the District Court, the plaintiff knows the cost of representation in litigation. The potential for a substantial award of costs in this case was also brought to her attention by Mr Thompson's letter to her of 17 March 2008. She took the matter to a hearing fully informed of the possible consequences if she was unsuccessful.

Conclusion

[25] The plaintiff is ordered to pay the defendant $65,000 by way of costs and $340 by way of disbursements.

[26] In 2007, the plaintiff paid $4,030 into Court on account of costs awarded to the defendant by the Authority. That sum, together with all accrued interest, is now to be paid out to the defendant.

A A Couch
Judge

Judgment signed at 4.45pm on 24 March 2010