IN THE EMPLOYMENT COURT
AUCKLAND

AC 51A/06
ARC 96/05

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

Hearing: Submissions received on 15 and 19 December 2006

Appearances: G Pollak, counsel for plaintiff
P Caisley, counsel for defendant

Judgment: 21 December 2006

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff was unsuccessful in his challenge to a determination of the Employment Relations Authority which found that he had been justifiably dismissed for serious misconduct. Costs were reserved but the parties have been unable to agree on the quantum. The defendant now seeks a reasonable contribution towards its actual costs incurred in defending the plaintiff's unsuccessful personal grievance claim before the Authority and his unsuccessful challenge before the Court.

[2] The plaintiff's counsel does not take any issue with the general principles, contained in counsel for the defendant's costs memorandum accepting that the criteria upon which the Court awards costs are well known and do not need to be repeated. It is was common ground that the Court has the jurisdiction to deal with costs in the Authority on a challenge, as well as the costs before the Court.

[3] The only issue of fact which appears to be in dispute is the length of the time of the hearing before the Authority, which counsel for the plaintiff claims took part of one day, with the submissions on a later day, rather than two full days.

[4] Mr Caisley for the defendant, after citing *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433, and *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, suggested that the Authority's tariff that applied in 2003 would have given a range of about $3,000-$4,500 as an appropriate contribution. The matter was heard in 2005, and involved a significant and serious breach of safety requirements and complex legal considerations in relation to the new justification test and a higher daily rate was sought.

[5] The defendant says its actual costs in the Authority were $12,191 including GST and disbursements of $50, at a charge out rate from Mr Caisley at $395 per hour. Ms Larmer assisted in preparing the defendant's case for the investigation meeting at a charge out rate of $300 per hour. Mr Caisley spent 17.6 hours and Ms Larmer 12.8 hours on the matter. It was submitted that those costs were reasonable.

[6] As to the costs in the Court, Mr Caisley referred to cases such as *Victoria University of Wellington v Alton-Lee* [2001] 1 ERNZ 305 (CA) and *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) and contended that the starting point of 66 percent of actual and reasonable costs of the successful party can be regarded as helpful in ordinary cases. These authorities also suggest two days preparation for every day hearing is a useful and ready guide.

[7] As to other considerations Mr Caisley referred to the complexity of the case, its importance to the parties and the consequences of the result. The hearing before the Court was accommodated in one day and involved viva voce evidence from three witnesses, affidavit evidence and legal argument, including submissions on the new s103A the Employment Relations Act 2000. At the time the challenge was heard the decision of Shaw J in *Air New Zealand Ltd v Hudson* (2006) 3 NZELR 155 had not been issued. Counsel for the defendant said that because the law was new and untested, additional time was spent on legal research and closing submissions. He referred to the safety sensitive industry in which the defendant operates and that the dismissal was for making a false declaration and for failing to ensure that no

dangerous goods were in the parcel that the plaintiff was shipping. He notes that the plaintiff admitted the conduct in question but argued that the dismissal was too harsh.

[8] The defendant's costs in the Court proceedings, were said to be $15,725.46 including GST plus disbursements of $186.40, Ms Larmer spent 35 hours at $310 per hour and Mr Caisley 7.5 hours at $395.00 per hour on the matter. It is submitted that the actual costs incurred were therefore, reasonable.

[9] Counsel for the defendant submitted that a contribution of just under the usual two thirds level would be around $10,000 but a higher than two thirds contribution is appropriate in this case because it was of fundamental importance to the defendant and involved the new justification test.

[10] Consequently the defendant seeks a $4,500 contribution towards its actual and reasonable costs in the Authority and $12,000 as a contribution towards its actual and reasonable Court costs.

[11] Mr Pollak for the plaintiff notes that the evidence in both the Authority and the Court was not essentially contradicted or challenged and cross-examination was largely confined to the alleged issue of possible disparity of treatment of other employees. No issue was taken by the plaintiff with the defendant's procedure, the defendant's enquiries and other matters to do with the plaintiff's dismissal. The only issue of significance between the parties, related to whether or not it was in accordance with the actions of a fair and reasonable employer. He observed that unfortunately for the parties there was little guidance available from the Employment Court at the time of the investigation, but the defendant's counsel were also involved in the *Hudson* matter and pointed out to the Authority quite correctly and appropriately, that a Court decision was pending. He also observed that counsel cooperated with the production of documents and that the witnesses were the same at the Authority and the Court. The personal grievance was really a challenge on penalty and again did not involve any significant challenge to the factual situation.

[12] The plaintiff did not take issue with the defendant's costs accepting that a large public organisation was entitled if it chose to have several lawyers working on

its behalf. He observed however, that the costs incurred by the defendant were three times the plaintiff's costs.

[13] He accepted that the plaintiff is a member of a union which would undoubtedly underwrite some of the legal costs but stated the plaintiff would have to pay some of the legal costs himself.

[14] For these reasons Mr Pollak submitted that the defendant's claim for costs of $4,500 in the Authority and $12,000 in the Court was excessive and unreasonable, the defendant having only called one witness. He invited the Employment Court to award a modest contribution of $2,500 plus GST for both the Authority investigation and the Court hearing.

Conclusion

[15] There is considerable force in Mr Pollak's submission that as a result of cooperation between counsel, this case was presented in both the Authority and the Court in an efficient and economic manner. It had elements of a test case in that there was still no decided case on the new test for justification in s103A of the Act. Further, the implications of s103A in what was, as Mr Pollak correctly described it, a challenge to penalty rather than to a substantive finding of serious misconduct, had unique features about it. Had the parties had the advantage of the decision in *Hudson* the challenge might not have proceeded. Further there must have been an element of duplication in the submissions made by counsel for the defendant in relation to s103A in both this and the *Hudson* case.

[16] For these reasons I agree that the usual starting point of two thirds should not be adopted but that a lower percentage is appropriate.

[17] As to the costs in the Authority, I accept Mr Pollak's submissions that this was effectively a one day hearing, made complex by the effect of the new legislation. The burden of dealing with the new s103A should not fall so heavily on the plaintiff. For these reasons I consider a more modest award of $1,500 is an appropriate contribution towards the defendant's costs in the Authority.

[18] As to the hearing in the Court, this again was completed in a very efficient and timely manner, lengthened only by the submissions on the new legislation. I

also take into account the unfortunate consequences the dismissal had on the plaintiff who was well regarded at work and had a previously impeccable record. This was unique in that the plaintiff's manager, Mr Sullivan, frankly conceded that this had been a very difficult matter for him and he had not wanted to dismiss the plaintiff. When he gave his evidence to the Court, the reliving of the disciplinary action he had felt obliged to have taken caused Mr Sullivan evident distress. I found in the substantive hearing that Mr Sullivan's evidence and the manner in which he presented it confirmed the high regard in which he had held the plaintiff and his considerable regret in having to carry out the action that he considered was appropriate.

[19] The dismissal flowed from the actions of the plaintiff's wife in packing a dangerous item into a box they were sending to their family in Samoa. The loss of the plaintiff's employment and cargo privileges has been a serious financial blow to the plaintiff's family. The plaintiff's wife's evidence showed contrition and distress at the consequences of her action.

[20] Taking all these matters into account including the novelty of the issue of the application of s103A, I order the plaintiff to pay a modest contribution of $2,500 towards the defendant's costs in the Court.

[21] The total award for costs in the Authority and the Court, including disbursements is therefore $4,000.

B S Travis
Judge

Judgment signed at 3.15pm on Thursday, 21 December 2006