

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**WC 25/06  
WRC 22/05**

IN THE MATTER of a challenge to a determination of the  
Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN PARS TRANSPORT LIMITED  
Plaintiff

AND HIRINI TE KANI LARDELLI  
Defendant

Hearing: Written submissions received 27 October 2006

Judgment: 13 December 2006

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**COSTS JUDGMENT OF JUDGE C M SHAW**

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[1] The defendant applies for costs against the plaintiff following its last minute withdrawal of a challenge to a determination of the Employment Relations Authority.

[2] The defendant successfully brought a claim for unjustifiable dismissal to the Employment Relations Authority. The Employment Relations Authority issued its determination on 10 June 2005 and the plaintiff brought a de novo challenge to this. The matter was twice set down for hearing in the Employment Court. The day before the second Court hearing, the proceeding was withdrawn by the plaintiff. The Court was advised that the plaintiff's counsel would try and resolve the issue of costs with counsel for the defendant.

[3] Pursuant to clause 19(1) of schedule 3 of the Employment Relations Act 2000, counsel for the defendant now seeks an award of increased or indemnity costs in the exercise of the Court's discretion because:

1. The plaintiff's case was flawed and without merit and the plaintiff acted improperly or unnecessarily in commencing or continuing the proceeding.
2. The plaintiff contributed unnecessarily to the time and expense of the proceeding.
3. The plaintiff's conduct was cynical and vexatious.

### **Merits of the case**

[4] The plaintiff's case was dependent on its submission that the defendant was not an employee. However, a tax certificate clearly showed that the defendant was an employee and that the plaintiff knew that it was deducting PAYE from the defendant's wages.

[5] The practice in the industry was that drivers were wage earning employees and the plaintiff was well aware of this.

[6] The plaintiff was fined a penalty in the Employment Relations Authority for failing to provide the defendant with an employment agreement and failing to keep wage and time records.

### **History of the Court proceedings**

[7] The de novo hearing of the challenge was set down to be heard on 31 October 2005. Counsel for the plaintiff sought an adjournment of the proceeding 2 working days before the matter was to be heard. This was for the defendant to produce log records which the plaintiff should have had in its possession as required by law. This entailed more time and expense to the defendant and counsel who had made preparations to attend the hearing on 31 October.

[8] At this late stage the plaintiff also requested the production of cellular and telephone records which entailed further preparation and expense to the defendant. Mr Gowland submits that, if this information had been so important to the plaintiff, it had had 7 months to make this request since the investigation hearing in the Employment Relations Authority.

[9] In March 2006 the Court again set down the proceeding for a 2-day hearing on 6 and 7 June 2006. It also set a timetable requiring the plaintiff to file its briefs of evidence by 1 May 2006 and reply briefs by 26 May 2006.

[10] Mr Gowland, counsel for the defendant, did not receive the plaintiff's briefs or hear from the plaintiff and on 18 May 2006 the Court issued a minute requiring the plaintiff to file briefs by 4pm on Friday, 19 May 2006. These were not received by Mr Gowland until Monday, 22 May 2006. Mr Gowland submits that this was nothing short of cynical and tardy conduct.

[11] Late in the afternoon of Tuesday, 5 June 2006, the plaintiff's counsel contacted Mr Gowland to inform him that the plaintiff had withdrawn the proceedings. By this time the defendant had fully prepared for the scheduled 2-day hearing and submits that again this was cynical and demonstrated that the plaintiff's case and persistent delays were nothing less than vexatious.

[12] It is further submitted that, during preparation of his case, other matters including additional arrears of wages had come to light which significantly increased the defendant's claim which he was now unable to put before the Court because the proceedings were withdrawn.

### **Costs**

[13] In a facsimile to the Court dated 6 June 2006, counsel for the plaintiff stated that he would try and resolve the issue of costs with counsel for the defendant.

[14] Mr Gowland has tried persistently to settle the issue of costs but has been frustrated in his attempts by the tardiness and lack of any genuine response to his proposals from counsel for the plaintiff. For this reason he submits that it is

appropriate that an award of costs should be based on the defendant's total costs which are:

(i)	Costs awarded by the Employment Relations Authority Disbursements	\$3,500.00 \$250.00	
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		\$3,750.00	\$3,750.00
(ii)	Counsel's preparation for de novo challenge: 48 hours x \$250.00 GST	\$12,000.00 \$1,500.00	
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		\$13,500.00	\$13,500.00
(iii)	Disbursements: Photocopying x 5 of: bound bundle of documents, witnesses x 2 briefs of evidence, closing submissions		\$120.00
<b>Total</b>			<hr/>
			\$17,370.00

[15] Mr Gowland filed his costs memorandum on 27 October 2006 and sent a copy of the memorandum to Mr Pa'u's instructing solicitors and directly to the plaintiff. He has confirmed the address for Mr Pa'u, counsel for the plaintiff. .

[16] On 31 October 2006, the Registrar of the Court sent a letter to Mr Pa'u, his instructing solicitors, and the plaintiff advising that an application for costs had been received and a response was required by 14 November 2006. No response has been received.

[17] I will therefore decide costs on the basis of Mr Gowland's unopposed submissions.

### **Decision**

[18] The history of the proceedings in the Court reveals conduct which can only be described as totally unacceptable by the plaintiff and its legal advisors. The plaintiff was given the benefit of the doubt when an application was made for an adjournment of the first hearing in October 2005 and costs were reserved at that

stage. It appears that that application for an adjournment was nothing more than a delaying tactic as it is quite plain that by May 2006 the plaintiff's claim had not properly been prepared in spite of over 6 months in which this should have been done.

[19] Next, plaintiff's counsel, having agreed to a timetable for filing briefs of evidence, failed to meet that timetable, placing Mr Gowland in a difficult position in his preparation for the challenge. Against this background, the withdrawal at the eleventh hour simply compounds the impression of lack of professional courtesy to the Court and to counsel. The plaintiff's actions have caused the defendant to fully prepare twice for a case which it is now apparent was never going to run the full course.

[20] For these reasons, the defendant is entitled to indemnity costs for the full amount claimed. The award of costs in the Employment Relations Authority has already been made and will stand. The plaintiff is ordered to pay to the defendant his full costs of preparation for the de novo challenge being \$13,500 plus disbursements of \$120.

**C M Shaw  
JUDGE**

Judgment signed at 1pm on 13 December 2006