

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 15A/06
WRC 9/06**

IN THE MATTER OF an application for declarations and
injunctions
AND IN THE MATTER OF an application for costs

BETWEEN OCS LIMITED
Plaintiff

AND SERVICE & FOOD WORKERS UNION
NGA RINGA TOTA INCORPORATED
First Defendant

AND LALOPUA SANELE
Second Defendant

Hearing: Written submissions received 27 September and 16 and 27 November
2006

Judgment: 15 December 2006

COSTS JUDGMENT OF JUDGE C M SHAW

[1] The first defendant, which represented the second defendant, seeks an order for costs against the plaintiff following an unsuccessful application for declarations, an injunction, and damages.

[2] The plaintiff opposes any order for costs on the basis that the costs ought to lie where they fall because the matter in issue was a dispute. In the alternative, if costs are awarded they should be modest.

Nature of the proceedings

[3] Mr McBride, counsel for the plaintiff, submitted that whatever the label given to the proceedings it was actually a dispute about whether the plaintiff was entitled under the collective employment agreement to change its method of timekeeping or whether that could only occur by agreement. As such, it was about the determination of the parties' collective rights and obligations. He noted that in previous decisions the Court has declined to award costs in such matters in spite of being brought as compliance actions or as proceedings against a strike. Two such cases are *Quality Service Enterprises v Huriwai*¹ and *NZ Tramways v Wellington City Transport*². They concerned disputes which arose in the course of collective bargaining and the parties needed a definitive answer to interpretive questions.

[4] I do not consider that this case falls into the same category. The proceedings were brought as an application for an injunction by the plaintiff who sought a declaration that the defendants were unlawfully striking by refusing to participate in the use of a finger scanner. At issue was not so much the interpretation of the collective agreement as an inquiry into whether OCS had lawfully directed its employees and whether in doing so had breached the collective agreement's requirements to consult.

[5] Although the present case began as a dispute between the parties about whether new timekeeping technology could be introduced under the collective agreement, the plaintiff did not follow the statutory procedures for resolving it by seeking rulings from the Employment Relations Authority but instead moved unilaterally to implement the technology on the basis of its own interpretation. It then took potentially punitive steps against the union and its affected members in the form of an application for injunction and damages against them. In so doing, the plaintiff went beyond pursuit of an interpretation of the collective agreement and looked instead to enforce its interpretation before it had been resolved.

¹ Unreported, Shaw J, 23 November 2005, WC 16A/05

² [2002] 2 ERNZ 435

Costs

[6] An award of costs is appropriate and the quantum will be assessed in accord with the principle that a successful party is entitled to a reasonable contribution to its actual and reasonably incurred costs.

[7] The hearing took 3 full days. Each party was represented by two counsel for at least part of that time. It had been preceded by a phone conference to deal with the plaintiff's application for urgency.

[8] Mr Cranney, counsel for the defendants, set out in detail the actual costs incurred by the defendants. These included receiving the proceedings from the plaintiff including the application for urgency, the preparation of 14 briefs of evidence and preparation for trial. This amounted to 126.5 hours for senior counsel at \$300 an hour and 12 hours at \$180 an hour for junior counsel resulting in actual costs of \$40,040. The defendants also seek reimbursement of \$2,898.07 disbursements.

[9] Mr Cranney submitted that there are reasons why the plaintiff should meet 80 percent of the actual costs incurred by the defendants. These are:

- Because the plaintiff advanced the proceedings on the basis of management prerogative, the defendants had to research the law on biometrics in all jurisdictions.
- The need to brief several witnesses whose primary language is not English.
- Some witnesses, including two from Auckland, were briefed but not called to meet evidence that did not eventually come up to brief.
- The hearing was prolonged by the plaintiff's late decision to call expert evidence about Samoan culture.

- In his brief of evidence, a witness for the defendant attacked the attitude of the union's representative but this stance was not maintained in the course of his evidence before the Court.

[10] For the plaintiff, Mr McBride submitted that the costs incurred by the defendants were not reasonable and that assertions about the conduct of the proceedings were unwarranted. He suggests that a modest award of \$7,500 would be reasonable. He also objects to the disbursements claimed by the defendants.

Decision

[11] Because the plaintiff disputes the reasonableness of the costs incurred by the defendants, it is appropriate to check the actual costs against the High Court scale of fees. The appearances for the defendants included a phone conference on the application for urgency and a 3-day hearing involving senior counsel for 3 days and junior counsel for 1 day. The following calculation is based on a category 2 proceeding which would take a normal amount of time:

Commencement of defence	2 days
Appearance at case management conference (urgency)	.3 days
Preparation of affidavits	2 days
Preparation of documents (reduced by half because McBride Davenport James prepared the common bundle)	1 day
Preparation for hearing	6 days
Appearance at hearing	3 days (senior) 1 day (junior)
Total days	14.3 (senior counsel at \$1,600 per day) 1.3 days (junior counsel at \$800 per day)

[12] The scale costs which would have been awarded in the High Court for similar proceedings would have been in the order of \$25,000.

[13] There were some factors which added to the defendants' costs in these proceedings including the urgency application, the pre-hearing dispute about whether

the employees who were called to give evidence for the defendants would receive paid time off work to attend the hearing, as well as the need to prepare for the last minute cultural evidence including calling rebuttal evidence. However, none of these warrant the Court departing significantly from the usual basis of awarding costs at 66 percent of actual cost.

[14] Sixty-six percent of the defendants' actual costs is \$26,426 which is reasonably close to the High Court scale of costs. The plaintiff is ordered to pay \$26,500 as a contribution to the costs of the defendants.

[15] The plaintiff also disputes the disbursements sought by the defendants. These include claims for travel and accommodation for two witnesses from Auckland who were not called largely because of the time pressures caused by the late and without notice decision of the plaintiff to call cultural evidence. The witnesses were also there to rebut evidence from the plaintiff about time recording procedures used in Auckland, a point that was belatedly conceded.

[16] The claim for disbursements includes \$1,474.44 for lost wages for the nine employees who attended Court to give evidence. There is a dispute between the parties about these payments which needs to be resolved. A claim for disbursements is not the appropriate way to do this and no order will be made in respect of that claim.

[17] The plaintiff is to meet the costs of airfares and accommodation and meals for Peter Shannon, Serra Williams, and Tim Oldfield amounting to \$1,100.

[18] Of the miscellaneous disbursements sought, the plaintiff is to pay the cost of \$50 for couriers and \$23.60 for library costs. The other claims for miscellaneous matters were not itemised or supported by invoices and are disallowed. The total disbursements to be paid by the plaintiff are \$1,173.60.

Costs award

1. The plaintiff is to pay the first defendant \$26,500 as a contribution to its costs.

2. The plaintiff is to pay the first defendant \$1,173.60 towards its disbursements.

C M Shaw
JUDGE

Judgment signed at 11.30am on 15 December 2006