IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 136
WRC 3/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LISA MARIE TUAPAWA Plaintiff
AND	AFFCO NEW ZEALAND LIMITED Defendant

Hearing: (on the papers by way of submissions filed by the defendant on 25 October 2011)

Counsel: Simon Mitchell, counsel for the plaintiff
Graeme Malone, counsel for the defendant

Judgment: 8 August 2012

COSTS JUDGMENT OF JUDGE A D FORD

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[1] The plaintiff is a meat worker employed by the defendant at its Wairoa meat processing plant. She initiated grievance proceedings on the basis that she had received unjustified written warnings for not working overtime on two occasions. She accepted that she did not work overtime on the two occasions in question but contended that her manager had unreasonably refused to grant her request to be excused from working the overtime given her family commitments in having to look after her terminally ill mother. The Employment Relations Authority (the Authority) dismissed the plaintiff's claims and she subsequently challenged the whole of the Authority's determination.[1]

[1] [2011] NZERA Wellington 8.

[2] In my substantive judgment[2] dated 8 September 2011, I found in favour of the plaintiff concluding that she had been unjustifiably disadvantaged by the issuance of the two warning letters. I awarded her compensation for humiliation and injury to feelings in the sum of $2,000 but I reduced that figure pursuant to s 124 of the Employment Relations Act by 60 per cent on account of her own contributory behaviour.

[3] In the final paragraph of my judgment I stated:

> [43] The plaintiff is entitled to costs which I would expect counsel to be able to reach agreement on. Failing agreement, however, Mr Mitchell (counsel for the plaintiff) is to file submissions within 21 days and Mr Malone (counsel for the defendant) will have a like time in which to respond.

[4] No submissions were received from counsel for the plaintiff within the stated 21 days. In fact, no submissions as to costs have ever been filed on behalf of the plaintiff.

[5] The case is most unusual because on 25 October 2011, submissions were filed on behalf of the defendant in relation to costs and they referred to submissions of the plaintiff but, as stated above, nothing had been filed in Court on behalf of the plaintiff.

[6] The plaintiff had been represented in the litigation by the New Zealand Meat Workers Union. In another costs judgment[3] between AFFCO and the union issued virtually contemporaneously with the present judgment, I noted that the Court was prepared to allow some leeway in relation to submissions because there was a significant amount of litigation pending at the relevant time between the parties. In one of the other cases relating to the defendant's Wairoa plant, AFFCO had been successful and had been awarded costs against the union.

[7] On 13 April 2012, the Court Registry Support Officer (Ms Kelly) sent an email to counsel for the plaintiff reminding him of the 21-day timetable that had been fixed for the filing of cost submissions. The email went on to state:

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[2] [2011] NZEmpC 114.
[3] [2012] NZEmpC 133.

> The defendant's submissions were received on 25 October. If you intend to respond, please file and serve your memorandum by 4pm Friday 27 April 2012.

No response was received to that email.

[8] On 2 May 2012, Ms Kelly left a telephone message for counsel for the plaintiff requesting him to file a copy of his submissions. Again, no response was received.

[9] On 30 July 2012, Ms Kelly sent a further email to counsel for the plaintiff reminding him that no submissions on costs on behalf of the plaintiff had yet been received by the Court. Counsel was requested to file the submissions by 1 August 2012 so that a costs judgment could be issued. Again, no response was forthcoming.

[10] The present situation is quite unsatisfactory. Even allowing for the leeway I refer to in [6] above, the Court is entitled to expect that timetabling orders issued in relation to costs submissions will be complied with or appropriate extensions of time sought. In spite of the reminders referred to above, that has simply not happened in the present case. Submissions have obviously been prepared and served on counsel for the defendant. Why they have not been filed in this Court is quite inexplicable. In the meantime, the defendant has filed its submissions and is entitled to know where it stands on costs. One option would simply be to decline to make any award of costs but, in all the circumstances, I consider the more appropriate course is to fix an award based on the helpful submissions filed by the defendant.

[11] Apparently, and the Court cannot be certain about this, the plaintiff sought a contribution in respect of costs incurred in the Authority investigation in the sum of $2,000. Mr Malone stated: "Counsel does not dispute that an appropriate award for a one day hearing before the Authority is $2,000." However, Mr Malone submitted that the costs in the Authority should be reduced to $1,000 to "reflect the contribution that was found to have existed". I do not accept that submission. Costs in the Authority are generally determined on the basis of a notional daily rate which is significantly higher than the figure apparently claimed. I therefore allow the sum of $2,000 for costs in the Authority. There is also apparently a claim made for disbursements of $473 which related to travel expenses for out-of-town counsel.

The Authority investigation was held in Napier. Mr Malone objected to those disbursements and, in the absence of some convincing explanation for the claim, I agree with his objection. The disbursements are disallowed.

[12] In relation to the plaintiff's claim for costs in this Court, defence counsel stated:

> 6. As regards costs in the Court, plaintiff's Counsel seeks an award of $5,000 plus a filing fee of $204.44 and travel costs of $368.50.

Mr Malone accepted the claim for the filing fee and travel costs noting in relation to the travel expenses that the hearing was held in Wairoa.

[13] Mr Malone did not, however, accept the fee claimed of $5,000. He submitted that an award of $5,000 was excessive for a court case:

> a. That was not complex;
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> b. Was heard within a half day;
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> c. Involved a level of contribution by the plaintiff held by the Court to be 60%.

[14] The principles relating to costs awards in this Court are well-established. They are based on the Court of Appeal judgments in *Victoria University of Wellington v Alton-Lee*,[4] *Binnie v Pacific Health Ltd*[5] and *Health Waikato Ltd v Elmsly*.[6] The Court has a broad discretion in making costs awards which must be exercised judicially and in accordance with the recognised principles. The usual approach is to determine whether the costs actually incurred by the successful party were reasonably incurred and once that step has been taken the Court must then decide, after an appraisal of all relevant factors, at what level it is reasonable for the unsuccessful party to contribute towards those costs. A starting point at 66 per cent of the reasonably incurred costs is generally regarded as an appropriate starting point to be adjusted up or down, if necessary, depending upon relevant considerations.

[15] Although the case centred on its facts, contrary to the implication in Mr Malone's submission, the facts turned out to be relatively complicated in that

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[4] [2001] ERNZ 305.
[5] [2002] 1 ERNZ 438.
[6] [2004] 1 ERNZ 172.

there were conflicts in the evidence involving issues of credibility and there were other complications over documentary evidence.

[16] The plaintiff apparently claimed that the hearing took in excess of one day but Mr Malone submitted that it "should be seen as a half day hearing" because the only reason it ran into the second and third days was because, for convenience, two other witnesses gave their evidence at the same time as they gave their evidence in another case. The times shown in the transcript support Mr Malone's submission in this regard and I am prepared to accept that the evidence occupied a half day hearing but it is also appropriate to make allowance for the subsequent presentation of written closing submissions.

[17] The third factor raised by Mr Malone relates to the relevance of the finding of 60 per cent contribution by the plaintiff. Counsel appears to be submitting that any costs award should be reduced in recognition of the plaintiff's contributory conduct which the Court had assessed under s 124 of the Employment Relations Act 2000 (the Act) at 60 per cent. Section 124 of the Act requires the Court to reduce the remedies that would otherwise have been awarded to an employee to the extent that the actions of the employee contributed towards the situation that gave rise to the personal grievance. No authorities were cited on this issue but in *White v Auckland District Health Board*[7] the Court of Appeal held that remedies and costs were separate discrete issues. It rejected the suggestion that contributory conduct under s 124 could be taken into account in relation to both remedies and costs. The Court stated:[8]

> ... Contributory conduct by the employee may only be taken into account in relation to remedies.

[18] The power granted to the Court to award costs is provided for in cl 19 of sch 3 to the Act. Clause 19 confers on the Court a broad discretion to make such orders and the overriding consideration in the exercise of that discretion must always be the interests of justice. The Court of Appeal reaffirmed in *White*[9] that while costs should generally follow the event, "where the parties have achieved mixed success, it is not necessarily easy to determine who won the case so as to be entitled

[7] [2008] ERNZ 635.
[8] At [43].
[9] At [46].

presumptively to costs. In such cases, where both parties have achieved a measure of success at trial it may be appropriate for no order for costs to be made."[10]

[19] I do not consider the present case to be one where it would be appropriate to make no order or a reduced order in relation to costs. The plaintiff succeeded in establishing her grievance claim and in obtaining more than nominal relief.

[20] The Court has no particulars as to how the plaintiff's costs claim of $5,000 is made up but I am prepared to accept that a reasonable figure for costs in this Court would have been $4,000. I see no reason to depart from the usual two thirds rule which, rounded off, gives a figure of $2,700.

[21] I therefore allow costs in both the Authority and this Court in the sum of $4,700 and disbursements in this Court in the sum of $572.94, making a total award of $5,272.94.

A D Ford
Judge

Judgment signed at 10.45 am on 8 August 2012

[10] *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ at [39-40].