IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 173
AEC 93/97

IN THE MATTER OF	a claim for damages for breach of employment contract
BETWEEN	CHRISTOPHER JOHN GILBERT Plaintiff
AND	THE ATTORNEY-GENERAL IN RESPECT OF THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

AEC 69/98

IN THE MATTER OF	a personal grievance removed from the Employment Tribunal for hearing in the Employment Court
BETWEEN	CHRISTOPHER JOHN GILBERT Plaintiff
AND	THE ATTORNEY-GENERAL IN RESPECT OF THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: By memoranda of submissions filed:
28 July, 28 August, 1 September, 27 October 2009
29 September, 20 October, 2 November, 24 November, 9 December 2010
9 February, 9 June 2011

Appearances: Plaintiff in person
Joanna Holden and Roanna Chan, counsel for defendant

Judgment: 5 October 2012

SUPPLEMENTARY COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] On 16 September 2010 the Court of Appeal delivered its judgment on Mr Gilbert's appeal.[1] Neither party sought leave to appeal further and there is now no barrier to determining costs including the earlier application that I agreed to hold over pending the judgment of the Court of Appeal.

[2] The defendant submits that in all the circumstances and particularly in view of the latest judgment of the Court of Appeal, the parties should be left to meet their own costs without recourse to contribution from the other. That was how the Court of Appeal dealt with costs on the second and latest appeal to that Court.[2]

[3] In this Court, on what is known to the parties as Mr Gilbert's application for recall of judgment, he was partly successful and partly unsuccessful.[3] The result of the appeal determined in the Court of Appeal has not altered that position materially. In their initial submissions on costs, the parties could not even agree about which of them had been successful on which issues. Mr Gilbert claimed that he was successful on two discrete issues. Ms Holden (for the defendant) submitted, however, that each party had been successful on a major issue and the defendant had achieved limited success on a third. That latter submission is taken from [53] of the Court's judgment on the application for recall and is, I think, the more accurate statement of the position. The parties settled the fourth issue (deductions for interest) before the hearing and the Court was not required to determine it.

[4] Ms Holden has pointed out that as a result of the hearing of the recall application in this Court, Mr Gilbert received an additional $45,567 (gross) in addition to the sums that were paid to him by the defendant in September 2005. Counsel submits that this amount does not justify the time and costs incurred by the parties in obtaining that additional relief in this Court. Finally, Ms Holden submits that the defendant's ready agreement to pay Mr Gilbert substantial costs and

[1] [2010] NZCA 421.
[2] At [106].
[3] AC 19/09, 28 April 2009.

disbursements ($269,692) arising from the first substantive hearing indicates the defendant's responsible conduct with regard to costs.

[5] Mr Gilbert takes issue with the defendant's assessment of the value of the increased remedies achieved by him in the recall hearing. He says that although payment of approximately $45,567 was made by the defendant as a result of this Court's judgment, and a further payment of approximately $56,336 in interest has been made by the defendant as a result of the appeal, there is still confusion about whether a net present value of future earnings was used in the calculation of those figures. Mr Gilbert says that agreement on this matter has not been finalised but, in reliance on the defendant's actuary's figures, the defendant owes him a further $59,904. In these circumstances, Mr Gilbert values his gains from the recall judgment of this Court at $161,807. The Court has not, however, been asked to determine that further question.

[6] Mr Gilbert says that it was reasonable for him to have been represented by counsel up to and at the judgment recall hearing. He says, also, that it was reasonable in all the circumstances to have had the expert advice and evidence that he did (and as the defendant had also) and points out that his lawyers' costs were discounted to legal aid rates. Mr Gilbert submits that in these circumstances the costs incurred by him on the judgment recall application should be awarded in full.

[7] Addressing interest on costs, Mr Gilbert submits that this should be calculated from the date of liability for the costs rather than the date at which the amount of them is established: *Hunt v RM Douglas (Roofing) Ltd.*[4] He submits that at the very least, interest should be payable on the costs from the date of hearing. Mr Gilbert submits that this should be at the full rate under the Judicature Act 1908 to reflect the recognised dual purposes of interest, those being to compensate for loss of use of money and the public policy of encouraging prompt resolution of litigation. Mr Gilbert says that he was not "a willing lender" and the proper comparison is not with bank deposit rates, but with borrowing rates. He says that a "punitive" borrowing rate could well exceed the rate of interest under the Judicature Act.

[4] [1990] 1 AC 398 (HL).

[8] So Mr Gilbert seeks contributions to his costs of $66,223.13 and to his disbursements of $76,177.26. These figures do not include costs and disbursements relating to the subsequent appeal to the Court of Appeal. Although Mr Gilbert had the assistance of counsel in preparing his application for recall and correction, he has advised the Court that he has been unable to afford to retain lawyers to act for him and so makes this application in person.

[9] The defendant accepts that Mr Gilbert was largely successful on the first recall issue of deduction for contingencies. It says, however, that he was not successful on the second issue which dealt with salaries and grandfathering. Ms Holden submits that the Court made two findings on this issue. The first sub-issue, which the defendant accepts went in Mr Gilbert's favour, was that the "grandfathering" principle applied. Ms Holden submits, however, that the second sub-issue under this question favoured the defendant's position that Mr Gilbert would probably have attained no more than 10 of the potential 13 competencies by the time his salary was fixed for future compensation loss purposes on 14 October 2002. Counsel submits that this second finding in favour of the defendant is the one with economic significance.

[10] Further, the defendant does not accept Mr Gilbert's contention that its success on the third issue on recall (tax calculations) should not be taken into account for the purposes of calculating costs. The defendant says it is not to the point that this might have more properly been a matter for appeal – the fact is that it was dealt with by the Court to the defendant's (albeit limited) advantage.

[11] Turning to the defendant's contention that Mr Gilbert's claims to costs are excessive, Ms Holden identifies correctly that the approach to Employment Court costs is set out in the judgment of Tipping J in *Binnie v Pacific Health Ltd*:[5]

> The first step is to decide whether the costs actually incurred by the plaintiff were reasonably incurred. Adjustment must be made if they were not. The second step is to decide, after an appraisal of all relevant factors, at what level it is reasonable for the defendant to contribute to the plaintiff's costs.

[5] [2002] 1 ERNZ 438 (CA) at [14].

[12] The defendant submits that in circumstances, as here, where disbursements constitute a significant proportion of the award sought, it is not appropriate to distinguish between costs and disbursements. Counsel relies, for this submission, on the judgment of the Court of Appeal in another employment case, *Health Waikato Ltd v Elmsly.*[6] Ms Holden concedes that this is not an approach of universal application but might sometimes be appropriate.

[13] Challenging the disbursements which constitute Mr Gilbert's actuary's fees and disbursements ($62,541), the defendant says these were about 40 per cent more than the costs and disbursements of the defendant's actuary, so that the difference between the two figures ($26,447) should be deducted from the total costs sought by the plaintiff. Next, counsel for the defendant submits that it was unnecessary for Mr Gilbert to have engaged a tax expert in addition to an actuary. She points out that the defendant did not engage a similar expert so that the costs of a tax expert ($9,881.40) were not, therefore, incurred reasonably. Counsel submits that, in any event, the Court found against Mr Gilbert on the tax issue so that it should not be reasonable for the defendant to contribute to that expense and the best way of allowing for this would be to deduct from the costs sought by Mr Gilbert the amount so incurred.

[14] Next, the defendant's case is that it was unreasonable generally for Mr Gilbert to incur such high costs and disbursements in light of his limited success at the recall hearing. Ms Holden invites the Court to take this into account when determining what is to be a reasonable contribution to costs reasonably incurred.

[15] So, Ms Holden submits, Mr Gilbert's claim for costs and disbursements should be reduced thereby from $142,400.39 to $106,071.60.

[16] Addressing the second *Binnie* question (at what level is it reasonable for the defendant to contribute to Mr Gilbert's costs and disbursements), counsel identify several factors in countering Mr Gilbert's claim to indemnity costs.

[17] The first of these is the relative successes of the parties. As already noted, counsel submits that each party succeeded on one issue and the defendant is said to

[6] [2004] 1 ERNZ 172 (CA) at [48].

have gained some limited success on a third. The defendant has undertaken an analysis of the transcript and claims that nearly two-thirds of the hearing time was spent on issues on which Mr Gilbert failed or largely failed and, in particular, concerning salary level and tax. For that reason, the defendant sets the proportion of the hearing time spent on issues on which Mr Gilbert was successful, at 35 per cent of the total. Therefore, counsel submits, the defendant's contribution to Mr Gilbert's costs and disbursements should be at a modest level at most.

[18] Next, Ms Holden submits that the costs and disbursements incurred by Mr Gilbert were not proportionate to the result he achieved. Accepting that there is no absolute rule that costs must never be disproportionate to the money value of a judgment, she asserts that a comparison between the resource committed and the actual result is nevertheless appropriate.[7] Before the Court of Appeal judgment, she submitted the defendant's actuary had calculated that the sum payable to Mr Gilbert would be between $41,000 and $48,000 (comparable to the $45,567 paid by the defendant) which is, at most, one-third of the costs and disbursements sought by Mr Gilbert. The defendant submits that such a ratio is not reasonable, reinforcing the submission that only modest costs should be awarded.

[19] The defendant submits, also, that it is a relevant consideration that the parties attempted to settle the dispute.[8] Such a settlement was attempted by the parties but, the defendant says, Mr Gilbert's conduct hampered significantly this endeavour and, in particular, he failed to provide the defendant with a summary of the total amount that he claimed was owed to him. The defendant says that this information was not provided until Mr Gilbert's actuary's brief of evidence was filed and, with respect to some of the information, not until the hearing itself. The defendant says that it was open to seeking resolution of the matter without the need for a hearing but that this proved impossible because of Mr Gilbert's failure to provide information.

[20] Addressing Mr Gilbert's submission that the defendant's conduct justifies costs being awarded against it, it points out that the Court's criticism of conduct was directed at both parties' actuaries including the observation that, at times, they "took

[7] *Elmsly* at [53].
[8] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [62].

over conduct of the case from the lawyers"[9] and engaged in "second-guessing" what the Court had intended in its judgment on remedies.[10] The defendant submits that both parties must bear responsibility for this criticism and it is, therefore, not a factor to be taken into account when awarding costs.

[21] In summary, the defendant says that taking a starting point of 66 per cent of costs reasonably incurred,[11] and adopting a "partial success" approach endorsed in *Elmsly*,[12] the Court should calculate, first, the proportion of the costs and disbursements incurred reasonably by the plaintiff in relation to issues on which he was successful before allowing a percentage of that figure. So, the defendant submits that the starting point should be 35 per cent (the amount of time at trial spent on issues on which Mr Gilbert succeeded) of $106,071.60 (the costs and disbursements sought by Mr Gilbert as adjusted for unreasonable expenditure) amounting to $37,125.06. Two-thirds of this amount is $24,502.54, meaning that, rounded up, any costs awarded to Mr Gilbert, if the Court is minded not to let costs lie where they fall, should not exceed $25,000.

[22] As to the expert taxation evidence, Mr Gilbert submits that in its 10 March 2006 judgment,[13] the Court indicated it expected submissions to be made on the incidence of tax. Neither counsel at the hearing which preceded that judgment was able to assist the Court on the plaintiff's rate of tax and, in these circumstances, Mr Gilbert submits that expert tax advice was required. He says that he should not be penalised because the Crown elected to dispense with that and it is not an area of expertise of actuaries although their opinions may carry more weight than those of lay people. I would add that any later lack of success by Mr Gilbert on the tax issue was not attributable to his expert's evidence but, rather, to the position at law when this was reconsidered.

[23] Mr Gilbert submits that the parties' relative successes are irrelevant to an application to the Court to clarify and correct a previous judgment if the application

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[9] AC 19/09, 2 August 2009 at [6].
[10] At [7].
[11] *Binnie* at [14].
[12] At [48].
[13] [2006] ERNZ 1 at [62].

was well founded. He says he should not incur extra costs for having to guess whether the Court had expressed directly its intentions and especially when it accepted, at least prima facie, that it had not.

[24] Mr Gilbert submits that a close analysis of court time on particular items in a case is not a good gauge of the overall costs related to an issue. That is because, he submits, for both counsel and actuaries, the time actually spent in court was only about 20 per cent of their fees. He says, of the balance, the amount spent on tax and grandfathering would have been less than 10 per cent of the total time billed. Mr Gilbert submits that the transcript of the hearing does not contain an accurate, or even any, time record so that it may not accurately reflect the time taken, especially when actuaries were required to perform calculations and interpret them in the witness box.

[25] Next, Mr Gilbert submits that the value ascribed to an issue is not necessarily proportionate to the time involved. He doubts that two-thirds of the time in court was spent on the issues of tax and grandfathering and submits, rather, that about 75 per cent of the hearing time was spent on actuarial evidence on contingencies and methodology.

[26] As to the defendant's willingness to resolve outstanding matters without a further hearing, Mr Gilbert submits that these contentions are "outrageous and misleading". He points out that his senior counsel wrote to the Crown Law Office as long ago as 2005 endeavouring to resolve the issue but received no response, as did the plaintiff personally to the Chief Executive Officer of the Department of Corrections on a number of occasions after January 2008. Mr Gilbert says that the responses given to him were belated and, finally, amounted to an election by the defendant to await the judgment so that no meeting occurred. Mr Gilbert says that he agreed to attempt to mediate the parties' differences with a retired High Court Judge as both the Employment Court and the Court of Appeal had urged on the parties. Without disclosing details that he should not for reasons of privilege, Mr Gilbert says that there was correspondence between the parties in the later part of 2006 but this was apparently overtaken by the timetable for the filing of affidavit evidence with the Court. Mr Gilbert says that in mid-October 2006, immediately

before a preliminary conference with the mediator, the defendant elected not to continue in that forum but to proceed with the hearing which was scheduled for 6 November 2006. Mr Gilbert points out that the defendant only conceded in 2009 that he had a right of appeal, the defendant having abandoned his own appeal in 2004 without notice to Mr Gilbert.

[27] The plaintiff says that the defendant opposed his application for recall on every issue with some minor exceptions and that this reflects his practice throughout this long case. Mr Gilbert characterises the defendant's overall attitude as being one of "obduracy regardless of costs and delay" rather than "being open to resolution".

[28] As to the apportionment of costs reasonably incurred, Mr Gilbert submits that 66 per cent is not and should not be the usual starting point where legal aid is involved and in relation to disbursements if these are properly incurred. He reiterates that legal fees continue to be charged at legal aid rates despite his grant of legal aid having ceased. This in itself results in a 66 per cent discount, Mr Gilbert submits, and so it is not appropriate to make a further deduction. Mr Gilbert points out that neither of the leading cases, *Elmsly* and *Binnie*, involved questions of legal aid and that, in the latter, the Court of Appeal awarded 80 per cent of actual costs and disbursements in full. Mr Gilbert further emphasises that the Court of Appeal described those costs as being at the lower limit of discretion, made it clear that they are not limited by gains and that "… there is force in the view that such an approach [indemnity costs] would have been within a properly exercised discretion."[14] Although conceding that the *Binnie* case involved elements of reputation, Mr Gilbert submits that there are special factors in this case other than money.

[29] After the parties had filed their initial submissions on costs (and, in the case of Mr Gilbert, in reply) in 2009, the Court of Appeal delivered its second substantive judgment in these proceedings on 16 September 2010. The Court of Appeal allowed Mr Gilbert's appeal against this Court's judgment on recall in only two respects. First, it disallowed in part the interest reduction of 4.7 per cent referred to in [107](d) of the first remedies judgment of 4 December 2003[15] in respect of Mr Gilbert's

[14] *Binnie* at [20].
[15] AC 63/03, 4 December 2003.

salary loss after 14 October 2002. Second, the Court of Appeal allowed interest at the rate of 5 per cent per annum on the unpaid balance of the sum determined to be due to Mr Gilbert in respect of the loss of salary from 14 October 2002 to the end of his working life, such interest to run from 14 October 2002 until the date of payment. In all other respects, Mr Gilbert's appeal was dismissed and the Court of Appeal made no order for costs. At [106] of its judgment the Court of Appeal based its refusal to award costs either way on the fact that Mr Gilbert had been successful in part but unsuccessful on the main issues advanced by him.

[30] On 21 February 2011 the Court of Appeal issued a minute recording that the defendant had applied to it to correct an alleged slip in its judgment of 16 September 2010. This related to what the Court of Appeal had referred to as the defendant's concession recorded at [96] of its judgment. The Court of Appeal declined to amend the order, in part at least, because the matters involved were said to have been "relatively trivial" and that "a pragmatic approach needs to be taken to bring this longstanding matter to an end."

Decision

[31] I do not accept the defendant's primary submission that the plaintiff's costs and disbursements should not be contributed to by the defendant. That would not be a just result of the recall application. I therefore deal with this claim to costs, disbursements and interest, in five parts:

- The contribution to Mr Gilbert's legal fees;
- the disbursement of Mr Gilbert's actuary's costs;
- the disbursement of court hearing fees;
- the disbursement of Mr Gilbert's tax expert; and
- Mr Gilbert's claim to interest on costs and disbursements.

[32] The plaintiff's legal costs of $66,223.13 were incurred reasonably and, set at legal aid rates of between one-third and one-quarter of what would otherwise have been actual commercial rates, are at a fair and reasonable rate. Assessing a reasonable contribution to these costs must take into account the limited success achieved by Mr Gilbert in the judgment recall proceedings. Following the Court of Appeal's judgment in *Elmsly* and allowing for a 50 per cent success rate, I adopt as a starting point 66 per cent of that 50 per cent, that is $22,100. I consider that should be uplifted to 75 per cent, or $25,000 in round figures.

[33] Next, I allow for a lesser claim than full reimbursement of Mr Gilbert's actuary's costs to reflect the misdirected nature of some of that evidence. Although I accept that the irrelevancies addressed in the evidence of both parties' actuaries were first generated by the defendant's, and that the plaintiff's may have felt an understandable need to counter these, there should nevertheless be a reduction to take account of this and also of the value of the plaintiff's achievements overall. I allow Mr Gilbert $35,000 of the $62,541 claimed.

[34] Next, I allow the plaintiff 50 per cent of the court hearing fees of $1,470, that is the sum of $735, to reflect the parties' relevant successes.

[35] Penultimately, I allow the plaintiff's full claim for the costs of his tax expert. I agree with Mr Gilbert that the Court indicated that it would benefit from expert taxation advice and it is really no answer for the defendant, in seeking to negate this, to say that he did not engage a tax expert and therefore incur costs. That Mr Gilbert did not succeed ultimately on the tax point was not attributable to his expert's evidence, but to a later-discovered point of law. I therefore allow this disbursement of $9,881.40.

[36] The foregoing four constituents of Mr Gilbert's claim to costs and disbursements total $70,616.40

[37] Finally, I deal with Mr Gilbert's claim to interest on this sum. I accept that the plaintiff has paid those costs and disbursements and has been held out of a just reimbursement of them for a significant period. The matter is not quite as simple as

Mr Gilbert's reliance solely on the judgment of the House of Lords in *RM Douglas (Roofing)* referred to earlier in this judgment suggests. The position is not necessarily or certainly now the same in New Zealand. In that regard, I have had the benefit of a recent article in the New Zealand Law Journal, "A matter of no interest" by Jason McHerron.[16]

[38] The judgment of the House of Lords was in a very different jurisdiction so far as court costs are concerned. In the United Kingdom, such costs are taxed according to a scale but, as Asher J in the High Court of New Zealand pointed out in *Fullers Bay of Islands Ltd v Otehei Bay Holdings Ltd*,[17] decided on very different relevant English rules. In New Zealand, the power to award interest on costs comes from r 11.27 of the High Court Rules. The previous r 538 in force until 31 January 2009 was an almost identical provision. The High Court rule requires that there be a "judgment debt" on which interest can be ordered. The High Court found in *Fullers*[18] that no judgment debt costs are created until there is an order to pay a specific amount. Asher J's judgment in *Fullers* was followed by Fogarty J in *Chesterfields Preschools Ltd v Commissioner of Inland Revenue.*[19]

[39] There is, however, contradictory authority on the issue which the High Court declined to follow in *Fullers.* Those contrary authorities now include *The Dunes Café and Bar Ltd v 623 Rocks Road Ltd*[20] and *Eden Refuge Trust v Hohepa.*[21] In *AFFCO New Zealand Ltd v ANZCO Foods Waitara Ltd*[22] the High Court ordered interest on costs from the date of the demand for payment following a costs judgment although this would appear to be in accordance with the interpretation of the rules of Asher and Fogarty JJ in *Fullers* and *Chesterfields* respectively. In *Te Mata Properties Ltd v Hastings District Council*[23] the High Court awarded interest on costs and other amounts after it had given guidance about these but had not fixed precise amounts.

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[16] [2012] NZLJ 260.
[17] HC Auckland CIV-2009-404-7207, 21 December 2011 at [17].
[18] At [18].
[19] [2012] NZHC 1532 at [17].
[20] HC Nelson CIV-2006-442-481, 31 March 2010.
[21] [2012] NZHC 685 at [36].
[22] (2005) 17 PRNZ 676.
[23] HC Napier CIV-2004-441-151, 23 February 2010 at [16].

[40] Jason McHerron in the recent New Zealand Law Journal article (referred to above) argues that the three cases cited in *Fullers*, where interest was awarded on costs, all seem to be ones of sufficient certainty for a debt to exist.[24] It may even be sufficient that there is a decision in principle to award costs to a party.

[41] That was not the position, however, in this case. In the Court's judgment of 28 April 2009 costs were simply reserved, the Court holding:[25]

> Costs are reserved in respect of the hearings in 2006 leading to this judgment. Each party has been successful on a major issue and the defendant has achieved a limited success on a third. If either party seeks costs, application must be made by memorandum within 3 months of the date of this judgment with any respondent thereto having the period of 1 month thereafter to reply.

[42] A further difficulty that Mr Gilbert faces is in the form of a judgment of this Court in *Blowes v NCR (NZ) Corporation*.[26] This Court agreed that it had no power to award interest on costs, albeit under the statutory regime of the Employment Contracts Act 1991.

[43] For these reasons, I must refuse Mr Gilbert's claim to interest on costs.

[44] The plaintiff is entitled to an order for costs and disbursements in the sum of $70,616.40

[45] I will let costs on this application for costs and disbursements lie where they fall between the parties.

GL Colgan
Chief Judge

Judgment signed at 2.45 pm on Friday 5 October 2012

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[24] At 261.
[25] At [53] as also in [2006] ERNZ 1 at [65].
[26] AC 40A/04, 7 December 2004.