IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 37
WRC 39/10

IN THE MATTER OF	an application for leave to file challenge out of time
BETWEEN	ALEXANDER ANTO Plaintiff
AND	PLANET SPICE LIMITED Defendant

Hearing: (on the papers)

Counsel: Daniel Vincent, counsel for the plaintiff
Paul McBride, counsel for the defendant

Judgment: 1 March 2012

COSTS JUDGMENT OF JUDGE A D FORD

Background

[1] On 24 February 2012, the Acting Registrar reported that he had received an enquiry from counsel for the defendant in relation to an outstanding costs decision in this matter. The Acting Registrar advised that after locating the Court file he had noted that relevant memoranda filed by counsel for the plaintiff and the defendant back in March and April 2011 had never previously been referred to a Judge for attention. The oversight, which appears to be wholly attributable to the Registry Office, is regretted.

[2] In brief, the relevant chronology is that on 3 November 2010, the Employment Relations Authority (the Authority) found[1] against Mr Alexander Anto's claim that he had been unjustifiably constructively dismissed

[1] WA 178/10.

and unjustifiably disadvantaged by his employer, the defendant. Mr Anto then sought to challenge the whole of the Authority's determination de novo in this Court but he failed to file his challenge within the prescribed 28-day period.

[3] The limitation period expired on 2 December 2010. On 15 December 2010, the plaintiff filed an application for leave to challenge out of time. The defendant filed a notice of opposition on 12 January 2011. In a minute dated 20 January 2011, Chief Judge Colgan ordered that the application for leave to challenge out of time would be heard on Monday, 21 February 2011. On 3 February 2011, a notice of change of solicitor was filed confirming that Mr McBride had been instructed to act for the defendant.

[4] On 4 February 2011, counsel for the plaintiff filed an application for a fixture adjournment of four weeks on the grounds that the plaintiff had not heard the outcome of his legal aid application which, "will, in all likelihood, have some bearing on whether this matter proceeds." On 10 February 2011, Mr McBride filed a memorandum in opposition to the application for an adjournment. On 2 March 2011, the plaintiff filed a notice of discontinuance.

[5] The next development came on 30 March 2011 when, consequent upon the discontinuance, Mr McBride filed a memorandum seeking costs on behalf of the defendant. The total amount claimed is $6,110 which is said to be, "a reasonable contribution towards reasonable costs". No invoices are attached to counsel's memorandum. The breakdown provided for the costs claimed is described in terms of a daily rate of $1,880 per day on the basis of Schedule 3 2B proceedings in the High Court. Two days ($3,760) are claimed for preparation of the notice of opposition and statement of defence and a further one and a quarter days ($2,350) are claimed for:

> ...
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> 4.10 Filing memorandum for case management conference or mentions hearing
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> 4.13 Preparation for hearing of defended interlocutory application and supporting affidavits
>
> 4.14 Preparation for hearing

[6] Up until 1 February 2011, the defendant had been represented by Mr Higgins, in-house counsel with the Hospitality Association of New Zealand. Mr Higgins filed the statement of defence and notice of opposition to the application for leave to file the statement of claim out of time. He did not, of course, need to file a statement of defence until such time as leave had been granted for the statement of claim to be filed out of time, if that was ever going to happen. In his memorandum, Mr McBride states that Mr Higgins did not separately record time spent in connection with the case but he went on to explain: "Time spent by current counsel comprises some six hours, plus some four hours research and preparation by a law clerk."

[7] Counsel for the plaintiff, Mr Vincent, filed a memorandum in response stating that the plaintiff did not accept that the costs claimed by the defendant were reasonable. Mr Vincent went on to submit that, in the particular circumstances of this case, no award of costs should be made. He made the following additional points:

1. The plaintiff had been granted legal aid for the Authority hearing and the defendant had been advised under cover of letter dated 12 January 2011, that it would be notified as soon as the applicant's legal aid position had been confirmed.

2. On 10 February 2011, the defendant had been, "specifically advised that the issue as to whether the applicant was granted aid would have a bearing on whether the proceedings continued." The application for legal aid was declined and the discontinuance was then filed.

3. The plaintiff was entitled to apply for legal aid but given "the inherent delays in the application process" a decision on the application for aid would not have been made within the 28-day limitation period. "It would deter many potentially legally aided applicants from pursuing an appeal/rehearing in the Court if they could be held liable for costs, pending a decision of the Agency."

4. The plaintiff, who had been working part-time as a chef at the time of the Authority hearing, had recently been made redundant and was anticipating going on the unemployment benefit. Mr Vincent also advised that the plaintiff owed around $30,000 to various creditors. It was claimed that any award of costs would cause him serious financial hardship.

Discussion

[8] The principles relating to the assessment of costs awards in this Court are well established and need not be repeated – *Binnie v Pacific Health Ltd*.[2] The Court has a broad discretion under cl 19 of sch 3 of the Employment Relations Act 2000 (the Act) in awarding costs but that discretion must be exercised in a principled way. Costs normally follow the event. The first step is to decide whether the costs actually incurred by the successful party were reasonably incurred and 66 per cent of the resulting figure is generally regarded as an appropriate starting point to be adjusted up or down depending upon relevant factors.

[9] There are a number of unsatisfactory features in relation to the present claim. No record was kept by Mr Higgins of time spent in connection with the case. I have already observed that it was not necessary for a statement of defence to be filed but $3,760 is claimed for two days allegedly spent by Mr Higgins in preparing the statement of defence and a simple one-page notice of opposition. Furthermore, the statement of defence is defective in that, contrary to reg 20(1)(b)(i) of the Employment Court Regulations 2000, it fails to admit or deny the allegations contained in the draft statement of claim. No information is provided as to Mr Higgins' charge-out rate and, as already noted, although two days is claimed for his attendances, he apparently failed to keep any record of time spent in connection with the case. No affidavit has been filed on behalf of the defendant that might enlighten the Court in relation to the deficiencies outlined in connection with the involvement of Mr Higgins.

[10] In relation to Mr McBride's involvement, no breakdown is provided of his input into the case as distinct from the involvement of his law clerk. It is claimed that the law clerk carried out some four hours of research and preparation. I am not

[2] [2002] 1 ERNZ 438.

prepared to make any allowance for research. This was a perfectly straightforward case. A four and a bit page affidavit was prepared on behalf of the defendant on 3 February 2011 in opposition to the application for leave. It is not clear whether that was prepared by Mr McBride or the law clerk. It was a perfectly uncomplicated affidavit recording the chronology of events. In his costs memorandum Mr McBride refers to "supporting affidavits" in the plural but only the one affidavit appears on the Court file. No hourly rates are provided. No distinction is made, in other words, in the claimed daily rate figure of $1,880 between attendances by Mr Higgins, Mr McBride or the law clerk. The charge out rate (daily rate) for all three appears to be the same.

[11] Mr McBride filed a copy of his submissions in opposition to the extension of time application. They appear to have been prepared on 3 February 2011. It is not clear whether they are taken from a template which can be adapted on a case-by-case basis. I, nevertheless, consider that there is significant substance in the submission made by Mr Vincent that the preparation of submissions on 3 February 2011 for the hearing not scheduled until 21 February 2011 was premature, particularly considering the advice defence counsel had clearly received about the plaintiff's pending legal aid application.

Conclusion

[12] In short, in my view the costs claimed are grossly excessive. Having regard to the deficiencies I have outlined, I would, if reliable evidence had been produced about undue hardship to the plaintiff, have ordered costs lie where they fall. There was no affidavit evidence presented on this issue however.

[13] In all the circumstances, I consider that an appropriate costs award in favour of the defendant for attendances, including attendances in respect of the present application, is $600 and I order accordingly. I am conscious that through no fault of the plaintiffs, the only information the Court has as to his personal circumstances is that contained in his counsel's memorandum dated 8 April 2011 which is now well out of date. I simply draw counsel's attention to cl 19(2) of sch 3 to the Act which gives the Court broad powers to vary or alter a costs award at any time.

[14] The issue raised by Mr Vincent about the unlikelihood of a potential plaintiff knowing the outcome of a legal aid application before the expiration of the 28-day limitation period for challenging a determination is understood. The answer may be for a very basic pro forma challenge to be lodged within the 28-day period so as to preserve the litigant's rights and at the same time counsel could file and serve a memorandum requesting the Court to give directions that no statement of defence need be filed until the outcome of the legal aid application is known one way or the other. In that way, should the legal aid application be declined, the potential plaintiff would be exposed to a bare minimal award of costs.

A D Ford

Judge

Judgment signed at 4.00 pm on 1 March 2012