IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 110
ARC 82/12

IN THE MATTER OF	an application for special leave to remove proceedings from the Employment Relations Authority to the Employment Court
AND IN THE MATTER	of an application for costs
BETWEEN	GREGORY DOUGLAS HALL Applicant
AND	WESTPAC NEW ZEALAND LIMITED Respondent

Hearing: By submissions filed on 24 May and 6 June 2013

Appearances: Tony Drake, counsel for applicant
Phillipa Muir, counsel for respondent

Judgment: 14 June 2013

COSTS JUDGMENT OF JUDGE M E PERKINS

---

[1] Costs were reserved in this matter to enable counsel to file submissions. Memoranda have now been received.

[2] The respondent was successful in the substantive judgment I issued on 24 April 2013.[1] The application for special leave to remove the proceedings from the Employment Relations Authority (the Authority) to this Court was declined.

[3] The respondent now seeks costs against the applicant in the sum of $8,459 plus disbursements of $150. This is on the basis that such a level of costs equates to two-thirds of actual reasonably incurred costs. Ms Muir, counsel for respondent,

[1] [2013] NZEmpC 66.

relies upon previous Court of Appeal decisions dealing with awards of costs in this Court.[2]

[4] In addition, based on *O'Hagan v Waitomo Adventures Ltd*[3] the respondent seeks a further sum of $750 as a contribution towards costs incurred in preparing the application for costs.

[5] Mr Drake, counsel for the applicant, accepts the general rule that costs follow the event applies in this case. He submits, however, that the amount sought by the respondent is not reasonable in the circumstances.

[6] The application made in this case was analogous to an interlocutory application. Mr Drake refers to authorities where similar applications for costs have been considered.[4] Costs awards in those cases amounted to $1,500 to $3,000. The hearings lasted for approximately two hours, which is similar to the present case.

[7] As fortification for his argument, Mr Drake carried out calculations based on the High Court Rules scale for categories 1B and 2B. Such costs, having regard to the attendances in this case and allowing for 1.6 days amount to $2,000 and $3,008 respectively.

[8] Ms Muir submits that in this case the Court should follow the usual approach of two thirds of actual reasonably incurred costs and that the fees charged in this case to the respondent ($12,689.00 exclusive of GST and disbursements) can be categorised as reasonable and indeed modest. In addition, she submits that the proceedings were of significant importance to the respondent as it risked losing an important right of appeal on first instance factual findings. She also refers to the extensive preparation required, the fact that the hearing occupied one half day, that the application itself was without merit, and that the submission based on exemplary

---

[2] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.

[3] [2012] NZEmpC 161.

[4] *Smith v Evolution E-Business Ltd* [2010] ERNZ 514; *New Zealand Tramways & Public Passenger Transport Authorities Employees IUOW (Wellington Branch) v Cityline (NZ) Ltd t/a Cityline Hutt Valley* [2007] ERNZ 667; and *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v SCA Hygiene Australasia Ltd* [2011] NZEmpC 53.

damages had no prospect of success. The respondent, she submits, was put to unnecessary expense.

[9] Even with those factors it is hard to reach the conclusion that for an interlocutory application of this kind and in the context of an application for party to party costs, fees of $12,689 are reasonable. It may well be that the respondent, being a substantial financial institution regarded the issues in this application as of importance in principle and required substantial and detailed attendances from its legal advisors. However, even though without merit, an application such as this, where senior and experienced counsel was in attendance and with the efficiencies that would entail, would not normally result in fees of that magnitude.

[10] Mr Drake accepts that an award of the moderate kind adopted in the authorities referred to in the range of $1,500 to $3,000 would be appropriate if no other relevant consideration applied. In this case he submits that the Court is obliged to consider the applicant's current financial position. That is set out in Mr Hall's affidavit sworn on 27 May 2013. Mr Hall is not currently employed. Apart from a small sum he earned from work as a self employed consultant he has not earned any income since his employment with the respondent terminated. He has been living off savings.

[11] This application for costs requires the Court to balance the respective positions of the parties in exercise of its discretion on costs. While Mr Hall is in a relatively precarious position financially, the respondent has been forced to incur costs by his unmeritorious application. I note that his substantive claim will be dealt with by the Authority in an investigation meeting on 27 and 28 August 2013. I consider that an appropriate award of costs, having regard to all the circumstances, should be $2,000. There will be an award against Mr Hall accordingly and he is also ordered to pay the disbursements claimed of $150.

M E Perkins
Judge

Judgment signed at 11.45am on 14 June 2013