IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC12A/08
CRC51/07

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND	
IN THE MATTER OF	an application for costs
BETWEEN	MIRIAM CLARK Plaintiff
AND	NELSON MARLBOROUGH INSTITUTE OF TECHNOLOGY Defendant

Hearing: Submissions received 6 October, 17 October and 4 November 2008

Judgment: 5 December 2008

COSTS JUDGMENT OF JUDGE A A COUCH

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[1] On 19 August 2008, I gave my judgment on a preliminary issue between the parties about whether the plaintiff's personal grievance had been raised in time (CC 12/08). I found that it had been raised in time and, as the plaintiff had been successful in the challenge, she was entitled to a reasonable contribution to her costs. In the event that they were unable to agree on costs, counsel were invited to file memoranda.

[2] Mr Praat filed a memorandum on 6 October 2008. In it, he correctly identified the principles guiding the Court's jurisdiction to award costs derived from several decisions of the Court of Appeal. Costs will usually follow the event and a useful starting point as to quantum is two-thirds of the costs actually and reasonably incurred.

[3] Mr Praat attached to his memorandum copies of invoices rendered by his firm to the plaintiff and which he said she had paid. These invoices totalled $9,116.85 inclusive of GST. Mr Praat invited me to accept that this level of costs was reasonable in its entirety but provided no information which would enable me to assess whether or not that was so.

[4] In her memorandum dated 17 October 2008, Ms Kirk questioned the reasonableness of the costs actually incurred by the plaintiff.

[5] On 21 October 2008, I issued a minute to the parties in which I said:

> *1. Following my judgment dated 19 August 2008, counsel for both parties have now filed memoranda relating to costs and disbursements.*
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> *2. In short, the plaintiff seeks two thirds of costs and disbursements totalling $9,116.85.*
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> *3. As counsel have acknowledged in their memoranda, an issue I must have regard to is the extent to which those costs were actually and reasonably incurred. Copies of tax invoices have been attached to Mr Praat's submissions and he says that those invoices have been paid by the plaintiff. On the face of it, the amount of costs is very large, particularly in light of the fact that the same point had previously been argued before the Authority and the matter was decided on the papers.*
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> *4. There is very little, if any, information provided in counsel's memorandum to assist me in determining the extent to which those costs were reasonable. While it would be open to me to simply fix a figure which I regard as reasonable, that would be potentially unfair to the plaintiff. Through counsel, she ought to have an opportunity to justify her claim more fully.*

[6] I then set a timetable for Mr Praat to file and serve a further memorandum and Ms Kirk to do likewise in reply. Mr Praat filed a further memorandum dated 4 November 2008. Ms Kirk filed nothing further within the time allowed and I infer from this that she has elected not to respond to Mr Praat's further memorandum.

[7] In his second memorandum, Mr Praat noted that the charge out rate for his time on this matter was $280 per hour. I find that reasonable given the nature of the issue. What is questionable, however, is the time spent on the matter.

[8] Mr Praat provided me with copies of time records apparently derived from his firm's computer database but these were not analysed. Rather, I have been left to make what I can of three pages of detailed records. What is immediately apparent is that these records include work done on matters other than the challenge to the Court. For example, they seem to include 6 to 7 hours of work related to the issue of costs in the Authority. I note also 1.4 hours devoted to research on "holiday pay". While this work may well have been done during the period in which Mr Praat was also working on the proceedings in the Court, it does not relate to the matter before the Court and the costs associated with that work are therefore not costs to which a contribution may be sought in the Court.

[9] In addition, Mr Praat provided copies of two letters. The first was from Ms Kirk which recorded that the defendant's costs in relation to the Authority's investigation were $13,100 plus GST. The second was from Mr Praat to the plaintiff giving an estimate of $10,000 costs plus $840 disbursements for the challenge. I find this correspondence of no practical assistance. I have no means of assessing whether the costs incurred by the defendant in relation to the proceedings before the Authority were reasonable or not and, in any event, it is irrelevant to my present consideration. The fact that the amount the plaintiff was actually charged for conducting the challenge was consistent with the estimate given may assist Mr Praat in justifying the amount of the invoices rendered to the plaintiff but it does not assist in establishing whether they were objectively reasonable.

[10] In support of the amount of costs actually incurred, Mr Praat noted that the effect of the Authority's determination was to prevent the plaintiff pursuing her personal grievance and emphasised the importance of the substantive matter to her. As he put it:

> *…the Plaintiff's claim arises from the actions of her employer in failing to recognise her professional qualifications and development insofar as that affected her remuneration and her continuing status as a probationary employee over a period of several years. The claim therefore involved important issues of principle for the Plaintiff as well as a financial aspect.*

[11] I take this as a submission that, because the case involves what the plaintiff regards as issues of principle, she instructed him to devote additional time and effort

to it and that it was reasonable that she do so. I accept that submission, but only to a limited extent. The issue was narrow and clearly defined. The essential facts were few and not in dispute. The same issue had already been discussed with the Authority in an investigation meeting and had subsequently been the subject of written submissions to the Authority. The issue was decided on the papers with no appearance in Court. Thus, while I accept that it was reasonable for the plaintiff to instruct Mr Praat to do a thorough job in pursuing the challenge, the extent to which additional work was reasonably required to carry out those instructions was distinctly limited.

[12] In her memorandum, Ms Kirk informed me that the Authority has yet to fix costs in relation to its investigation so far. She then submitted that *"…costs should lie where they fall given that each party has succeeded."* In the alternative, Ms Kirk suggested that any costs awarded in the Court be offset *"…by an amount representing the fact that the defendant was completely successful in the Authority."*

[13] These submissions entirely overlook the fact that the Authority's determination has been set aside and the judgment of the Court now stands in its place. On the issue which was the subject of the challenge, the plaintiff is entitled to a contribution to her costs in both the Authority and the Court. As the substantive matter apparently remains before the Authority, however, it is not appropriate that I fix costs in relation to any part of its investigation.

[14] Ms Kirk submitted that another option would be that costs on all aspects of the matter be reserved until the plaintiff's substantive claim has been determined. It will be a matter for the Authority to determine how costs associated with the various aspects of its investigation are dealt with. As the only aspect of the matter before the Court has been decided, it is appropriate that costs be fixed now regardless of the final outcome of the substantive matters. The defendant chose to argue before the Authority that the plaintiff was not entitled to pursue her personal grievance because it was not raised in time. Having done so, the defendant took the risk that a determination to that effect by the Authority would be challenged. Equally, when the plaintiff did challenge the Authority's determination, the defendant chose to defend that challenge, thereby putting the plaintiff to more expense than might

otherwise have been the case. The defendant must accept the consequences of those decisions.

[15] Ms Kirk then suggested that the plaintiff had failed to properly quantify her substantive claim and that this prevented the defendant from attempting to settle the matter. She submitted that this was a factor I should take into account in fixing costs in the Court. I reject that submission. Any complaint the defendant may have that the plaintiff's claim is not properly particularised could have been addressed to the Authority and resolved long ago. Equally, there will have been ample scope for the parties to discuss such issues at mediation.

[16] Finally, Ms Kirk referred me to the decision of the Chief Judge in *Maritime Union of New Zealand Inc v TLNZ Ltd* [2008] ERNZ 91. In that decision, the Chief Judge took the view that the principles enunciated by the Court of Appeal that I have referred to earlier ought not to be strictly applied to cases involving disputes affecting a workforce generally as opposed to a single employee. Ms Kirk did not attempt to relate that decision to this case and I can only assume she saw some sort of parallel between that case and this one and was inviting me to not apply the conventional principles as to costs in this case. I see no such parallel and no basis to distinguish the decisions of the Court of Appeal which are binding on this Court.

[17] On the material provided to me, it is clear that only some of the costs to which the plaintiff seeks a contribution were actually incurred in relation to this matter. That material also fails to satisfy me that the costs actually incurred in relation to this matter were entirely reasonable.

[18] In these circumstances, an approach which has been taken in some cases is to apply the costs provisions of the High Court Rules. Given that this matter was comparable to an appeal and was decided on the papers, however, there is no appropriate analogy available in those rules.

[19] Taking all aspects of the matter into account, it seems to me that the extent to which costs were reasonably incurred by the plaintiff was $6,000. I therefore take a starting point for an award of costs of $4,000. Mr Praat does not suggest there were

any aspects of the manner in which the case was conducted before the Court which justify a departure from that starting point and I find that there are none.

[20] Mr Praat did not specifically address disbursements in his memoranda but it is a matter of record that a filing fee of $200 has been paid. The plaintiff ought to be reimbursed in full for that sum.

[21] The defendant is ordered to pay the plaintiff $4,000 by way of costs and $200 for disbursements.

A A Couch
Judge

Judgment signed at 8.00am on 5 December 2008