**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**AC 10A/07**
**ARC 52/05**

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| IN THE MATTER OF | personal grievances removed from the Employment Relations Authority |
| AND IN THE MATTER OF | an application for costs |
| BETWEEN | HARVEY DOUGLAS WHITE (FORMERLY "X")<br>Plaintiff |
| AND | AUCKLAND DISTRICT HEALTH BOARD<br>Defendant |

Hearing: By memoranda of submissions filed on 27 March and 7 May 2007

Judgment: 15 October 2007

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## COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] All avenues of appeal having been exhausted in this case, the remaining issue is for me to decide whether the plaintiff should be awarded costs.

[2] The power to award costs is set out in clause 19 of Schedule 3 to the Employment Relations Act 2000 and vests in the Court a very broad discretion to deal with costs as the interests of the case may determine. Although costs will frequently follow the event in that a successful party can expect to have at least some of that party's costs of representation reimbursed, that is not inevitable. In some cases, and this is among them, both parties have succeeded in some measure and it is then a question of balancing those successes to determine costs.

[3] Dr White succeeded in having his dismissal declared unjustified. He was also successful in being reinstated to his former position. He was not, however, successful in his claims to monetary compensation for his unjustified dismissal and for an order prohibiting publication of his identity permanently. The issues of justification for dismissal and non-publication of identity have gone on to the Court of Appeal and, in the case of non-publication, also to the Supreme Court but leave has been refused for all grounds of appeal. In refusing Dr White leave to challenge my order declining a permanent order for non-publication of his identity, both the Court of Appeal and the Supreme Court declined to interfere with my conclusion that the assessment of remedies for unjustified dismissal in this case included questions of the publication of his identity.

[4] I have concluded that questions of costs should, in this case, also be considered not in isolation of the other outcomes of the case but in light of them and in the round.

[5] The plaintiff seeks reimbursement of 80 percent of his legal fees and reimbursement of all of his disbursements incurred in this proceeding begun in the Employment Relations Authority that ended in a finding of unjustified dismissal and an order for the plaintiff's reinstatement. The claim for 80 percent of legal fees comes to $188,758.12 and the claim for all disbursements to $6,798.35, a grand total sought of $195,556.47.

[6] At paragraph [240] of the principal judgment, delivered on 23 February 2007, I wrote:

> *I have already indicated that, on the very detailed case heard by me and, as one element of setting appropriate remedies and taking into account contributory conduct, my inclination is that although the plaintiff may be seen to have been successful, he should meet his own costs of representation in the proceedings without contribution from the defendant.*

[7] Nevertheless, the plaintiff has exercised the leave granted to apply for costs and I must now reconsider that preliminary indication.

[8] First, counsel for the plaintiff submitted that costs should not be an element of remedy assessment, citing *O'Connor v Wellington City Council* [1990] 3 NZILR 653, 656 in support of this proposition. In that case, remedies awarded to a successful employee were nevertheless reduced to reflect his contributory conduct that led to the circumstances of his dismissal. In that case the Labour Court held:

> *The amount of income which he might otherwise have had awarded having been reduced by us to reflect our view of his own culpability, it would now be inappropriate for this to be taken into account a second time in the assessment of an entitlement for or the quantum of, costs.*

[9] In this case, however, it would not be a second reduction that had already been reflected in lesser remedies because the assessment of monetary compensatory remedies made in the principal judgment included, as one of the express elements, a prospective nil costs award. The *O'Connor* case is therefore distinguishable.

[10] Next, in this regard, the plaintiff says that to refuse to grant him any costs would be punitive. He says that before litigation even commenced, he put ADHB on notice, through counsel, that he would seek a substantial award of costs when it was apparent that ADHB would not succeed. That was by a letter from counsel Mr Waalkens QC to ADHB's solicitors dated 28 September 2005. After commenting on the merits of his client's case, Mr Waalkens wrote:

> *In the event that [the plaintiff] wins this litigation he will be seeking a realistic order for costs against ADHB as well as the other relief that has been claimed. …*
>
> *Would you please make sure that the cost and other financial consequences of ADHB's decision are well understood but (sic) it.*
>
> *I am likely to seek an order of solicitor and own client costs and it is appropriate to put ADHB on clear notice of this.*

[11] At the end of the first week of the trial, Ms Swarbrick, counsel for Dr White, wrote to ADHB's solicitors on the questions of prospects of success and costs. The letter was marked *"Without Prejudice Save as to Costs"* and contained an offer to settle even at that stage. Ms Swarbrick proposed that ADHB should agree to reinstatement and other declaratory remedies that the plaintiff was seeking. He also sought the defendant's agreement to an order for permanent suppression of the

plaintiff's identity. The plaintiff, through counsel, indicated that he would be prepared to accept $5,000 to settle his claim for distress compensation under s123(1)(c)(i) that his costs to that date would have to be paid with the amount either being agreed or set by the Court. The plaintiff's solicitors reiterated that if the offer of settlement on these terms was refused, solicitor/client costs would be sought. The plaintiff says that in the exercise of the Court's discretion on questions, such matters should be taken into account: reg 68 Employment Court Regulations 2000.

[12] Next, the plaintiff says that ADHB's conduct throughout the litigation and, in particular, its vehement and continually unsuccessful opposition to reinstatement and its dealing with interlocutory matters, increased unreasonably the cost of the litigation.

[13] The plaintiff reminds the Court of the general principle that costs follow the event: *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at para [48]. The principle is also one of reasonable contribution to costs actually and reasonably incurred: *Alton-Lee* and *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438.

[14] Turning to his litigation costs, the plaintiff says that from April 2005, when he was dismissed, to December 2005, when the hearing of his claim concluded in this Court (including six interlocutory hearings), costs approaching $300,000 were incurred. The plaintiff complains that he was charged for (and paid) the Court hearing fees but says that these should have been borne by the defendant because the case was removed for hearing in this Court on its application. The hearing fees total $4,410. As a matter of principle, I conclude these were properly payable by Dr White as plaintiff, albeit in proceedings removed to this Court that has higher fees than the Employment Relations Authority. Such fees paid properly by Dr White are disbursements to which the defendant may, potentially, have to contribute.

[15] As the principal judgment notes, until a matter of only a few days before the trial, Mr Waalkens QC was senior counsel for the plaintiff but relinquished this role as a necessary witness. A further feature of the case is that Mr Waalkens also acted, in effect, as the plaintiff's solicitor during ADHB's investigation of the allegations of misconduct against the plaintiff, attending meetings as his representative and

engaging in correspondence and discussions with ADHB before any decision was made to dismiss the plaintiff, thereby giving him a cause of action. As the judgment of the Court of Appeal in the *Binnie* case (also the case of a hospital doctor investigated for alleged misconduct) states, the costs of legal representation during investigations that lead to a cause of action based on dismissal may be categorised as special damages recoverable other than by contribution to legal representation costs. No such claim was made in this case however.

[16] The plaintiff highlights the necessity to prepare for, and be represented at, six separate interlocutory hearings as well as the 10 days of the trial. He says that it was appropriate for two counsel to appear for him at all but one of those hearings, given the extent of the evidence, the number of witnesses, and the importance of the issues. He notes that at some hearings ADHB had three counsel present.

[17] The six interlocutory hearings included:

- defending twice (unsuccessfully) ADHB's urgent application for stay of the reinstatement order made by the Employment Relations Authority;

- defending (successfully) ADHB's challenge to the interim reinstatement and identity suppression orders;

- defending (unsuccessfully) ADHB's application for special leave to remove the matter to the Employment Court;

- applying to the Court (largely successfully) regarding ADHB's refusal or omission to disclose certain documents;

- applying to the Court (largely successfully) for rulings about the admissibility of evidence sought to be adduced by ADHB.

[18] The plaintiff says that his solicitors' fees for interlocutory hearings exceeded $18,000 (excluding GST) while Mr Waalkens's fee as counsel in each of these matters was billed as a global sum. He says that given the nature of ADHB's

approach to these matters and the importance of the issues to the parties, it was necessary and appropriate for him to engage both senior counsel (Mr Waalkens QC) and a very experienced employment law practitioner (Ms Swarbrick).

[19] In support of the legal costs attributable to the 10 day trial, the plaintiff says that given that his livelihood, career and reputation were at stake, it was entirely appropriate to engage two counsel for these matters as well. The plaintiff says that Mr Waalkens was involved professionally in the preparation for the substantive hearing and his fees for this were incurred necessarily. It was also said to have been reasonable that Ms Swarbrick had a junior with her for the trial.

[20] The plaintiff discloses that his legal costs have been met to date by a specialist insurer, the Medical Protection Society. However, he submits, correctly, that this does not preclude an award of costs in his favour.

[21] The plaintiff says that the following features of the case warrant an increase from the notional starting point (*Binnie*) of 66 percent of costs actually and reasonably incurred. These include:

- the importance of the case to the plaintiff;
- the plaintiff's reasonable attempts to settle the matter;
- the way in which the case was conducted by the defendant;
- the conduct of the defendant at the hearing.

[22] Addressing first the importance of the case to the plaintiff, his counsel describes this as *"fundamental"*. Turning on it were said to be the future of his professional career including his substantial international reputation. So not only was it vital for the plaintiff that his dismissal be found to have been unjustified, but it was as important that he be reinstated allowing him to continue his clinical work in the public health sector and his research.

[23] Turning next to attempts to settle the litigation, the plaintiff says that his reasonable offers of settlement made both before and during the case were spurned by ADHB so that no resolution was possible and the plaintiff was put to the expense of lengthy and complex judicial proceedings. His counsel points to the defendant's efforts to challenge the plaintiff's early interim reinstatement ordered by the Employment Relations Authority. The plaintiff says that ADHB was, or should reasonably have been, aware of the hopelessness of its case at a number of stages including when this Court upheld the Employment Relations Authority's order for interim reinstatement, finding that Dr White had a strongly arguable case. On 28 September 2005 Dr White's counsel put ADHB on notice that in the event that he was successful, he would likely seek solicitor/client costs. Further, on about 11 November 2005, following the evidence before me of ADHB's human resources manager confirming that the defendant had failed to follow its own policies and procedures and had taken irrelevant matters into consideration in reaching its decision to dismiss, Dr White made an offer of settlement without prejudice except as to costs including that he be reinstated and that ADHB would agree to the Court making a permanent order for non-publication of his identity. The plaintiff offered to accept distress compensation of $5,000 and his costs to that date would have had to have been paid. The plaintiff's solicitors again put ADHB on notice that solicitor/client costs would be sought in the event that he was found to have been unjustifiably dismissed.

[24] Addressing next the plaintiff's allegations about ADHB's conduct, Dr White says that the manner of the employer's defence of the claim added unreasonably to his litigation costs. This is said to have included the conduct requiring interlocutory applications to the Court before commencement of the substantive hearing. These included a successful application challenging the Board's refusal to disclose certain documents and in association with which Dr White says that the Court was ultimately critical of the defendant's approach. The point is made that even at trial, ADHB attempted to refer to documents which had not been disclosed including policies relied on. Dr White emphasises that despite more than six months having elapsed between dismissal and trial and despite the parties having been timetabled by the case management process, additional materials were introduced into evidence by trial by the defendant with little or no notice to the plaintiff.

[25] Dr White emphasises his success in a separate interlocutory application to exclude all or at least parts of the evidence of a number of the defendant's proposed witnesses.

[26] In addition to these interlocutory matters, Dr White says that ADHB's evidence justifying dismissal was lengthy but ultimately rejected by the Court. Likewise, the plaintiff says that evidence adduced by the defendant that called into question the plaintiff's clinical competence, was without foundation and against the weight of evidence called for him.

[27] Finally, in this regard, the plaintiff says that a number of the defendant's witnesses rigidly maintained extreme and unsupportable positions in their evidence necessitating detailed cross-examination of these witnesses which in turn added to the plaintiff's costs.

[28] Turning next to the outcome of the case, the plaintiff claims he was wholly successful in his claim of unjustified dismissal, both procedurally and substantively. He says that the defendant's failings identified by the Court were *"significant and pervasive"*. Dr White says that he had no option but to pursue litigation in which he was successful but in which he incurred substantial costs.

[29] Dr White submits that for the Court to take into account his culpability in its conclusion of any costs award would be punitive and contrary to the interests of justice.

[30] The actual legal fees charged by Dr White's solicitors (including the fees of counsel at trial) amounted to $128,594.53 including GST. His costs of counsel including 50 percent of time invoiced until 21 June 2005 and to the conclusion of the trial amounted to $107,353.12 including GST. Disbursements (GST inclusive) amounted to a further $6,798.35 including court filing and hearing fees and other disbursements. The grand total of Dr White's legal costs therefore stands at $235,947.65. He seeks reimbursement of 80 percent of his legal fees and all of his disbursements, being a total of $195,556.47. The plaintiff says that his costs were

reasonable costs in all the circumstances and that 80 percent of them should be determined to be a reasonable contribution to reasonable costs incurred.

[31] Opposing the making of the awards sought, the defendant, through counsel, makes the following points.

[32] The defendant submits that because Dr White failed to obtain remedies that exceeded or were otherwise more favourable than those proposed by him to it without prejudice as to costs, nothing should be held against ADHB as a result of its rejection of this settlement proposals.

[33] The defendant submits that my initial indication set out in the substantive judgment that Dr White should meet his own costs without contribution from it should now be adopted after the parties have had a full opportunity to make submissions that I have considered.

[34] The defendant advances five broad reasons in support of its opposition to an award of costs in Dr White's favour.

[35] First, it says that to make what by any account would be a substantial award would be to reconstruct the unique combination of remedies ordered by the Court which would lead to an imbalance not reflecting adequately the Court's findings as to the relative merits of the parties' conduct.

[36] Second, the defendant reiterates that Dr White cannot rely upon the offers made by him to settle for reasons set out above.

[37] Third, the defendant says that costs are at the discretion of the Court and on the general principles developed in other cases, it would be inappropriate to award costs in this.

[38] Penultimately, the defendant says that the facts do not support an award of costs.

[39] Fifth, and finally, the defendant says that if the Court is to award costs, there should only be a modest award and the claim made by Dr White is substantially overstated.

[40] The defendant emphasises the Court's equity and good conscience jurisdiction (s189) to fix an outcome that is reasonable and just to both parties and submits that costs may therefore form part of any mix of remedies awarded by the Court including a decision to decline costs.

[41] The defendant reminds me what I had written in the substantive judgment at paragraph [227]:

> *A unique combination of remedies must be crafted to both meet the justice of a finding of unjustified dismissal and the statute's requirement for contributory conduct to sound in remedy reduction. In these circumstances the plaintiff will be reinstated but should have no other remedies.*

[42] And, at paragraph [240], I wrote the passage that has already been set out at paragraph [6] of this judgment including:

> *… although the plaintiff may be seen to have been successful, he should meet his own costs of representation in the proceedings without contribution from the defendant.*

[43] I declined, however, to make a final order as to costs because of what was then the potential existence of offers of settlement made without prejudice except as to costs but not revealed to the Court before judgment. As the defendant says, although these were made, Dr White has not beaten them and they should not, in my assessment, therefore affect the position.

[44] The defendant also makes the following points about the Court's factual findings as being against any entitlement for Dr White to recover costs. As I found at paragraphs [183] to [224] of the substantive judgment, Dr White engaged in blameworthy conduct which I described as "*bizarre and reprehensible*". The electronic imagery that Dr White dealt with wrongfully, was inappropriate content on the defendant's e-mail system. There were, contrary to Dr White's assertions of disadvantage, no unreasonable delays in the defendant's investigation of the

allegations of misconduct against him. Nor was the defendant's dealing with the plaintiff's laptop computer unjustified in all the circumstances. So too were all of Dr White's unjustified disadvantage claims that related to events that occurred after his dismissal. Dr White's actions were contrary to commonly accepted standards of conduct for senior clinicians in public hospitals. Also without substance were his claims that he had been dismissed for other and improper motives.

[45] The defendant points to what it says was Dr White's unreasonable insistence upon returning to work immediately the Employment Relations Authority made an order for interim reinstatement even where it was clear that the defendant was to file a challenge to that. The defendant's application for an interim stay of execution of the order for interim reinstatement heard on 10 May was successful. The substantive application for stay heard on the following day, 11 May, produced a measure of success for both parties, the plaintiff returning to work but on a restricted basis pending the outcome of the substantive challenge to the Authority's determination on interim reinstatement.

[46] The defendant also emphasises Dr White's unsuccessful opposition to ADHB's application to remove the proceedings for hearing at first instance in this Court. Nominally, at least, I concluded that it was entitled to costs on that application.

[47] Next, the defendant says it is appropriate for each party to bear its own costs because this was, effectively, a test case involving the first interpretation by the Court of the new s103A justification tests which came into effect on 1 December 2004. I accept that this was a case in which new legal provisions were tested: for example, the defendant was unsuccessful in seeking to adduce evidence to be given by representatives of other district health boards about how they would have dealt with Dr White, evidence purporting to address whether the defendant acted as a fair and reasonable employer.

[48] The defendant says that the length of the substantive hearing (10 days) was caused in part by Dr White's pursuit of a number of disadvantage claims and allegations of improper motive in respect of which he was unsuccessful.

[49] Dr White contributed to the circumstances that gave rise to his dismissal in the ways already outlined in my primary judgment. The determination of justification for dismissal and of the remedy of reinstatement that was granted were not an open and shut question as the primary judgment reflects.

[50] Taking into account all of the above submissions, I still consider that the interests of justice would be met by not making an order that the defendant contribute to the plaintiff's legal costs. To deal with the question of reserved costs on the removal application, I now consider that these also are best left to lie where they fell.

[51] Although the presence of an insurer, as the plaintiff has frankly acknowledged in his submissions in support of costs, has relieved him of personal liability for representational expenses, the consequence of any order in the plaintiff's favour would be the same for the defendant irrespective of the presence of an insurer. Having considered the position absent an insurer, I have concluded that I would not have decided Dr White's claim for costs any differently.

[52] I consider that, consistently with the remedial elements of the Court's decision, the interests of justice dictate that neither party should contribute to the costs of legal representation of the other and Dr White's claim for an award is therefore dismissed.

GL Colgan
Chief Judge

Judgment signed at 9 am on Monday 15 October 2007