

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2011] NZEmpC 112
CRC 44/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN KAREN PATRICIA PIVOTT
First Plaintiff

AND PATRICK MAURICE O'SULLIVAN
Second Plaintiff

AND SOUTHERN ADULT LITERACY INC
(FORMERLY SOUTHLAND ADULT
LEARNING PROGRAMME INC)
First Defendant

AND LITERACY AOTEAROA INC
Second Defendant

Hearing: By memoranda of submissions filed on 20 July and 22 August 2011

Appearances: Patrick O'Sullivan in person and agent for first plaintiff
Mary-Jane Thomas, counsel for first defendant
Prudence Kapua, counsel for second defendant

Judgment: 2 September 2011

COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] In the judgment delivered on 22 June 2011¹ dismissing the plaintiffs' claims, the Court allowed the defendants costs if these were unable to be agreed with the plaintiffs. The first defendant has sought an order for costs from the Court. The second defendant has not so applied.

¹ [2011] NZEmpC 67.

[2] The first defendant's claim is \$9,652.80, said to be 80 per cent of its actual legal costs. In addition, the first defendant seeks to be reimbursed \$188.90 for photocopying. It has provided copies of the bills of costs rendered to it by its solicitors.

[3] It is well established that costs in proceedings of this sort should generally consist of a reasonable contribution to reasonably incurred legal fees and disbursements. That involves, first, an assessment of the reasonableness of those actual costs and disbursements. The second part of the exercise is to take as a starting point two-thirds of those reasonable costs and disbursements and either fix costs at that level or at any other level below or above that, as is just in the particular circumstances of the case.²

[4] Much of Mr O'Sullivan's lengthy submissions on costs consist of a re-statement of the substantive arguments on the challenge and of which I take no account. Other portions of his submissions on costs relate to the provision by the first defendant to the plaintiffs, after this Court's judgment, of a tape recording or tape recordings. Although Mr O'Sullivan seeks to link this to the judgment and, perhaps, to claim some element of vindication for the plaintiffs thereby, it is a separate issue which, although it may be a matter for costs in the Authority, does not influence me in my decision in this case.

[5] Penultimately, Mr O'Sullivan argues that the first defendant's costs are excessive. For reasons set out below, I do not agree.

[6] The only submission made by Mr O'Sullivan which assists the plaintiffs' position is that the judgment was largely based on grounds that did not occur to, or at least were not argued by, the defendants in their successful defence of the challenge. In effect, Mr O'Sullivan's submission is that the defendants succeeded in spite of, rather than because of, their defences raised.

² *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 at [14].

[7] I accept that the actual legal costs rendered to the first defendant were reasonable in all the circumstances. There are two particular factors which reinforce this in addition to my assessment of their inherent reasonableness for the defence of a challenge, albeit without a hearing. First, I accept that although the first defendant's solicitors could justifiably have charged more, they did not do so. Second, the first defendant's solicitors allocated the work done on the file between an employment advocate at a lower charge out rate and a senior partner at an appropriately higher charge out rate reflecting the particular requirements of the attendances to be performed. I accept that this has resulted in a fair charge to the client and is indeed a scheme that other legal practices should consider in appropriate employment law cases to provide best value for money legal advice and work.

[8] So the starting point of reasonable legal fees for defending the plaintiffs' proceedings is \$12,000.

[9] I conclude that a fair award of costs to the first defendant should be two-thirds of its reasonable legal costs of \$12,000, that is the sum of \$8,000 which I direct the plaintiffs to pay to the first defendant. I agree with Mr O'Sullivan that photocopying charges should properly be office overheads and not a separate disbursement to be reimbursed. Finally, I confirm that in the absence of any claim to costs by the second defendant against the plaintiffs, no order is made in its favour.

GL Colgan
Chief Judge

Judgment signed at 11.45 am on Friday 2 September 2011