IN THE EMPLOYMENT COURT
WELLINGTON

[2011] NZEmpC7
WRC 8/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MARGARET SMITH Plaintiff
AND	LIFE TO THE MAX HOROWHENUA TRUST Defendant

Hearing: by memoranda filed on 3 and 22 December 2010

Judgment: 8 February 2011

COSTS JUDGMENT OF JUDGE A D FORD

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[1] I concluded my judgment in this case, dated 15 November 2010, with the following statement in relation to costs: [1]

> [35] In all the circumstances, my preliminary view is that the justice of the case can best be met through an order requiring each party to bear their own costs but if Mr Drummond takes a different view he should file a memorandum within 21 days and Mr O'Sullivan will then have a further 21 days in which to file a response.

[2] Clearly Mr Drummond did take a different view and both counsel have now filed helpful memoranda. In colloquial terms the parties are poles apart. Mr Drummond seeks costs on behalf of the defendant in the sum of $9000 representing 75 percent of the costs actually incurred of $12,000 whereas Mr O'Sullivan concurs with the views I expressed in my judgment with the qualification that, "if there is to be an award, it is submitted that the conduct of the defendant in this case has been such that costs should lie with the plaintiff."

[1] *Smith v Life to the Max Horowhenua Trust,* [2010] NZEmpC 152.

Mr O'Sullivan has filed a copy of the invoice he rendered to his client in the total sum of $9000.

[3] In my substantive judgment, I did not elaborate on why I had expressed the preliminary view that each party should bear their own costs but I now proceed to do so.

Basis for preliminary view

[4] In its determination,[2] the Employment Relations Authority (the Authority) upheld the plaintiff's claim that she had been unjustifiably suspended, unjustifiably warned and unjustifiably dismissed. It awarded one lump sum of $10,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) on account of all three personal grievances. The Authority also awarded the plaintiff the sum of $11,750 under s 123(1)(b) and s 128 of the Act as her loss of three months' salary resulting from the unjustified dismissal. In making the loss of earnings award, the Authority Member noted that he was not prepared to award the plaintiff the full six months' loss of salary she had claimed because he was not satisfied that she had made sufficient attempts to find other work and, hence, mitigate her loss.

[5] The plaintiff challenged only two aspects of the Authority's decision, namely, its conclusion that the loss of salary award should be reduced from six months' down to three months' and the adequacy of the $10,000 compensation figure. There was no cross-challenge by the defendant. That meant that there was no need for a full hearing of the entire matter but there would be a partial hearing confined to the two issues challenged by the plaintiff.

[6] The position was confirmed in this regard by Judge Couch in a minute dated 9 June 2010 where His Honour recorded: "The defendant accepts the whole of the Authority's determination and resists an award of increased remedies." The minute recorded that the hearing will be confined to "the remedies to be awarded to the plaintiff."

[2] WA 40/10, 26 February 2010.

[7] The evidence was that the plaintiff had been unjustifiably dismissed on 22 May 2009. Her claim for six months' loss of earnings would have covered the period up until 22 November 2009. The three months' loss of earnings award by the Authority covered the period up until 22 August 2009. I mention these dates because, although there was no cross-challenge, the defendant in its statement of defence alleged: "That the Plaintiff's job would have come to an end on or about 30 June 2009 as the Ministry of Health funding for the position came to an end for the position that the Plaintiff held."

[8] The case had been set down for hearing in this Court at Palmerston North on 22 September 2010. On 16 September 2010 the defendant filed briefs of evidence from two witnesses in support of its contention that the duration of the plaintiff's employment was intrinsically linked to funding from the Ministry of Health and that source of funding would have ceased on 30 June 2009. Plaintiff's counsel responded by filing a Memorandum dated 21 September 2010 contending that the defendant was estopped from contesting the implicit finding of the Authority that the plaintiff's employment was of indefinite duration or at least for a term of six months. Counsel submitted that, "the partial de novo appeal should be limited to the parameters outlined in the Statement of Claim and in Judge Couch's Minute."

[9] The hearing had been set down for one day only commencing at 9.30 am. I had indicated through the Registrar that I wished to see counsel in Chambers prior to the commencement of the case to deal with the issue raised by Mr O'Sullivan in his Memorandum. Mr O'Sullivan and his client were present at 9.30 am but Mr Drummond did not arrive until 10.00 am. In his submissions in relation to the present application, Mr O'Sullivan correctly records the outcome of the Chambers hearing:

> 13. In Chambers, His Honour dealt with the Memorandum. Counsel for the defendant advised that the Statement of Defence had been prepared early and made no reference to the cap on funding, or limitation to 30 June 2009. When His Honour pointed out that it in fact did, counsel said that that was not the intention and the defendant no longer stood by that.
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> 14. It was then pointed out that the defendant's witnesses' briefs also said the same thing and His Honour will recall a lengthy discussion regarding the nature of that evidence. That part of the in-Chambers meeting culminated with His Honour advising the defendant's counsel that if that evidence was

> proceeded with, then an adjournment would be granted and costs would be against the defendant.
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> 15. His Honour will recall further discussion regarding the proposed evidence from the Ministry of Health, contained in the bundle of documents, which quite fundamentally showed that funding was for a minimum of two years. Counsel for the defendant accepted this, and after the parties met (outside Chambers) it was agreed that a consent order for an award of a further three months' compensation, i.e. a doubling of the compensation, for economic loss, would be made.
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> 16. In Chambers, counsel then advised that the defendant would not be calling witnesses.

[10] As a result of the matters outlined in the previous paragraph, the hearing of the case did not get under way until after 12 noon. It should have been possible to dispose of the case in one day as anticipated but, because of the delayed start, the hearing had to be adjourned until 30 September 2009 and that inevitably involved the plaintiff in additional costs because her counsel was Wellington based while Mr Drummond practices as a barrister in Palmerston North.

[11] There is another matter which contributed unnecessarily to the length of the hearing. In her evidence, the plaintiff had referred to certain diary entries. There was extensive cross-examination by Mr Drummond in relation to those diary entries. In the end, as it was obvious that the case was going to run over into another day, I requested Mr O'Sullivan to make the plaintiff's diary available to Mr Drummond for perusal during the adjournment. The point was, however, that extracts from the diary had been included in the bundle of documents before the Authority and it would have saved much time in cross-examination if Mr Drummond had made a request for the original diary at some stage prior to the hearing.

[12] Further in relation to the diary entries, the issue of disclosure had been expressly raised and dealt with by Judge Couch at the telephone conference on 9 June 2010. Mr O'Sullivan referred to the following passage from Judge Couch's Minute:

> [6] Mr Drummond raised issue of disclosure of documents by the plaintiff. In discussion, it emerged that there was a comprehensive bundle of documents provided to all parties in the course of the Authority's investigation meeting and Mr O'Sullivan believed the documents sought by Mr Drummond were in that bundle. Mr Drummond said that he had

> received a large volume of material from his instructing solicitors and had not examined it thoroughly to see whether the documents he wished to see were there. I suggested to Mr Drummond that he should diligently search the documents he or the defendant has before requesting further copies from the plaintiff. If such a request was necessary, the plaintiff should respond but the cost of doing so would be taken into account when fixing costs.

Discussion

[13] I can only conclude from the issue over the plaintiff's diary that Mr Drummond failed to properly heed Judge Couch's suggestion. If the original diary had been requested and perused by defence counsel prior to the hearing, I have no doubt that considerable time could have been saved. I accept that it may be a moot point as to whether it would have been possible to finish the case in the one day but I have no doubt that the case could have been disposed of in one day had it not been for the time wasted in clarifying the defendant's stance in relation to the issue over the duration of the plaintiff's employment. In respect of the delays resulting from argument over that issue, the defendant must accept responsibility.

[14] There is another aspect of the issue over the duration of the plaintiff's employment which was confirmed in Mr O'Sullivan's submissions. With no cross-challenge, there appeared to be ample evidence before the Court to confirm the plaintiff's contention that the term of her employment would have run for at least another six months from the date of her dismissal and there was also ample evidence to support her further contention that she had taken all reasonable steps to mitigate her loss by searching for other employment. In the end, both these matters were conceded by the defendant and under the consent judgment the plaintiff succeeded in obtaining a 100 percent increase in her economic loss claim. If, instead of leaving the matter until the very last moment, the defendant had conceded its untenable argument earlier on, that may very well have led to settlement of the whole claim. Given the limited nature of the challenge and the fact that there was no cross-challenge, the defendant's concession should have been made much earlier than it was.

[15] Clause 19 of Schedule 3 of the Act confers on the Court a wide discretion in relation to costs which, as with all discretions, must be exercised judicially in accordance with certain principles. Those principles are now well established.

Although costs usually follow the event, that is not invariably the case. As the Court of Appeal noted in *Health Waikato Ltd v Elmsly,*[3] there are cases where the parties have mixed success and "in such instances it is not necessarily easy to determine who 'won' the case so as to be entitled presumptively to costs."[4] The Court in *Elsmly* also noted:

> [39] It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made.

[16] I regard the present case as being one in which both parties have had a measure of success. The plaintiff lost her challenge to obtain an increase in her compensation award for humiliation, loss of dignity and injury to feelings but she had a decisive win in her claim for an increase in her economic loss award. It is true that her win came about, not through success at trial, but rather through a settlement resulting from a concession made by the defendant at the hearing. There was a certain inevitability, however, about the concession which resulted in the settlement as the Court had made it clear to counsel that the alternative was going to be an adjournment coupled with a significant costs award being made against the defendant.

[17] As the Court noted in *NZ Air Line Pilots' Association IUOW v Registrar of Unions,*[5] not only is the amount of any cost award discretionary, but so too is the primary question of whether it is appropriate that costs ought to be awarded at all. The authorities also establish that, in the exercise of its discretion, the Court may take into account the conduct of the parties to the litigation and in particular whether the conduct of one party may have increased the costs of the other party unnecessarily. The Court's discretion in this regard is actually specified in regulation 68 of the Employment Court Regulations 2000. My analysis, and disapproval, of the defendant's conduct in this proceeding is recorded above. In all the circumstances, it seems to me that the justice of the case can best be met by the Court making no award of costs.

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[3] [2004] 1 ERNZ 172, (2004) 2 NZELR 58.
[4] At [35].
[5] [1989] 2 NZJLR 550, (1989) ERNZ Sel Cas 304.

[18] I confirm my preliminary view that costs in the proceedings, including now the costs associated with the present application, should lie where they fall.

A D Ford
Judge

Judgment signed at 12.30 pm on 8 February 2011