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Berger v Marshall AC 36/06 [2006] NZEmpC 62 (4 July 2006)

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Berger v Marshall AC 36/06 [2006] NZEmpC 62 (4 July 2006)

Last Updated: 31 March 2011

IN THE EMPLOYMENT COURT AUCKLAND

AC 36/06

ARC 22/05

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

BETWEEN EWEN BERGER First Plaintiff

AND KEITH MARSHALL Second Plaintiff

AND AIR NEW ZEALAND LTD Defendant

Hearing: By written memorandum filed on 18 April and 16 and 29 June 2006

Judgment: 4 July 2006

Supplementary Judgment of Chief Judge GL Colgan

[1] This is a decision on costs in unusual circumstances. The defendant seeks indemnity costs from the first plaintiff only, following a hearing of challenges that were abandoned mid-trial by both plaintiffs.

[2] Keith Marshall, the second plaintiff, has settled questions of costs between him and the defendant so it is only in respect of Ewen Berger, the first plaintiff, that Air New Zealand now says it should be fully reimbursed for its costs expended on his case in the following circumstances.

[3] Following the conclusion of the hearing in this Court on 27 September 2005, Mr Berger's solicitors have attempted unsuccessfully to obtain his instructions in this matter of costs and generally. I am satisfied that Mr Berger has declined or failed to instruct his solicitors. They have sought leave to withdraw as solicitors on the record. There is, however in my view, nothing to be gained by granting such leave.

The issuing of this judgment will likely be the final act in the proceeding, at least

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involving this Court. I note, also, that Air New Zealand had sought to make it a condition of any grant of leave to withdraw that Mr Berger's solicitors should disclose to the Court and to Air New Zealand his most recent physical address and contact details and that this should be deemed to be an alternative address for service. Even if it had been appropriate to grant leave to withdraw, I would not have done so on those conditions. A solicitor's knowledge of a client's or former client's address or other contact details are subject to privilege that has not been waived. An address for service is something that is generally elected by a party and not imposed by the Court. If, as I suspect, Air New Zealand's true motive is to enforce any costs judgment against Mr Berger, there is a myriad of legitimate means that it can employ to locate the whereabouts of any person.

[4] In these circumstances I have been unable to have the benefit of any submissions on behalf of Mr Berger but that is not for want of trying. Copies of this judgment should be sent by the Registrar to Mr Berger's address for service being his former solicitors. I have no doubt they will attempt to advise him of its contents and effect.

[5] Each of Messrs Berger and Marshall was dismissed from his cabin crew role following incidents on an international flight in which Air New Zealand said they had both been involved in the prohibited consumption of liquor by on-duty cabin crew members. The Employment Relations Authority found they had been dismissed justifiably. Both plaintiffs challenged that finding and a hearing de novo was set down for five days before me in late September 2005.

[6] On the second day of the hearing, however, Mr Berger's counsel, Paul Wicks, sought leave to withdraw from representing the first plaintiff. After discussions with counsel and Mr Berger (Mr Marshall having already discontinued his case), the proceeding was adjourned sine die and Mr Berger subsequently discontinued formally, leaving only the question of costs for decision.

[7] It is common ground that after Mr Marshall had given evidence to the Court, he disclosed to his counsel, Mr Wicks, who was also representing Mr Berger, that the company's evidence that was to be called and that would contradict the plaintiffs' was a correct account of what had happened in the incident and that the employer's conclusions following its inquiry that led to the dismissals were accurate.

[8] In these circumstances the defendant says that an award of indemnity costs against Mr Berger is warranted. Allowing that one-half of its costs are attributable to Mr Marshall's case, and therefore not recoverable against Mr Berger, Air New Zealand nevertheless says that its legal costs amounted to \$35,844 (excluding GST), so that one-half of this sum plus GST is the amount it claims against Mr Berger,

\$20,162.25.

[9] Air New Zealand is entitled to a reasonable contribution to legal fees reasonably incurred. Although, generally, the starting point for this will be two-thirds of actual and reasonable costs, the Court has a discretion to set the contribution at any point on the continuum between 0 and 100 percent.

[10] Air New Zealand incurred the legal costs of preparing for a five day hearing. This turned out to be a two day hearing in the circumstances set out above. It seems fair to conclude that Mr Berger ought not to have challenged the Authority's determination and, therefore, put his former employer to the expense of defending that challenge, as it was obliged to, by establishing justification for the dismissal.

[11] In all the circumstances of the case, however, I do not consider that an order for indemnity costs against Mr Berger would be warranted. Although I accept that Air New Zealand's legal costs were reasonable in the circumstances, I find that a reasonable contribution towards these would be 75 percent of them, the sum of \$15,121.68 that I direct be paid by the first plaintiff to the defendant.

GL Colgan
Chief Judge

Judgment signed at 11.45 am on Tuesday 4 July 2006

Solicitors:

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