



Employment Court of New Zealand

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Ogilvy New Zealand Limited v Whitten AC29A/09 [2009] NZEmpC 114 (2 December 2009)

Last Updated: 5 December 2009

IN THE EMPLOYMENT COURT

AUCKLANDAC 29A/09ARC 30/09

IN THE MATTER OF an application for leave to file challenge out of time

AND IN THE MATTER OF an application for costs

BETWEEN OGILVY NEW ZEALAND LIMITED

Plaintiff

AND MARGARET WHITTEN

Defendant

Hearing: By memoranda filed on 9 September and 1 October 2009

Judgment: 2 December 2009

COSTS JUDGMENT OF JUDGE B S TRAVIS

[1] In the substantive judgment I declined the applicant's application for leave to file its challenge out of time as the challenge was without merit. The matter was determined on the papers in terms of an agreed timetable. The applicant was intending to challenge an award of costs by the Authority, with GST excluded, of \$4,386.

[2] I reserved costs and a memorandum was filed on behalf of the respondent. Ms Hornsby-Geluk for the respondent addressed the Court's discretion in relation to the matter of costs and referred to the decision of *Binnie v Pacific Health Ltd*^[1]. There the Court of Appeal said the first step is to determine whether the applicant's costs have been reasonably incurred and, in light of the circumstances, to decide how much the losing party should contribute to these costs. The Court found that a good starting point was 66 percent or two thirds contribution which could then be adjusted upwards or downwards, depending on the facts. The Court of Appeal also referred to the Employment Court's discretion to award full indemnity costs in respect of which the losing party's conduct overall was relevant.

[3] Ms Hornsby-Geluk observed that the Authority's award, which was upheld, was challenged on the basis that an award of \$600 was appropriate. The challenge therefore, was not a claim as to whether costs should be awarded but was directed only towards quantum.

[4] Ms Hornsby-Geluk set out the expenses to which the respondent was put in opposing the application for leave to file the challenge out of time. This included: filing a notice of opposition; preparation of the respondent's affidavit; preparation of the memorandum of counsel requesting the matter be dealt with on the papers to minimise costs to the respondent; research and preparation of submissions in respect of the application for leave to appeal out of time and the substantive merits of the appeal.

[5] Ms Hornsby-Geluk revealed that the actual costs in dealing with the applicant's application for leave and the merits of the substantive appeal were \$5,759 exclusive of GST. Because of the respondent's precarious financial position the fee was reduced to \$2,881 plus GST of \$360.13.

[6] Ms Hornsby-Geluk submitted that this was the appropriate amount to award in the circumstances. She submitted that the applicant had not only pursued an appeal which it was well aware would cost the applicant and the respondent close to, or more than, the amount in dispute, but also failed to file that appeal within time, putting

the respondent to additional expense and delay. She submitted that the sum of \$2,881 plus GST of \$360.13 was more than reasonable in light of the applicant's conduct in pursuing proceedings which were not only unmeritorious but conducted in a manner which gave rise to additional costs on the part of the respondent through the late filing of the appeal. She submitted that the applicant's conduct was consistent with its previous conduct in seeking to prevent the respondent from pursuing her legal entitlements by a letter which amounted to a threat to take steps to prevent the respondent being able to call a material witness. She submitted that the costs award should reflect this as the applicant had signalled in that letter a clear intention to make use of the proceedings against the respondent to put her to costs and delays.

[7] She submitted in these circumstances an award of full indemnity costs was justified.

[8] The applicant's memorandum in reply was filed a day late. The memorandum contained an apology for this delay but no explanation. Mr Patterson submitted that the relevant factor in determining costs was the amount charged to the respondent, in this case to \$2,881 plus GST. He submitted that any discount offered by the respondent's counsel was irrelevant, save to the question as to whether the costs were reasonably incurred. Mr Patterson submitted that the costs payable by the applicant should be half the total amount charged to the respondent being \$1,445 plus GST, as a reasonable costs contribution towards costs reasonably incurred.

[9] Technically the applicant's memorandum in response was out of time and could be disregarded. In any event I consider that the *Binnie* case requires me to first consider whether the costs actually incurred by the respondent were reasonable. I find that the fee actually charged to the respondent was entirely reasonable. The normal starting point would then be two thirds of that fee which is approximately \$2,160, inclusive of GST. For the reasons I have given in my substantive judgment, the applicant's late challenge was entirely without merit and that conclusion in part turned on the "unfortunate" (to use the Employment Relations Authority's accurate description) letter the respondent was sent. I observed that these were matters which would justify indemnity costs, not as a penalty but to recognise the costs to which the respondent was unnecessarily put in defending her position. I find that the respondent was also unnecessarily put to expense in defending the application for leave to challenge the original costs order out of time. These circumstances justify an award of indemnity costs.

[10] I am fortified in that view because I consider the actual costs of \$5,759, exclusive of GST, would not have been unreasonable if these had been actually charged to the respondent and two thirds of that amount would be more than the total costs, inclusive of GST, that I have awarded against the applicant.

[11] The applicant is therefore ordered to pay the respondent's costs of \$3,241.13.

B S Travis
Judge

Judgment signed at 3.30pm on 2 December 2009

[\[1\] \[2003\] NZCA 69; \[2002\] 1 ERNZ 438 \(CA\)](#)

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