IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 171
ARC 91/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	JAN SUSAN BRACEWELL Plaintiff
AND	RICHMOND SERVICES LIMITED Defendant

Hearing: (on the papers by documents filed on 16 July and 29 July 2014)

Counsel: Dr J Cook, agent for the plaintiff
P Shaw, counsel for the defendant

Judgment: 17 September 2014

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The plaintiff brought a challenge to set aside the determination of the Employment Relations Authority (the Authority) which had concluded that the plaintiff and her representative should return the clinical records of a patient to the defendant.[1] By way of challenge she asserted that she had the lawful right to retain and disclose confidential documents as evidence of possible criminal negligence for the purposes of an independent investigation; she also sought compensation for "stress, anxiety, and to cover advocacy costs". In addition she challenged the costs determination which was also made by the Authority.[2]

[1] *Richmond Services Ltd v Bracewell* [2013] NZERA Auckland 481.
[2] *Richmond Services Ltd v Bracewell* [2013] NZERA Auckland 519.

[2] The defendant brought a cross-challenge. It sought an order that Ms Bracewell return all confidential information to it, and a permanent injunction restraining her from disclosing or using any confidential information. It also sought a penalty for breaches of a confidentiality clause in the relevant employment agreement.

[3] The challenge failed and the cross-challenge succeeded. The Court made a compliance order, orders of injunction, and directed Ms Bracewell to pay to the Court a penalty in the sum of $2,000. It also stated that costs should follow the event. A direction was made for any application and evidence to be filed, by Richmond Services Limited (Richmond); and for Ms Bracewell to file and serve any submissions and evidence in response.[3]

[4] A final preliminary matter is that Ms Bracewell has filed an application for leave to appeal the decision of the Court to the Court of Appeal. That application has yet to be heard. In this Court the usual practice when application for leave to appeal is made is to conclude all outstanding questions including costs.[4]

Submissions

[5] In support of Richmond's costs application, counsel referred to the standard principles relating to costs, as set out below. It was confirmed that orders are sought in respect of the application for stay,[5] the application for discovery of a document from a third party;[6] and in respect of the substantive hearing.[7] Indemnity costs are sought on the basis that proceedings were brought that had no reasonable prospect of success; and that a reasonable offer was made to resolve the matter. Copies of the relevant invoices were provided.

[6] Ms Bracewell filed submissions asserting in summary that the defendant and its counsel had acted in bad faith, and breached legal obligations. It was submitted

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[3] *Bracewell v Richmond Services Ltd* [2014] NZEmpC 111.
[4] *Swales v AFFCO New Zealand Ltd* Employment Court Auckland AC19/01, 23 March 2001 at [3]; *N v Attorney-General* Employment Court Wellington WC14/01, 9 April 2001 at [1].
[5] *Bracewell v Richmond Services Ltd* [2013] NZEmpC 245.
[6] *Bracewell v Richmond Services Ltd* [2014] NZEmpC 63.
[7] *Bracewell v Richmond Services Ltd* [2014] NZEmpC 111.

that Richmond deliberately withheld documents that should have been disclosed. It was also asserted that costs orders should not be made because the Court had reached incorrect conclusions. In addition Ms Bracewell submitted:

a) With regard to the application for stay, she was diverted from the possibility of this being conducted by a telephone conference call, so that the hearing was conducted by the Court in Auckland.

b) With regard to the application for discovery against a third party, she submitted that her application was appropriate because the document in respect of which discovery was being sought (a report and related documentation made by Dr K) was not ultimately the subject of an order, but was referred to at the hearing. She said it was plainly a relevant document. It was accordingly submitted that the conclusion of Chief Judge Colgan in the interlocutory judgment that Richmond should not be awarded costs for this application was appropriate.

c) With regard to the substantive hearing, the challenge had merit because the Court found that certain of Ms Bracewell's disclosures were justified under the Protected Disclosures Act 2000 and under her employment agreement. It was submitted that the defendant's offer to resolve the matter was not reasonable. Reference was also made to an offer to mediate the matter further in February 2014, it being submitted that no response to this option was received from Richmond's counsel.

d) Finally it was submitted that the costs represented by the invoices in respect of the substantive hearing were not reasonable.

Principles

[7] The Court has wide discretion in respect of costs under cl 19(1) of sch 3 of the Employment Relations Act 2000 (the Act). It provides:

> The court may order any party to pay any other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable.

[8] The main principles are outlined in three decisions of the Court of Appeal.[8]

[9] Generally, an order for costs will follow the event. It is usual for the Court to take two-thirds of actual and reasonable costs incurred by the successful party, and then consider whether that figure should be increased or decreased having regard to the particular circumstances.

[10] Indemnity costs are sought by Richmond. The Court of Appeal confirmed in *Binnie v Pacific Health Limited* that this Court may award full indemnity costs. The Court confirmed that the nature of the conduct which entitled the winning party to relief could be relevant to the level at which costs may be set.[9]

[11] The leading case on this topic is *Bradbury v Westpac Banking Corporation.*[10] There the Court of Appeal emphasised that access to justice is a fundamental right and is a significant, although not dominant, factor supporting the New Zealand position of limiting a losing party's liability for costs.[11] After considering the approach to costs adopted in other jurisdictions, the Court concluded that indemnity costs may be ordered where a party has behaved either badly or very unreasonably.[12]

[12] One of the circumstances in which indemnity costs have been ordered is in the situation where there are allegations which ought never to have been made, or the case is prolonged by groundless contentions, summarised in what was referred to as a "hopeless case" test. As was explained recently in a further decision of the Court of Appeal,[13] this test was derived from an Australian decision where it was considered appropriate to award indemnity costs "whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success".[14]

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[8] *Victoria University of Wellington v Elton-Lee* [2001] ERNZ 305 (CA) at [47]-[48], *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14]-[18], and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [39].
[9] At [21].
[10] *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400.
[11] At [10].
[12] At [27].
[13] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 348, at [17].
[14] *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 (FCA) at 401.

[13] The foregoing principles must be considered carefully in the present case.

Application for stay

[14] At the conclusion of his decision granting orders for stay, the Chief Judge stated:[15]

> The defendant is entitled to costs on this application. I do not propose to fix costs because I have not heard from the parties' representatives about the amounts of them. The defendant is entitled to costs because it has, from the outset, proposed and otherwise been prepared to accept reasonable and sensible interim solution that is the orders that I have made on conditions which the plaintiff could not realistically have opposed as she has. The costs to which the defendant is entitled, when fixed, will include the reasonable cost of travel of counsel to the hearing in Auckland.

[15] The Chief Judge was best placed to consider the merits of the costs issues that were before him. It is clear that the Court regarded Ms Bracewell's opposition to the order for stay as unrealistic.

[16] I am satisfied that the costs incurred by the defendant totalling $2,875 are reasonable in the circumstances, as are the disbursements of $506.

[17] Recognising the "access to justice" issue alluded to above, I consider that an increase above the starting point of two-thirds of reasonable costs is justified, but I do not consider that it is appropriate to award indemnity costs. The defendant is entitled to the sum of $2,300 costs, and disbursements of $506 in relation to the application for stay, a total of $2,806.

Application for disclosure

[18] At the conclusion of his interlocutory judgment dealing with the application for disclosure, the Chief Judge stated that he was not minded to allow the defendant costs in view of Richmond's then intention to refer to the circumstances that gave rise to the K medical report in its evidence at trial.[16]

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[15] *Bracewell v Richmond Services Ltd*, above n 5.
[16] *Bracewell v Richmond Services Ltd*, above n 6.

[19] The Court also indicated that it would be for the presiding Judge to determine whether the medical report in question could be used at trial.

[20] As it transpired, the medical report was not placed before the Court, though evidence about the circumstances of its preparation and its conclusion was given. Again I consider that the Chief Judge was best placed to assess the merits of the position as to costs in light of all the matters to be considered. The subsequent events do not require a reassessment of his view as to costs. I decline the defendant's application for costs in respect of this discovery issue.

Substantive hearing

[21] The amount sought by Richmond for costs relating to the substantive hearing is $12,625 in total. The five invoices which produce this total have been placed before the Court; it is apparent that two of them have been reduced. I consider the amount charged to be fair and reasonable.

[22] Ms Bracewell is correct that not all assertions advanced by Richmond succeeded. However, the cross-challenge succeeded to the point where the substantive orders being sought were made, including a penalty order. Ms Bracewell should have known that she had no chance of success having regard to the advice she received from many authorities including the Police. The Chief Judge also recommended that she obtain independent advice. This did not occur. The submissions made to the effect that the Court reached incorrect conclusions cannot form part of the costs assessment. Those issues must now be considered by the Court of Appeal.

[23] Counsel for Richmond has produced a without prejudice offer which was made to resolve the matter on a full and final basis. Ms Bracewell has submitted that it was inappropriate to place the offer before the Court, because it was written on a without prejudice basis. The privilege that was sought by counsel in respect of that offer was Richmond's to waive, and I infer that it has done so by now producing it. However the reply from Ms Bracewell's representative was also on a without prejudice basis; the privilege in respect of that reply was Ms Bracewell's to waive

and she has not done so; I therefore have not taken that response into account. It is appropriate, however, to consider the offer that was made and to note counsel's advice that it was not accepted. It was a reasonable offer which again confirms that this matter could have been resolved without the necessity of a hearing.

[24] Also to be considered are the many pejorative statements that have been made asserting bad faith on the part of Richmond and its counsel; and an assertion of perjury. These were inappropriate statements which should not have been made.

[25] I am satisfied that there should be an uplift above the two-thirds starting point; but I also take into account the point made by Ms Bracewell that not all of Richmond's assertions were upheld, and that she offered to attend mediation. I also take into account the important point referred to above that access to justice is a fundamental right.

[26] I conclude that 80 per cent of the quantum sought is appropriate. I order Ms Bracewell to pay Richmond costs in the sum of $10,100.

Conclusion

[27] Ms Bracewell is to pay Richmond costs:

a) In respect of the application for stay in the sum of $2,806.

b) In respect of the substantive hearing costs in the sum of $10,100.

B A Corkill
Judge

Judgment signed at 9.15 am on 17 September 2014