



Employment Court of New Zealand

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Graham v Crestline Pty Limited AC 53A/06 [2006] NZEmpC 115 (21 November 2006)

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Graham v Crestline Pty Limited AC 53A/06 [2006] NZEmpC 115 (21 November 2006)

Last Updated: 11 January 2012

IN THE EMPLOYMENT COURT AUCKLAND

AC 53A/06

ARC 100/05

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

AND IN THE MATTER OF an application for costs

BETWEEN DONALD MONTROSE GRAHAM Plaintiff

AND CRESTLINE PTY LIMITED Defendant

Hearing: By memoranda of submissions filed on 20 October and 8 November

2006

Judgment: 21 November 2006

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] Crestline Pty Limited as the successful party asks that it be awarded costs of

\$26,577.84 together with disbursements in the litigation of \$1,435.90. Donald Graham, the unsuccessful plaintiff, says that the Court should direct that costs be met by the parties themselves without contribution from the other or, at worst, that any award against him be limited to a sum between \$1,000 and \$3,000. Although invited to attempt to resolve these issues between themselves, the parties are not within the proverbial bull's roar of each other.

[2] The proceeding was a challenge by Mr Graham to the Employment Relations Authority's determination dismissing his claim to a personal grievance. After the challenge had been filed, Crestline applied to have it dismissed because the parties had settled their litigation. This application was dealt with as a preliminary point and, after hearing evidence and submissions occupying more than one-half but less

than one full sitting day, the defendant was successful and the case has concluded.

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[3] Crestline's claim to \$26,577.84 as a contribution towards its legal costs is said to represent 80 percent of those actual costs. Both parties accept and rely on the leading judgment of the Court of Appeal in this area in *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 which requires the Court to assess, first, whether the costs actually incurred were reasonably incurred and, second, the reasonable contribution to those reasonable costs. The Court of Appeal in the *Binnie* case suggested that a reimbursement starting point should be about two-thirds but that the potential range, depending upon relevant circumstances might be in practice from 0 to 100 percent.

[4] Crestline emphasises that whilst its legal costs are significant, so too were the litigation stakes. It says Mr Graham's claims exceeded \$480,000. The defendant says its solicitors had to file and serve an application for leave to file an amended statement of defence out of time; to file and serve an application and supporting affidavit to have Crestline's application to strike the challenge out heard as a preliminary issue; to arrange attendances in respect of timetabling including Mr Graham's request to amend the timetable; to consider and review the affidavit evidence filed on behalf of Mr Graham; to arrange for witnesses to be available for cross-examination; to oppose Mr Graham's application to require Crestline to pay Mr Ian Graham's costs; to apply to have Mr Graham disclose the contents of a document following his waiver of privilege; and to prepare for and attend at the hearing on 8 September 2006.

[5] Crestline says the work undertaken by its solicitors was reasonably necessary for the following reasons. First, the claim was for at least \$480,000 so that it was appropriate for "a senior solicitor"¹ to represent the company at the hearing. Second, Crestline says that its application that was ultimately successful obviated the need for more extensive preparation for a substantive hearing on the merits of Mr Graham's grievance. Crestline says it was appropriate and necessary for it to propose and formulate a timetable and to oppose Mr Graham's application that it

meet his son's costs of attending at the hearing.

¹ This is apparently a position or "rank" within the defendant's firm of solicitors and does not necessarily relate to the broad categories at the bar of junior, intermediate and senior barristers. I understand the "ranks" of professionally qualified lawyers within this firm to be, in ascending order: solicitor, senior solicitor, associate, partner.

[6] The fees for this work charged to Crestline were \$33,222.30, representing

95.8 hours of work "undertaken by solicitors at different levels representing a blended hourly rate of \$346.79".

[7] Although it is a truism that the legal work for a respondent to any application is frequently less complex and arduous than that which faces an applicant, the contrast with Mr Graham's costs in this regard is stark. He was represented by a solicitor whom I assess to be of greater seniority than was the defendant's. Mr Graham's legal costs were \$8,072.66 including GST (not applicable in Crestline's case) plus disbursements, of which the basic fee element was \$7,131.25. Counsel for Mr Graham says

that allowing for preparation time of 12.5 hours for a 5 hour hearing using a multiplier of 2.5:1 would result in a reasonable time commitment of 17.5 hours as opposed to the 95.8 hours claimed by the defendant's solicitors. Even allowing for the additional work inherent in representing an applicant, a total reasonable time for preparation and hearing of 20 hours is still almost a mere 21 percent of the time spent by the defendant's lawyers on these matters.

[8] Although the defendant asserts that Mr Graham's claim against it exceeded

\$480,000, there is an element of double accounting for a figure of almost \$210,000 within that calculation. So I consider that the greatest risk to which Crestline may have been put was a judgment for about \$270,000 plus unquantified accrued annual leave and unquantified sums for remuneration relating to the remainder of the term of the employment agreement but excluding costs.

[9] Although neither counsel referred to it, a useful measure to apply to the Court's judgment is what the scale of costs under the High Court Rules 1985 would provide.

[10] Assigning a category 2 rating under rule 48 (proceedings of average complexity requiring counsel of skill and experience considered average in the High Court) for which an appropriate daily recovery rate of \$1,600 is set by Schedule 2 to the Rules, I calculate that the category 2A rate would have resulted in an award of about \$4,000. Assuming that this is intended to represent two-thirds of a reasonable fee for that work, such reasonable fee would be approximately \$6,000, less than one-fifth of Crestline's actual legal costs amounting to \$33,222.30. That check by

reference to the scale costs in the High Court tends to confirm my own assessment of the proper contribution in this case.

[11] I discern no reason in this case to depart from the starting point of a two-thirds reimbursement of reasonable costs. The amount of such reasonable costs is the real question now.

[12] There is, in practice, little to differentiate the legal work undertaken for each of the parties. Whilst Crestline may be said to have incurred more in legal costs in making the application to dismiss the proceedings than did Mr Graham in defending it, the plaintiff would likely have required more legal input into the bringing of his challenge in the first place than did Crestline in preparing its defence to that challenge. Legal work in preparation for the interlocutory hearing and at Court was, in my assessment, roughly similar.

[13] Turning to disbursements, I conclude that most of those claimed ought to fall within the usual office overheads covered by a fee for legal services. So I do not propose to allow, for example, "*Standard office service charges*" of \$1,169, "*Court filing and service*" of \$33.77, "*Documents supply*" of \$55, "*Judgments*" of \$55, "*Binding*" of \$40, and "*Photocopying*" of \$10. I allow for the disbursements of taxi charges, courier charges and video duplication totalling \$73.13.

[14] Excluding GST and disbursements, Mr Graham's legal costs were a little more than \$7,000. I consider that to be a reasonable fee also for the defendant's legal representation in respect of which the plaintiff should be called upon to contribute. Two-thirds of that is \$4,666. Adding the sum of \$73.13 for disbursements, I determine that Mr Graham should contribute to Crestline's costs and disbursements in the total sum of \$4,739.13 and so order.

GLColgan
Chief Judge

Judgment signed at 11 am on Tuesday 21 November 2006

Solicitors: Swarbrick Beck, PO Box 7120, Wellesley St, Auckland

Russell McVeagh, DX CX 10085, Auckland

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