



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2007](#) >> [2007] NZEmpC 130

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Hansells (NZ) Ltd v Ma AC 53A/07 [2007] NZEmpC 130 (1 November 2007)

Last Updated: 19 November 2007

IN THE EMPLOYMENT COURT

AUCKLANDAC 53A/07ARC 21/07

IN THE MATTER OF a point of law challenge to a determination

AND

IN THE MATTER OF an application for costs

BETWEEN HANSELLS (NZ) LTD

Plaintiff

AND LILI MA

Defendant

Hearing: Submissions received from the plaintiff on 8 October 2007
and from the defendant on 16 October 2007

Judgment: 1 November 2007

COSTS JUDGMENT OF JUDGE B S TRAVIS

[1] In the substantive decision I resolved the dispute in favour of the plaintiff and set aside an award of the Employment Relations Authority. Costs were reserved. They have not been agreed and memoranda have been filed.

[2] Mr Towner for the plaintiff sought costs in the Employment Relations Authority as well as the Court. He observed that neither party had sought costs following the Authority's determination and therefore no costs determination was made. The plaintiff sought an order of \$3,000 in relation to the Authority proceedings.

[3] In opposition, Mr Oldfield for the defendant observed that the defendant was successful in two disputes before the Authority, and the plaintiff did not challenge the result of one of those disputes. He also noted that the defendant, in spite of that success, had not sought costs before the Authority, recognising that the matter was a genuine dispute over the interpretation, application or operation of a collective agreement. He also challenged the amount of costs sought for an investigation that took less than one day in the Authority.

[4] For costs in the Employment Court, Mr Towner advised that the plaintiff had incurred \$18,765.31 inclusive of GST in relation to the challenge and that the normal approach of two thirds of actual costs would be the

appropriate starting point, citing *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438. He then submitted that this was an appropriate case for the Court to exercise its discretion pursuant to reg 68 of the [Employment Court Regulations 2000](#) to increase the costs order. Regulation 68 provides:

(1) *In exercising the Court's discretion under the Act to make orders as to costs, the Court may have regard to any conduct of the parties tending to increase or contain costs, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.*

(2) *Under subclause (1), the Court—*

(a) *may have regard to an offer despite that offer being expressed to be without prejudice except as to costs; but*

(b) *may not have regard to anything that was done in the course of the provision of mediation services.*

[5] Mr Towner relied on a letter he wrote on 4 April 2007 marked “*Without Prejudice save as to costs*” in which the settlement proposal was for the plaintiff to pay to the defendant a sum based on the Authority’s conclusion on the aspect of the dispute that was not challenged.

[6] Mr Oldfield contended that this did not make the letter a Calderbank offer able to be taken into account under reg 68, as it amounted to an offer only to pay that which the plaintiff was not challenging.

[7] I observe there is support for this approach in *Graham v Airways Corporation of New Zealand* AC 1/06, 12.1.06. However, because I consider this matter can be determined on the basis contended for by Mr Oldfield, I do not need to authoritatively determine that aspect.

[8] Mr Oldfield submitted that, as in the Authority, costs in the Court should be allowed to lie where they fall because the matter is a dispute over the interpretation, application or operation of a collective agreement. He relied on *New Zealand Tramways Union (Wellington Branch) v Wellington City Transport, (t/a Stagecoach New Zealand)* [2002] NZEmpC 151; [2002] 2 ERNZ 435 at paragraph 73, where in ordering that costs lie where they fall in both the Authority and the Court, Chief Judge Goddard held:

In relation to the hearing before the Authority, it seems questionable whether the Authority should ever award costs when asked to assist parties by investigating the meaning of a collective instrument or by determining its proper application and operation. This case is no exception, although it could have been if the company had unreasonably refused to go to mediation.

[9] Whilst the Court there was referring to the Authority there was no order for costs made in relation to the successful challenge by the union in the Court.

[10] To similar effect, Mr Oldfield cited *Quality Service Enterprises Ltd v Huriwai* WC16A/05, 23.11.05, where the Court held:

[5] No doubt the rationale for costs being allowed to lie where they fall in disputes is that both parties need the services of the employment institutions to assist in resolving genuine disputes over agreements to which they are parties and, to this extent, can be contrasted with other more fractious employment relationship problems.

[6] In the present case I have no doubt that this was a genuine dispute between the parties over a difficult issue which was sufficiently unclear to result in two different interpretations, one in the Authority, and one in the Court.

[11] Mr Oldfield submitted that *Huriwai* was on all fours with the present case where the provisions of the collective agreement were poorly drafted, unclear and interpretation was difficult. The present agreement, as in *Huriwai*, had resulted in two different interpretations, one in the Authority and one in the Court.

[12] Mr Oldfield submitted that the plaintiff had not provided any convincing argument in support of a departure from the usual practice of ordering that costs lie where they fall in disputes over the interpretation of a collective agreement and submitted that the present case fits neatly into the authorities he cited, supporting the submission that costs should lie where they fall.

[13] I accept Mr Oldfield’s submissions. This was a case where the union was supporting its member in an interpretation argument which was clearly open to it on the wording of the collective agreement and where it succeeded before the Authority at first instance. It is also clear that the result in this case could affect some 40 other employees who were made redundant at the same time.

[14] Neither party sought costs in the Authority where the defendant had been fully successful. Any costs that could have been awarded in the Authority, had this not been a dispute, would have had to take into account the partial success of the defendant at first instance.

[15] This was in the nature of a test case and a dispute over the interpretation of a collective agreement, which was ambiguous, and costs should lie where they fall.

Costs judgment signed at 2pm on 1 November 2007

NZLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.nzlii.org/nz/cases/NZEmpC/2007/130.html>