Employment Court of New Zealand

RHB Chartered Accountants Limited v Rawcliffe [2012] NZEmpC 31 (24 February 2012)

Last Updated: 8 March 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 31

ARC 57/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN RHB CHARTERED ACCOUNTANTS LIMITED, KENNETH BROWN AND STEVEN WILKINS

Plaintiffs

AND DAVID JOHN RAWCLIFFE Defendant

Hearing: By memoranda of submissions filed on 11 November and 5 and 8

December 2011

Appearances: Defendant in person

Iain Hutcheson, counsel for Plaintiffs

Judgment: 24 February 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The plaintiffs have challenged a costs determination of the Employment Relations Authority1 declining to award costs. The challenge raises the vexed issue of the recoverability or otherwise of the costs associated with the preparation for, and attendance at, mediation.

[2] The defendant had pursued a grievance against the wrong respondents in the Authority. This was pointed out to the defendant at an early stage and the Authority was requested to determine the matter, effectively as a preliminary issue. The

Authority declined to adopt this course and instead directed the parties to mediation.

1 [2011] NZERA Auckland 316.

The defendant subsequently amended his claim and proceeded against a different party.

[3] The plaintiffs applied to the Authority for a contribution to the costs associated with preparing the statement of problem and with preparing for, and attending, mediation. The Authority dealt very briefly with the application, holding that:2

There are no grounds to award costs. This matter is no different from any other matter that either settles at mediation or is withdrawn after mediation. In *Eniata* ... Colgan J stated that he had reservations regarding whether the Authority could order costs for participation in mediation. In *Naturex* ... Judge Ford stated that he did not see how it could be realistically determined whether, in the course of a mediation, the conduct of either party had tended to increase or contain costs. He

declined to award mediation related costs. I decline to make an award of costs.

[4] The challenge has been brought on a de novo basis. The parties agreed that it could be dealt with on an exchange of submissions without the need for a hearing.

Background

[5] Mr Rawcliffe was originally employed by Eurotech Ltd in 2005. It sold its business to Eurotech Audio Ltd in 2008, and Mr Rawcliffe accepted employment with that company. Eurotech Audio Ltd was placed in receivership in 2009. Mr Brown and Mr Rodewald were appointed as receivers. Mr Wilkins acted as an agent for the receivers. Mr Rawcliffe filed a grievance in the Authority for the recovery of holiday pay, naming an unidentified entity "RHB", Mr Brown and Mr Wilkins as respondents (the current plaintiffs). A support officer from the Authority wrote to Mr Rawcliffe raising concerns about whether the correct respondent had been named, and noting the results of a Company Office search. Mr Rawcliffe replied stating that the named respondents were properly cited and had been named in “another staff member file.” The grievance proceeded.

[6] The plaintiffs filed a statement in reply saying that they were improperly named and detailing why they contended this was so. Documentation from the

2 At [6]-[9].

Companies Office was annexed to the statement in reply which supported the plaintiff’ position. The plaintiffs requested the Authority to issue a determination on that point but the Authority declined to do so. Rather the Authority directed the plaintiffs and the defendant to mediation. Mediation then occurred.

[7] Mr Rawcliffe subsequently filed an amended statement of problem, naming

Circle 54 NZ Ltd and Eurotech Audio Limited (in receivership) as respondents.3

[8] The plaintiffs then applied for costs. The costs incurred by them were said to amount to $5,583, and included the costs relating to the preparation of a statement in reply, costs incurred by an agent for the receivers, costs relating to time incurred responding to the claim, and the costs associated with preparing for (and attending) mediation. The application for costs was declined, for the reasons set out above.

Parties’ submissions

[9] The plaintiffs submit that, while it would be unusual, costs ought to be awarded in the particular circumstances of this case. It is said, in support of this submission, that the claim was fundamentally flawed from its inception given it was directed at the receivers and the receiver’s agent, notwithstanding clear advice to the defendant that this was in error. It is submitted that the plaintiffs were required to prepare and file a statement in reply and to prepare for, and attend, mediation directed by the Authority, despite the plaintiffs’ objection to such a course given the party issue they had identified.

[10] In addition, the plaintiffs submit that the defendant proceeded despite being aware of insurmountable deficiencies in his claim against them, and for the purpose of attempting to extract payment purely for “pragmatic” reasons.

[11] The defendant has filed a brief submission on costs. He says that he does not have the luxury of being able to afford to retain a lawyer to debate the costs issue. He says that the claim was withdrawn after mediation and that the Authority was

right to award no costs.

3 [2011] NZERA Auckland 316 at [2].

Approach to determination of challenge

[12] The role of the Court on a challenge to costs is to stand in the shoes of the Authority and to assess de novo the evidence relating to the costs award in that forum in order to judge what is an appropriate award in light of all considerations which are relevant to the Authority: *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.4 In approaching this task the Court takes into account factors relevant to an Authority costs determination, such as the daily tariff rate.

[13] The power under cl 19 of sch 3 of the Act to award costs “in any proceedings” refers to both proceedings in the Authority and the Court.5 If an Authority costs award is challenged, it is open to the Court to alter the Authority’s costs award.6

Discussion

[14] The Authority has a broad general discretion to order that one or more parties contribute to the costs of any other party. In relation to the Authority, cl 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) provides that:

15 Power to award costs

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

The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable."

[15] In *Da Cruz* the full Court of the Employment Court held that the principles guiding the Authority's approach to costs are different from the principles applied by the Court. In this regard it noted that: "The unique nature of the Authority and its proceedings mean that parties to investigation meetings should not have the same

expectations about procedure and costs as they have of the Court."[7]

4 [2005] NZEmpC 144; [2005] ERNZ 808 at [19].

5 See also reg 68 of the Employment Court Regulations 2000 discussed below.

6 *Da Cruz* at [13].

7 At [41].

[16] The Court set out a non-exhaustive list of "basic tenets" applying in relation to costs awards in the Authority, including that the Authority's discretion as to costs is to be exercised in accordance with principle and not arbitrarily; equity and good conscience is to be considered on a case by case basis; conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award; it is open to the Authority to consider whether all or any of the parties' costs were

unnecessary or unreasonable; and that costs generally follow the event.8 Each case

must be considered on its own merits.9

What happened here?

[17] The plaintiffs contend that the claim was withdrawn against them following mediation. Mr Rawcliffe says that, contrary to the plaintiffs' submission that the claim was withdrawn, it was in fact amended. While it is apparent from the Authority's determination that after mediation an amended statement of problem was filed (changing the name of the respondents), the practical effect of such an amendment was to discontinue the claim against the plaintiffs after costs had been incurred by them in responding to the claim – both through the preparation and filing of a statement in reply and preparing for and attending a mediation that they were directed to attend.

[18] The Authority did not distinguish between the categories of cost incurred by the plaintiffs. It simply declined to award costs at all. The Authority observed that the case before it was "no different" to "other matters" which had settled or been withdrawn after mediation. This suggests that there may be a practice of not allowing costs associated with steps taken after proceedings are filed (such as filing a statement in reply) in circumstances where the grievance is subsequently settled or withdrawn.

[19] There are a number of policy considerations that arise in relation to mediation costs, which have been traversed in decisions of this Court and which are referred to

below. For the reasons that follow, I do not consider that the policy concerns relating

8 At [44].

9 At [46].

to allowing mediation costs have any real application in respect of attendances such as the preparation of a statement in reply prior to mediation taking place, and I can discern no reason in principle why such costs ought to be automatically excluded from consideration where a grievance is subsequently withdrawn (absent agreement between the parties).

[20] Because the present challenge relates to different categories of cost incurred by the plaintiffs, it is convenient to deal with them separately.

Mediation costs

[21] Counsel for the plaintiffs accepts that costs in relation to mediation are generally not awarded but submits that they may be awarded in an unusual case, referring to *Open Systems Ltd v Pontifex*10 as authority for this proposition. *Open Systems Ltd* involved an award of costs in respect of the applicant's refusal to go to mediation, despite a direction by the Authority that it do so.

[22] The issue of whether a costs award may be made for the costs of attending mediation has been the subject of ongoing

judicial consideration. The issue relates both to whether an award of costs may be made for mediation occurring before a challenge has been filed, and after. Judge Ford has recently described the concept

of a claim of costs relating to mediation as being "something of an anomaly".11

[23] In *Waugh v Commissioner of Police*,12 Chief Judge Goddard reconsidered his earlier conclusion in *Trotter v Telecom Corporation of New Zealand Ltd*13 that it would not be appropriate for the Court to allow costs with regard to mediation because the parties owed it to each other to put resources toward a genuine

endeavour to settle their dispute. His Honour noted that *Trotter* was decided under the Employment Contracts Act 1991 when mediation was voluntary. His Honour

observed that the position is quite different under the current Act where mediation is,

10 [1995] NZEmpC 278; [1995] 2 ERNZ 211.

11 *Naturex* at [16].

12 [2004] NZEmpC 55; [2004] 1 ERNZ 450.

13 [1993] NZEmpC 173; [1993] 2 ERNZ 935 at 937.

because of statutory requirements, a necessary part of almost every proceeding.14

The Chief Judge concluded that because of this, the Court would consider whether a contribution to mediation costs would be appropriate. His Honour also observed that reg 68 of the Employment Court Regulations 2000 (which precludes the Court from taking into account anything "done in the course of the provision of mediation

services") did not prevent an award of costs for mediation.15 The Chief Judge

referred to *National Mutual Life Association of Australasia Ltd (t/a AXA) v Burke* where Judge Shaw similarly found that reg 68 does not prevent an award of costs for mediation.16 However, his Honour noted that this was a "contentious area"17 and, in the event, costs were reserved.

[24] A more recent favourable view of the Court's ability to award costs for mediation was expressed in *Jinkinson v Oceana Gold (NZ) Ltd*.18 In that case, the parties had been directed to mediation under s 188(2) of the Act. Judge Couch echoed the point previously made by Chief Judge Goddard in *Waugh* that mediation is now "virtually obligatory".19 Judge Couch considered that it was reasonable to regard one attendance at mediation as a genuine attempt (following *Trotter*) but that "further mediation directed by a Judge pursuant to a statutory requirement should be regarded as costs necessarily incurred in the proceedings before the Court and subject to the same considerations for recovery as other costs."20 His Honour proceeded to take into account costs relating to further mediation when calculating costs. Notably, however, it appears that no costs were awarded for attendance at the first mediation.

[25] The power to award mediation costs was considered, albeit briefly, in *Eniata v AMCOR Packaging (New Zealand) Ltd*21 (one of the two judgments relied on by

14 *Waugh* at [162].

15 At [163]. Regulation 68 also requires the Court to consider conduct of the parties which tended to increase or decrease costs, including *Calderbank* offers.

16 [2003] NZEmpC 178; [2003] 2 ERNZ 103 at [21]- [22]. It appears that mediation costs were accepted as part of the total costs figure. In *Burke* mediation occurred before Authority proceedings were filed.

17 At [164].

18 [2011] NZEmpC 2.

19 At [16].

20 At [16].

21 AC 19A/02, 24 May 2002.

the Authority in declining costs in this case). There Judge Colgan doubted the ability to award mediation costs, stating that:22

Nor do I think the Court is empowered to award costs in respect of mediation. Unlike the Employment Contracts Act 1991, the mediation process is not a part of, nor even dependent upon, proceedings having been issued. Rather, mediation is usually

attempted prior to any proceedings being lodged with the Authority although in some cases the Authority will direct mediation where it is not satisfied this alternate dispute resolution mechanism has been employed but should be. I have reservations as to whether even the Employment Relations Authority can order costs of participation in mediation but leave the question open for determination in another case if it arises.

[26] I pause to note that the concern identified in *Eniata* in relation to mediation occurring independently of a proceeding having been filed does not arise in the present case. Here mediation had been ordered by the Authority after proceedings were commenced, namely after the statement of problem and statement in reply had been filed (and after the party issue had been raised).

[27] In the recent case of *Naturex* Judge Ford considered the issue of the recoverability of mediation costs but ultimately found it unnecessary to reach a concluded view.23 However, the judgment is instructive as it sets out a number of competing arguments both for, and against, allowing costs relating to mediation. In particular Judge Ford noted the argument that if parties are to be required to mediate then costs should be able to be recovered by the successful party. If costs for

mediation are awarded, then this might encourage parties to reach a resolution at that stage and may encourage counsel and parties to take mediation seriously.24

[28] His Honour observed that there were, however, real difficulties with the proposition that mediation should be taken into account when determining costs. He noted the difficulties with reg 68 which, while not excluding an award of costs for mediation, hardly facilitated it.25 And Judge Ford recognised26 that the Court of

Appeal has observed that mediation is confidential because it allows the parties to

22 At [2].

23 *Naturex* at [22].

24 At [23].

25 At [25].

26 At [27].

"bare their souls."27 If costs were a factor to be considered during mediation, then parties may not feel so free to lay out their positions. In essence, everything should be done to encourage mediation and parties should be encouraged to participate without regard to adverse costs consequences.28

[29] Most recently, Judge Travis disallowed a claim for mediation costs relying on

Naturex. His Honour concluded that:29

Naturex and the cases cited there, provide a foundation for the practice the Authority has apparently adopted of not awarding costs for mediation and I see no reason for not approving the continuation of that practice, including its application in the present case. I therefore disregard the costs of mediation.

[30] While there has been a discernible reluctance to award mediation costs, such costs have been allowed in cases where the parties have been directed to mediation but have refused to attend. *Real Cool Ltd v Gunfield*30 is one such example. In *Real Cool Ltd*, the Chief Judge considered it appropriate for the Authority to have included mediation costs when one party failed to appear at mediation twice ordered by the Authority. This was also the approach earlier adopted in *Open Systems Ltd v Pontifex*, which was approved by the Court of Appeal in *Gallagher Group Ltd v Walley*.31 In *Naturex* Judge Ford accepted that a failure to attend mediation that had

been directed constituted a different situation requiring an award of costs.32 In such

a case an award of costs can be seen as promoting mediation and encouraging the parties to take mediation seriously.

[31] There are undoubtedly strong policy considerations to be weighed in assessing the extent to which mediation costs might be recoverable. Consistent with the Act's emphasis on good faith behaviour and the efficient resolution of employment relationship problems, mediation is to be encouraged. Both the

Authority and the Court have a duty to consider whether mediation should be

27 *Just Hotel Ltd v Jesudhass* [2007] NZCA 582; [2007] ERNZ 817, [2008] 2 NZLR 210 (CA) at [35].

28 See *Lee v Minor Developments Ltd trading as Before Six Childcare Centre* AC 21/09, 24 April

2009 at [17] where Judge Shaw considered that Judicial Settlement Conference costs should not generally form part of the

actual and reasonable costs incurred.

29 *Callaghan v Taege Manufacturing Ltd* [2011] NZEmpC 81 at [24].

30 AC 37A/09, 10 December 2009.

31 [1999] NZCA 333; [1999] 1 ERNZ 490 at 500.

32 At [29].

directed in cases which come before these bodies.33 Practical difficulties are likely to arise in terms of assessing the reasonableness of mediation costs and such difficulties are compounded by the confidentiality of mediation, which limits the Court's inquiry into whether the conduct of the parties increased or limited costs (as required by reg 68). Further, mediation is designed so that both parties can reach an acceptable compromise and is not about winning or losing.34

[32] However, the difficulties associated with mediation costs have not been universally accepted. In *Newcastle City Council v Wieland*,35 the New South Wales Court of Appeal considered the recoverability of mediation costs in circumstances where mediation had been ordered by the Court pursuant to s 26 of the Civil Procedure Act 2005 (under which the Court may refer any proceedings before it to mediation, where it considers the circumstances appropriate, and may do so with or without the agreement of the parties). Mediations occurring pursuant to s 26 are

subject to a number of constraints, including confidentiality, reciprocal duties of good faith, and privilege. Justice Ipp, with whom the other members of the Court agreed, said that:36

As a matter of policy ... there are compelling policy reasons why costs of mediation should be included in the costs of the proceedings.

[33] *Charlick Trading Pty Ltd v Australian National Railways Commission*37 was cited by Ipp J in support. There Mansfield J referred to the:38

... substantial public interest, as well of private interest, in the resolution of disputes by negotiation or mediation...Apart from the benefit to the parties of such resolution, such an outcome saves the costs associated with the trial and releases the judicial and court resources to deal with other matters. Negotiation and mediation often also partly resolves a dispute so as to enable the focus of the parties in litigation to be more confined, again with consequential savings of time and expense to the parties and the benefit of the public.

And observed that:39

33 The relevant Authority provision is s 158; the relevant Court provision is s 188.

34 See *Naturex* at [16].

35 [2009] NSWCA 113.

36 At [40].

37 [2001] FCA 629.

38 At [92].

39 At [93].

I do not consider that the line drawn by Holroyd J in *Mackay v Hamilton* [1905] ArgusLawRp 66; [1905] VLR 457 between costs: "incurred by a party for the simple purpose of making a settlement...[and] costs incurred in fighting or prosecuting the action until from one cause or another it has to stop" is one which should continue to be rigidly given effect to. Indeed, His Honour recognised that costs incurred in seeking to procure a settlement may overlap with costs which would have been necessary for the prosecution of the action, and made allowance for that. But, in my view, in the light of the more modern approach to litigation discussed above, that sharply drawn line no longer exists.

[34] While there are differing views about the competing public interest considerations, and practical issues, that a rise in respect of mediation costs I do not consider that a blanket rule can or should be adopted. That is because costs are inherently discretionary and should be neither automatically awarded nor withheld. Much will turn on the facts of the individual case. As Lord Lloyd of Berwick has held:40

As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule.

[35] And while the Authority is a unique body, operating in a practical and efficient way, it must exercise its discretionary powers (including as to costs) in a principled, not arbitrary, manner.

[36] In the present case the parties were directed to mediation, despite the objections of the plaintiffs and despite an obvious preliminary issue arising as to whether the plaintiffs were properly named. Those objections were set out in full in the statement in reply. Despite these objections, the nature of the preliminary issue that had arisen, and the documentation filed in relation to it, the Authority directed mediation. Two points can be made in relation to these events. First, the plaintiffs were effectively compelled to attend mediation. It was not voluntary. Second, given the exercise of the Authority's statutory powers of direction to mediation, and the

fact that mediation occurred after the grievance had been filed, it is difficult to

40 *Bolton Metropolitan District Council v Secretary of State for the Environment* [1996] 1 All ER 184 at 186.

conceive of the mediation as being anything other than a necessary step in the proceedings. 41

[37] The Authority is statutorily required to consider whether mediation is appropriate in every case before it and must direct mediation unless certain tests are met. The plaintiffs were not the employer and were not properly party to the grievance. The issue was one that could have been dealt with by way of preliminary determination and may have given rise to an application of the Authority's power under s 159(1)(b)(i) (which allows the Authority not to order mediation if it considers that mediation "will not contribute constructively to resolving the matter"). As the plaintiffs were not the employers, it is difficult to see how mediation could resolve the defendant's grievance against them, except to the limited extent of clarifying what had already been made clear, namely that they were incorrectly cited in the grievance. The plaintiffs were essentially obliged to throw away costs in refuting a claim which was not maintained against them, and which was hopeless from its inception.

[38] Counsel for the plaintiffs submits that Mr Rawcliffe essentially pursued his grievance against the plaintiffs to extract a pragmatic settlement from them despite knowing that they were not the correct plaintiffs. This submission appears to be supported by documentation filed in these proceedings, namely a response to the Authority prepared by Mr Rawcliffe dated 2 May 2011. There he says (in relation to

the plaintiffs' claim for costs) that:

41 The distinction between mediation costs occurring pre and post commencement has been the subject of judicial consideration in the United Kingdom, see (for example) *Roundstone Nurseries Limited v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC); *McGlinn v Waltham Contractors Ltd* [2005] EWHC 1419 (TCC), [2005] 3 All ER 1126. Generally, pre-commencement mediation costs are not allowed; post commencement mediation costs are allowed. In New Zealand, and by way of analogy, the High Court has expressed a reluctance to award costs in relation to attendances at judicial settlement conferences: *Simpson v BBs New Zealand Ltd* HC Auckland CIV-2005-404-6877, 23

August 2007 at [8] (citing the commentary to *McGechan on Procedure* in support). This analysis appears to be based on a question of whether such costs can be said to have been necessarily incurred in the proceedings, given that costs relating to judicial settlement conferences are omitted from the

costs schedule to the High Court Rules. This may, it is said, reflect a deliberate policy to encourage

parties to attend and participate in settlement conferences without being concerned about adverse consequences in costs should settlement not be reached. However, the point has been subject to limited consideration (*Simpson* at [7] to [9], citing *Greentank Ltd v IAG New Zealand Ltd* HC Dunedin CIV-2005-412-522, 2 December 2005, at [8]).

The extensive costs caused have been solely at the discretion of the receivers as what is claimed is far more than the costs I am claiming. I accept no recourse of any of the costs involved from the respondents.

Unfortunately the system we have is not perfect, but at the sole discretion of the respondents costs were incurred with little or no regard to the most pragmatic solution. This is in itself testament to the nature of the situation. This situation is a legal debate causing more costs to those involved, perhaps more goodwill on behalf of the respondents would have saved them considerable expense.

[39] Costs may be used to control and supervise litigation. Even having regard to the unique nature of the employment institutions, it is in the broader interests of justice that those commencing legal proceedings act responsibly and that strategic litigation involving the wrong parties be discouraged. A costs award in such circumstances would likely discourage hopeless (but deliberate) attempts to litigate against the wrong person for the purpose of extracting a monetary settlement. As the

Court of Appeal recognised in *Victoria University of Wellington v Alton-Lee*42,

"litigation is expensive, time-consuming and distracting and the requirement that a losing party not only pays his or her own costs but also makes a subsequent contribution to those of the successful party undoubtedly acts as a disincentive to

unmeritorious claims or defences."

[40] I am not in a position, based on the material before me, to form any concluded view as to the precise nature of Mr Rawcliffe's motivations in proceeding against the plaintiffs. However, what is clear is that he was put on early notice of the difficulties associated with the party issue and proceeded, despite these difficulties being brought to his attention.

[41] I do not consider that the general policy concerns applying to mediation costs apply with any significant force to the facts of this case. Like an award of costs for non-attendance at mediation there is no need to inquire into what occurred at mediation. Confidentiality would not be undermined. Nor would a modest costs award be likely to discourage genuine mediation. Rather, a costs award in the circumstances of the present case is likely to have the broader beneficial effects

referred to above.

42 [2001] NZCA 313; [2001] ERNZ 305 at [48].

Costs associated with preparing statement in reply

[42] It appears that the Authority applied a general rule that costs ought not to be awarded in circumstances where a claim has settled or been withdrawn following mediation. Two judgments were cited in support of this proposition, although both were focussed on mediation costs, rather than costs more broadly.

[43] Consideration of the claimed costs relating to the preparation of the statement in reply filed before attendance at mediation does not raise similar policy concerns to those identified by the Courts in respect of mediation costs, and nor is there any basis for suggesting that imposing such costs would compromise or discourage mediation in any way. I can discern no principled reason for automatically excluding these costs. In my view each case must be considered on its merits and having regard to the circumstances.

[44] The general principle is that a plaintiff who discontinues a proceeding against a defendant is liable for costs of and incidental to and including the discontinuance.43

Preparation of a statement in reply is a necessary step in proceedings, following the filing of a statement of problem in the Authority. The plaintiffs were obliged to incur the costs associated with taking that step in order to respond formally to the plaintiff's pleadings, and to address the party issue.

[45] In the circumstances of this case I see no reason why a contribution to costs relating to the preparation of a statement in reply ought not to be ordered. Mr Rawcliffe proceeded against the wrong party. An award of costs in such circumstances is consistent with the general approach that, where technical or futile points are advanced by an unsuccessful party, it can be expected that a larger

contribution to the successful party's costs will be required44 and is also consistent

with the "basic tenets" relating to costs awards in the Authority articulated by the full

Court in *Da Cruz*.

43 Reflected in High Court Rule 15.23.

44 *Okeby v Computer Associates (NZ) Ltd* [1994] NZEmpC 82; [1994] 1 ERNZ 613 at 619.

[46] I note for completeness that Mr Rawcliffe makes the point that no issue of costs arose in respect of other claims against the same plaintiffs which were subsequently withdrawn. That may be so but it is not an answer to whether or not costs should be awarded in this case.

Executive time

[47] Counsel for the plaintiffs submitted that executive or management time spent by the receiver's agent dealing with this litigation may be considered an expense when determining costs. The Court has recognised that the costs associated with executive time may appropriately be the subject of costs awards in certain

circumstances.45 While I am sympathetic to the fact that the receiver's agent was

required to spend time (in this case, 7 hours) dealing with litigation in which he should not have been named, I am not persuaded that this time was anything more than the time any defendant would be required to spend defending a claim, however unmeritorious.46 The fact that the receiver's agent should not have been a party to the proceedings can be adequately reflected in any costs award relating to legal fees incurred. For these reasons, I put the claimed costs under this head to one side.

Reasonableness of costs incurred

[48] The claimed legal costs relating to counsel's attendances amounted to $5,451. [49] No issue has been taken with the reasonableness or otherwise of these costs.

Having regard to the material before me, including the steps taken by the plaintiffs in these proceedings and the nature of the documentation filed, I am satisfied that the costs set out in the documentation before the Court are reasonable.

[50] The defendant's claim against the plaintiffs was doomed from the outset. He proceeded despite warnings. The plaintiffs were put to considerable, and unnecessary, expense. Counsel recognises that costs claims relating to mediation are

unusual, and have generally failed. In the circumstances, and having regard to the

45 *Canterbury District Health Board v National Union of Public Employees* CC 1A/02, 12 March

2002; *A C Nielsen (NZ) Ltd v Pappafloratos* WC 17B/03, 5 September 2003.

46 *Pappafloratos* at [13].

broader circumstances of the case, I consider that a relatively modest award of $1000 is appropriate.

Result

[51] In this case the plaintiffs were dragged into a dispute to which they were not properly party. Clear advice was provided to the defendant that this was so, supported by relevant documentation. When the plaintiffs informed the Authority member of the issue they were ordered to mediation, thereby incurring further expense.

[52] I am satisfied that the Court's discretion ought to be exercised in favour of a modest award of costs in the particular circumstances, to reflect a contribution to the reasonable costs associated with the preparation of a statement in reply and preparation for and attendance at mediation. I am not prepared, based on the material before me, to incorporate a contribution towards the agent's costs.

[53] Having regard to the circumstances, the defendant is ordered to pay the plaintiffs the sum of $1,000.

[54] As counsel for the plaintiffs acknowledged, this challenge raised unusual issues. It may be that in these circumstances no issue of costs arises. If, however, costs are sought (and cannot otherwise be agreed) they may be the subject of exchanged memoranda – the plaintiffs to file and serve submissions no later than 60 days after the date of this judgment, with the defendant filing any submissions in

reply no later than 30 days following.

Judgment signed at 4.15pm on 24 February 2012

Christina Inglis
Judge