Employment Court of New Zealand

Snowden v Radio New Zealand Limited [2013] NZEmpC 60 (12 April 2013)

Last Updated: 23 April 2013

IN THE EMPLOYMENT COURT WELLINGTON

[2013] NZEmpC 60

WRC 17/04

WRC 19/05

WRC 8/09

IN THE MATTER OF application for orders and for costs on adjournments

AND IN THE MATTER OF proceedings removed from the

Employment Relations Authority

BETWEEN LYNNE FRANCES SNOWDON Plaintiff

AND RADIO NEW ZEALAND LIMITED Defendant

Hearing: By submissions filed by the plaintiff on 4, 12, 26 August,

4 November, 23 December 2011 and 9 October and 16 November

2012 and by the defendant on 29 July, 9 and 24 August, 9 December

2011, 19 January, 4 October and 2 November 2012

Counsel: Colin Carruthers QC and Richard Fletcher, counsel for plaintiff

Michael Quigg, counsel for defendant

Judgment: 12 April 2013

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

[1] The plaintiff and the defendant have both sought costs arising from the adjournment of a four week fixture set down to commence on Monday 1 August

2011 (the August fixture) for the hearing of the three proceedings brought by the plaintiff against the defendant.

[2] The proceedings in WRC 17/04 are described as disadvantage grievances;

those in WRC 19/05 are described as the unjustified dismissal grievance; and those in WRC 8/09 are described as the fraud proceedings.

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[3] On 25 July 2011 after an interlocutory hearing, in which Mr Fletcher acted for the plaintiff, her application to adjourn all three proceedings was partly successful; the disadvantage grievances and the unjustified dismissal grievance proceedings were adjourned sine die.1 The fraud proceedings were directed to commence on 8 August 2011, a week later than originally set down. On 29 July

2011[2] I set out in some detail my reasons for that decision and I canvassed the

matters that had led up to the adjournment application.

[4] The August fixture had been set down in a management conference on

5 November 2010 after full consultation with the parties and with the agreement of the plaintiff's then counsel, Mr Laurenson. There was a telephone hearing management meeting with Mr Fletcher as counsel for the plaintiff on Thursday

14 July 2011 dealing with the final matters for the hearing. By this stage the plaintiff's solicitors had been replaced by her on or about 16 May 2011 and Mr Fletcher was now the solicitor acting for the plaintiff and Mr Carruthers QC had been instructed to appear as counsel. Because of other commitments Mr Carruthers was unable to attend the July hearing management conference (the July conference).

[5] At no stage during that July conference were the plaintiff's health difficulties mentioned. Mr Fletcher later stated to the Court, during the opposed adjournment hearing on 25 July 2011, that he was not aware of those health difficulties at the time, and I accepted his assurance. The evidence has subsequently indicated that Mr Hickling, the plaintiff's husband, a barrister and solicitor who had appeared as

counsel for her in a related Court of Appeal hearing3 and has also filed many

affidavits on her behalf in this Court in support of her various applications, had received a medical certificate from the plaintiff's general practitioner on or about

6 July 2011. Mr Hickling was therefore in a position to properly instruct Mr Fletcher

on the plaintiff's medical condition before the final July conference.

[6] Further, Mr Kedzlie, who is being held out as the plaintiff's independent

forensic accounting expert, in a lengthy affidavit sworn on 18 July 2011 in support of

1 [2011] NZEmpC 94.

2 [2011] NZEmpC 96.

3 *Snowdon v Radio New Zealand Ltd* [2009] NZCA 557.

the plaintiff's adjournment application, set out in considerable detail his difficulties with the documentary evidence and why he considered an adjournment should be granted. None of these concerns were mentioned by Mr Fletcher in the 14 July conference and therefore they are not dealt with in my six page minute following that conference dealing with trial management issues.

[7] As my reasons of 29 July 2011 record,4 the 18 July 2011 application to adjourn the proceedings was principally made on the basis that the plaintiff had fallen seriously ill with medically diagnosed depression and post traumatic stress disorder but also on the following grounds in reliance on Mr Kedzlie's 18 July 2011 affidavit:

[2]... that the hearing set down for 1 August 2011 should not proceed as it was not possible for the information technology experts to prepare a joint expert's report; that Mr Kedzlie would not be able to participate in the concurrent giving of evidence at trial because he had not been permitted to inspect and analyse the defendant's "SunSystem SQL" database; there had been non-disclosure of relevant documents; an adjournment would allow sufficient time for the Court to appoint two independent experts under the High Court Rules to assist the Court to determine the complex financial and information technology issues in dispute and that a referral by the forensic expert has been made to the Director of the Serious Fraud Office (SFO) at Auckland and a probable result of that referral may be that the proceedings in WRC 17/04, WRC 19/05 and WRC 8/09 will not proceed. Finally, Mr Fletcher submitted that as of late last week it had become apparent that senior counsel instructed, Mr Colin Carruthers QC, would not be available for the trial and that, despite significant efforts to seek and instruct alternative counsel, the plaintiff has not been successful to date in obtaining new counsel.

[8] The plaintiff had initially sought to have her proceedings adjourned for six months. The medical evidence that was presented on her behalf seemed to indicate that whenever the plaintiff was required to give evidence this triggered her illnesses. There have been two previously opposed adjournment applications when the plaintiff was represented by Dr Moodie.

[9] I was not prepared to adjourn the proceedings for six months to another lengthy fixture, which might again trigger the plaintiff's illnesses. Because there was evidence that the plaintiff was medically unfit to give evidence at the hearing, I

adjourned the two sets of grievance proceedings sine die. I adjourned the fraud proceedings for only one week as I considered those could proceed without her presence.

[10] The adjournment was, however, granted on conditions which included security for costs and the precondition of the payment of all outstanding costs by the plaintiff that had been awarded to the defendant during the course of these proceedings. I stated:5

[67] In relation to the defendant's lost costs on this adjournment application, which may be in the nature of indemnity costs, the defendant is to file and serve its application for costs by 4 pm on Friday 5 August 2011. The plaintiff is to have until 4pm on Friday 2 September 2011 to respond. The payment of these costs to the defendant, when determined by the Court, would be another condition before the plaintiff's grievance proceedings can be set down for hearing.

[11] Mr Fletcher then filed a memorandum seeking that my orders be varied or rescinded, submitting that I should have adjourned all the proceedings on the basis that the plaintiff was not able to give evidence.

[12] One of the principal grounds for seeking the adjournment of the fraud proceedings was that they should not go ahead while a criminal investigation was underway, Mr Kedzlie having made a complaint to both the SFO and more lately to the Police.

[13] By an oral interlocutory judgment of 2 August 2011,6 on the basis of additional medical evidence and over the strenuous objection of the defendant because of the consequences for the defendant's witnesses and their health, I concluded that the fraud proceedings were also not ready for trial and, with the greatest of reluctance, I granted the adjournment of those proceedings, sine die. I also stated:

[9] In addition, I wish it to be made clear to the Court and the defendant what instructions were received in relation to the plaintiff's proposed trial counsel's availability for the 1 August hearing and whether or not trial counsel indicated at the outset his unavailability for those proceedings.

These are matters which Mr Fletcher has undertaken to address by memorandum which will be filed tomorrow (3 August 2011).

[10] I also observe that there will be costs consequent on the ground of the second adjournment and that it was likely that these would involve indemnity costs because of the losses that the defendant was likely to have suffered as a result of the continued preparation for the trial and the consequences of it being aborted.

[14] In accordance with my direction in granting the first adjournment, Mr Quigg counsel for the defendant, filed a memorandum in relation to costs on 29 July 2011. This addressed the issue of the plaintiff's legal representation, Mr Quigg noting that Mr Fletcher had advised in his memorandum dated 2 June 2011 that Mr Carruthers had accepted instructions to act as senior counsel. Mr Carruthers's name appeared as counsel in the intitulement of all documents subsequently filed on the plaintiff's behalf. Mr Carruthers's acceptance of instructions as well as the plaintiff 's wish for the 1 August hearing to proceed, were referred to in Mr Hickling's letter to the Court dated 16 May 2011.

[15] Mr Quigg observed that it now appeared that Mr Carruthers's availability to undertake the hearing commencing on 1 August 2011 was always doubtful and that the accurate position was as directly communicated by Mr Carruthers to the Registrar on the morning of 25 July 2011. Mr Quigg referred to the plaintiff 's repeated changes of representation noting that previous solicitors and counsel for the plaintiff had included Cullen, the Employment Lawyers; Davis O'Sullivan; John Upton QC; Rainey Collins; Moodie & Co; Michael Okkrese; Izard Weston; Richard Laurenson; Fletcher Legal; and Mr Carruthers QC. He noted that it had also previously been said that Mr Rodney Harrison QC was to represent the plaintiff and that Australian and English Queens Counsel were also being approached. Instructions were withdrawn by the plaintiff from Izard Weston and Mr Laurenson on 12 May 2011, according to Mr Hickling's letter to the Court. Mr Quigg observed that the plaintiff's reliance on issues of representation to support the adjournment application was bound to fail as it flew in the face of very firm indications from the Court that no adjournment would be granted on the basis of unavailability of counsel. This had followed from the two previous adjournments which had involved plaintiff's counsel's unavailability.

[16] After addressing other interlocutory matters, Mr Quigg's memorandum

provided the actual costs that had been incurred by the defendant, which included

59.2 hours in respect of the adjournment application to that point for which total costs of $18,617.00 plus GST were sought on an indemnity basis (the adjournment costs). The defendant also sought costs on a reasonable contribution basis for those costs said to have been wasted in preparing for the personal grievance hearings, and set out in detail the steps that had been taken on behalf of the defendant since 5

November 2010 to the date of the application for the adjournment made by the plaintiff on 18 July 2011. Total costs of $64,026.86 plus GST were estimated in respect of the preparation for the hearing of the personal grievance applications (the preparation costs). As at the time of the filing date of the application for costs, the fraud proceedings were still set down for hearing on 8 August 2011. The defendant reserved its position in relation to the preparation of the costs for the fraud proceedings.

[17] On 4 August 2011, Mr Fletcher filed a memorandum setting out the plaintiff's understanding of counsel's availability on her behalf. Mr Fletcher advised that he received initial instructions on or about 16 May 2011 and had been advised that Mr Carruthers had been briefed as counsel. He stated that Mr Carruthers was difficult to contact directly as he was involved in a major financial company prosecution in Auckland. In accordance with the instructions he had received he attempted to keep Mr Carruthers abreast of developments in the case. Mr Fletcher stated he understood, "wrongly as it transpired", that Mr Carruthers would be appearing in the strike out application set down for 14 June 2011. That application had been brought by the defendant. Mr Fletcher stated that he had appeared to oppose the strike out application partly because the proceedings in which Mr Carruthers was engaged had continued for longer than expected. By letters dated 15 June to Mr Carruthers and to Mr Hickling he had formally raised concerns about the availability of Mr Carruthers and had expressed his own concerns about having to run the substantive trial for three to four weeks on his own. Having received no reply to either letter he wrote again on 23 June to Messrs Carruthers and Hickling regarding Mr Carruthers's availability. He claimed that he still believed that Mr Carruthers might be available for the substantive fixture though he was not absolutely certain of the situation. He continued to keep Mr Carruthers informed of developments.

[18] Mr Fletcher stated that Mr Carruthers met with Messrs Hickling and Kedzlie on 4 July and following that meeting, on 5 July, he emailed Mr Carruthers to ask his advice on further steps that should be taken. He was then involved in another matter until 12 July. At the 14 July teleconference dealing with trial management issues, he remained unclear about Mr Carruthers's availability.

[19] Mr Fletcher stated that following enquiries immediately afterwards it was clear that Mr Carruthers would not be available for the 1 August hearing and efforts to find alternative representation proved fruitless.

[20] Mr Fletcher then filed an affidavit of Mr Hickling, sworn on 9 August 2011, which sets out in considerable detail the various persons who have represented the plaintiff throughout these proceedings. Mr Hickling denied the defendant's claim that changes in the plaintiff's representation were the sole cause of the unnecessary delays and the costs in bringing the three proceedings on for trial. Mr Hickling addressed the steps that were taken in May 2011 by Mr Laurenson and Izard Weston, and why their instructions were withdrawn. He asked that the part of his affidavit relating to the events of May 2011 be placed under permanent Court suppression. Suffice to say that it is not necessary for present purposes to indicate why the instructions were withdrawn, but Mr Hickling confirms that Mr Fletcher accepted instructions on or about 16 May 2011.

[21] Mr Hickling deposed that in February 2011 he had approached Mr Carruthers and asked him to assist with legal aspects of the accounting issues, especially the work Mr Kedzlie was performing. Mr Hickling deposed that on or about 13 May he had conferred with Mr Carruthers who had been maintaining a "watching brief" on the proceedings, in particular, in relation to Mr Kedzlie's evidence. Mr Hickling deposed that when Mr Carruthers indicated he would accept instructions he requested a second barrister be approached and briefed to assist him as he was involved in another trial. Mr Hickling deposes that he had difficulties in finding another counsel to assist.

[22] Mr Hickling does not state when Mr Carruthers accepted instructions to appear at the trial. Nor does his affidavit address the issue of whether Mr Carruthers,

when accepting instructions to act for the plaintiff in the three proceedings, indicated that he may have difficulties appearing for the plaintiff at the 1 August 2011 fixture.

[23] These were the matters I required in my 2 August 2011 judgment, for the plaintiff to address. They were not adequately addressed by Mr Fletcher or Mr Hickling.

[24] Mr Hickling then deposed that Mr Carruthers met with Mr Kedzlie and him on 4 July 2011 to discuss a referral to the SFO and Mr Carruthers told him that a case in the Court of Appeal had been set down and that he could not appear for the plaintiff and lead the case for her on 1 August 2011. He states that he advised Mr Fletcher, who said he wanted to speak personally with Mr Carruthers and discuss the matter with him, which Mr Hickling understood that Mr Fletcher did.

[25] As I have noted, Mr Fletcher, in his 4 August 2011 memorandum stated that on 5 July he emailed Mr Carruthers to ask his advice on further steps that should be taken. However, if Mr Fletcher was told on 4 or 5 July that Mr Carruthers was not available on 1 August, then that does not explain why Mr Fletcher did not bring that to the attention of the Court at the final trial management meeting on 14 July when the Court and the defendant's counsel were told by Mr Fletcher that everything was on track for the plaintiff to start her case on 1 August, with Mr Carruthers as her counsel.

[26] This is also to be contrasted with the advice Mr Carruthers gave to a Court registry officer on 25 July 2011, when he stated that his involvement in the matter had been overseeing Mr Kedzlie's evidence and that he had consistently told Mr

Hickling that he was not available for the hearing starting 1 August, but if the matter adjourned to a time that suited him, he could represent the plaintiff I accept, without reservation, that Mr Carruthers' advice correctly records the situation.

[27] On 9 August 2011 Mr Quigg filed a further memorandum observing that as the three combined proceedings had now been adjourned the defendant proposed to file a single costs memorandum addressing costs in relation to all three proceedings. Mr Quigg asked the Court to disregard his earlier costs memorandum filed on 29

July and suggested a new timetable. For reasons I will give later I have not disregarded the 29 July memorandum. Attached to the 9 August memorandum was a letter Quigg Partners sent to Mr Fletcher seeking details of the communications between Mr Fletcher and Mr Carruthers as to the latter's unavailability for the fixture and indicating that they were seeking access to Ms Snowdon's medical records.

[28] Mr Fletcher responded to that memorandum on 12 August 2011 by advising that he had no instructions from his client and could not obtain instructions but would, as an officer of the Court, and to preserve his client's position, respond to a limited extent. As the plaintiff was not able to address costs in a comprehensive manner Mr Fletcher asked the Court to deal with those matters at some future date. He sought an order that the plaintiff not be required to file and serve a memorandum in relation to the costs at that stage.

[29] On 24 August 2011 Mr Quigg applied for orders regarding the information relied on in the plaintiff's adjournment applications. He sought orders requiring the plaintiff to obtain and disclose to the Court copies of all medical notes relevant to the adjournment application dating back to 2003, with copies of the letters written by Mr Fletcher to Mr Hickling and Mr Carruthers regarding the availability of plaintiff's counsel at trial dated 15 and 23 June and various other information. In support it was submitted that there was a substantial history in these proceedings of the plaintiff filing evidence as to her medical state for reasons which appear to have a tactical effect. It was noted, based on Mr Hickling's affidavit evidence, that he was told on 4 July by Mr Carruthers that Mr Carruthers would not be available as counsel at the trial and Ms Snowdon's first attendance on her medical advisor was on 6 July

2011.

[30] Mr Fletcher responded by a memorandum filed on 26 August 2011 which addressed the issues of mutual disclosure of documents and the medical evidence and sought the Court's directions as to what steps may be appropriate.

[31] On 29 August 2011 Izard Weston sought a copy of the Mr Hickling's affidavit which addressed the actions of Mr Laurenson and that firm. Mr Fletcher objected to that affidavit being provided and relied on Mr Hickling's affidavit of 9 August 2011

where he had asked for part of it to be placed under permanent suppression and noted there had been no Court ruling on this aspect.

[32] I issued a minute on 20 October 2011 addressing these matters and referred to the existing timetable for the filing of certain memorandum. I noted that if a suppression order was sought, an application needed to be filed. I issued timetable orders to assist Mr Fletcher in his responses. No formal application for suppression orders has been filed.

[33] Mr Fletcher responded on 4 November 2011 by stating that it was highly inappropriate for the plaintiff's solicitor to proceed on any interlocutory issues in the absence of instructions from the plaintiff and that an application to bring proceedings on again would not be able to be made until sometime after February 2012.

[34] I noted, in a minute dated 18 November 2011, that throughout the recent course of these proceedings the plaintiff had been assisted by her husband, Mr Hickling, a legal practitioner, and as the current orders sought by the defendant were of a legal nature, I directed there be a further interlocutory hearing to deal with them. That hearing took place on 25 November 2011. After hearing from Mr Quigg and Mr Fletcher, I made a variety of orders which are recorded in my reasons for so doing, issued on 5 December 2011. That included a timetable with an exchange of costs memoranda in respect of the adjourned proceedings. The defendant was required to file a costs memorandum by 9 December 2011, the plaintiff by 23

December 2011 and the defendant to respond by 9 January 2012, later extended to 19

January 2012.

[35] On 2 December 2011 Mr Fletcher filed an affidavit of Mr Hickling, sworn on

2 December "2012". From the exhibit notes and the date of filing I presume this was meant to read "2011". Mr Hickling deposed that the plaintiff was going to make an appointment with an independent medical practitioner, who is a psychiatrist, and the medical report would be provided to the Court. Mr Hickling sought to have the plaintiff's medical privacy protected by the Court. He opposed disclosure of the SFO report to the Court and the defendant and set out grounds for his opposition.

[36] Mr Quigg's memorandum of 9 December 2011 claimed that the defendant had incurred considerable costs in preparing

for the substantive hearing of the three sets of proceedings and in relation to the two adjournment applications. He submitted that the costs were reasonably incurred for the work performed. He submitted that the conduct of the plaintiff and the history of the proceedings justified an award of indemnity costs in favour of the defendant. The memorandum set out in detail the steps taken by the defendant representatives from 5 November 2010 until

2 August 2011 in preparation for the substantive hearing. Whilst accepting that the defendant's costs for preparation were considerable, it was submitted they were reasonable in light of:

(a) The large number of steps taken;

(b) the large number of allegations made in the three sets of pleadings;

(c) the seriousness of some of those allegations against the defendant and its current and former employees;

(d) the poor state of the plaintiff's pleadings and the protracted and difficult

process by which those pleadings were amended;

(e) the plaintiff's awareness that considerable costs were being incurred by the defendant;

(f) the unusually large volume of evidence filed on behalf of the plaintiff and the discursive nature of that evidence;

(g) the need for the defendant to file a considerable volume of evidence in reply;

(h) the plaintiff's failure to file evidence in accordance with the timetables agreed on 5 November 2010, or the extended timetable set by the Court on 8 April 2011;

(i) the considerable difficulties in obtaining the plaintiff's will say

statements and the satisfactory nature of those statements;

(j) the difficulty briefing the defendant's evidence and collating relevant

documents for the length of time that had elapsed;

(k) the anticipated duration of the hearing of four weeks; (l) the plaintiff's change of representation;

(m) the plaintiff's continuing failure to provide relevant documents which were referred to in Mr Kedzlie's evidence;

(n) the circumstances which led the defendant to apply for security for costs; (o) the plaintiff's failure to provide a signed consent order in respect of that

security;

(p) the large amount of executive time required which has not been claimed for but has saved the defendant from further legal costs; and

(q) the two separate applications for adjournments of proceedings and the various and changing bases on which those applications relied, and the unsatisfactory information provided in support.

[37] Mr Quigg submitted that with the adjournment of the proceedings, the costs incurred by the defendant will need to be largely repeated, if and when the proceedings are ever heard. He relied on the statement of the High Court in *Hamilton v Papakura District Council*7 in the context of a late adjournment:

...the gearing up of counsel and witnesses and litigants' employees to deal with the case, putting the time aside and the unscrambling of all that to be geared up again at a later stage, is not a minor undertaking...

[38] In reliance on *Binnie v Pacific Health Ltd*8 Mr Quigg observed that an 80 per cent contribution towards costs of $203,222.45 was held to be reasonable by the Court of Appeal in the context of an important and complex proceeding.

[39] In support for the claim for indemnity costs, Mr Quigg submitted that the Court in exercising its discretion to make an order as to costs, may have regard to the conduct of a party tending to increase those costs, citing reg 68(1) of the Employment Court Regulations 2000 (the Regulations). He relied on the following passage from the *Binnie* decision in the Court of Appeal:9

The level of contribution is of course the second step of the two step approach earlier identified. We shall deal with the first step after noting a submission made by Mr Taylor on the full indemnity point. He relied on the decision of Chief Judge Goddard in *Counties Manukau Health Ltd v Pack* (Auckland Registry, AEC 69/00, 25 October 2002). There the Chief Judge suggested that full indemnity costs should ordinarily be reserved for a case in which the losing party's case was wholly

lacking in merit and its stance had been pursued in a way that could be described as reprehensible. With respect, we consider this to be rather too narrow an approach to whether the discretion to award full indemnity costs should be exercised. We recognise that the Chief Judge introduced his proposition with the word "ordinarily" but even on that basis his two criteria are too limiting. Certainly, if these two criteria can be shown to exist, a strong case for full indemnity costs would be present but they should not be regarded as mandatory considerations requiring some special reason to depart from them. For example, the losing party's conduct will be relevant overall, not just in the way the case was pursued. The nature of the conduct which entitles the winning party to relief can be relevant to the level at which costs should be awarded. That said, we

7 [1997] 11 PRNZ 43 (HC) at 45.

8 [2003] NZCA 69; [2002] 1 ERNZ 438 (CA).

9 At [21].

are not, for the reasons given above, persuaded that the Judge's 80%

assessment should be increased or replaced by a full indemnity approach.

[40] Mr Quigg then cited a number of decisions of the Employment Court where full indemnity costs were awarded.10 Mr Quigg referred to the steps the defendant had taken to ensure that these matters proceeded to trial, the history of the two previous adjournments, the Employment Court's previous comments as to complexities and delays which were unconscionable and largely unnecessary and the extraordinary amount of time and effort and resources that had to be poured into these proceedings by the defendant without any resolution of the substantive claims. He referred to the affidavits of current and former employees and advisors of the defendant as to the significant impact on them of the plaintiff's allegations.

[41] As to the grounds on which the adjournments were sought, Mr Quigg submitted that they were relevant in determining whether the nature of the plaintiff's overall conduct justified the awarding of indemnity costs and addressed them under the following headings:

Health

[42] Mr Quigg observed that the defendant had raised concerns in June 2011 about the potential for the plaintiff's health to give rise to an adjournment application. The plaintiff in her affidavit in response sworn on 10 June 2011 deposed that she had been in Auckland attending to her ill mother and in paragraph 9 stated:

It is quite incorrect for Mr Cavanagh to assert as he does in paragraph 18, conduct on my part will result in the hearing not proceeding on 1 August

2011. I have given very firm instructions that all matters required by the Court for the hearing to proceed on 1 August 2011, be attended to. As to my health, I am perfectly fit and well. I want to appear in Court in August, give

my evidence and have my case heard.

[43] Mr Quigg observed that the plaintiff had visited her doctor, Dr Sawrey, on 6

July 2011, but her illness was not mentioned at the one and a half hour hearing

10 *Postles v Airways Corporation of New Zealand Ltd (No 2)* [2002] NZEmpC 81; [2002] 2 ERNZ 817; *Tian v Hollywood*

Bakery (Holdings) Ltd [2010] NZEmpC 24; *Reid v NZ Fire Service Commission (No 2)* [1998] 3

ERNZ 1237.

management teleconference on 14 July 2011 and the defendant was not told of the illness until the application for adjournment which was filed on 19 July 2011. He submitted that the plaintiff's health appeared to have deteriorated in such a way as to meet the defendant's opposition to the adjournment of the proceedings. He submitted that there was no evidence that active steps were taken by the plaintiff prior to 6 July 2011 to lessen the risk of medical issues leading to the proceedings being adjourned again. Mr Quigg referred to earlier memoranda which he had filed (24 August 2011 and 18 November 2011) in which he submitted there must have been a tactical element to the reliance placed on the plaintiff's state of health and submitted that, even absent a tactical motivation, the adjournment of the proceedings on the basis of the plaintiff's health was a matter for which the plaintiff and not the defendant must bear responsibility.

Representation

[44] Mr Quigg submitted that it appeared that Mr Carruthers had communicated with Mr Hickling in May or June 2011 and advised that he would not be available for the hearing of these proceedings on 1 August 2011. That does appear to correspond with Mr Carruthers's message to the Court that he had throughout advised Mr Hickling of his unavailability on 1 August and

Mr Hickling's affidavit that he had approached Mr Carruthers in February and May of 2011. Mr Quigg submitted that despite the defendant and the Court repeatedly seeking confirmation that Mr Carruthers was available for that hearing, his unavailability was not conveyed to the defendant or the Court until it was relied upon as a basis for seeking the adjournment of the proceedings. Mr Quigg submitted that the plaintiff having withdrawn instructions from her previous solicitors and counsel, her difficulties as to representation were entirely of her own making and her reliance on those difficulties flew in the face of numerous very firm indications from the Court that no adjournment would be granted on the basis of unavailability of counsel.

Break in

[45] The plaintiff also relied on a break-in or burglary at Mr Hickling's office in

support of her application to adjourn the fraud proceedings on 8 August. Her

application suggested that it was reasonable to speculate that some witnesses in the proceedings and other people involved might be the subject of criminal investigations as a result of the burglary. Mr Quigg submitted that none of the defendant's potential witnesses or employees or former employees have been the subject of any such investigation, the defendant bore no responsibility for the burglary and should not therefore be required to bear the cost of an adjournment which was granted in part, in reliance upon it.

SFO

[46] Mr Quigg also dealt with the issues of the SFO referral by Mr Hickling and disclosure issues which the Court did not accept as grounds for the adjournment.

Steps taken and costs incurred

[47] Under this heading Mr Quigg referred to the hours spent by Quigg Partners on the matters covered by the memorandum which totalled 603.3 hours and, at the charge out rates of the various legal staff involved, totalled $174,407.39 excluding GST. In addition the following disbursements were said to have been incurred for the period 5 November 2010 until 2 August 2011 in relation to the proceedings:

PriceWaterhouseCoopers (costs and disbursements) $79,306.50

Delwyn Walsh $1,901.15

Wayne Findlay (costs and disbursements) $4,220.00

Morrison Kent (in respect of the consent order) $1,139.65

All sums exclude GST

[48] The defendant therefore sought a total costs award of $261,025.04, exclusive of GST.

[49] Mr Fletcher filed a memorandum for the plaintiff regarding costs on 23

December 2011, commenting on the orders the defendant had sought and seeking orders in relation to the plaintiff's costs arising out of the plaintiff 's successful adjournment applications. The plaintiff's costs sought were not set out in the memorandum. He submitted that the most basic principle of costs awards is that

costs follow the event and the plaintiff, having won her adjournment applications, was entitled to the costs that flowed from these wins. In making any costs award to the defendant, the Court, he contended, would be acting against this most basic principle, especially if it proposed to award indemnity costs against the victor.

[50] Mr Fletcher also referred to the plaintiff's successful application to obtain leave from the Court of Appeal to appeal a decision of Judge Shaw awarding indemnity costs (the 2009 decision).11 He submitted that until the Court of Appeal's final decision is issued, the Court of Appeal having indicated that it will not issue until the fraud proceedings have finally been dealt with, this Court should make no award for costs until the Court of Appeal has expressed its view on the nature of costs awards in the Employment Court.

[51] Mr Fletcher relied on the High Court Rules HR 14.6(4) which set out the Court's discretion to award indemnity costs and also relied on *Bradbury v Westpac Banking Corporation,*12 which observed that indemnity costs form an exception to the normal New Zealand costs regime and that the loser must pay the winner's costs according to scale. He submitted this reflects the principle in HR 14.2 and, in reliance on the 2009 decision, further submitted that those must apply and limit the

amount of costs as those provided in the High Court scale.

[52] Mr Fletcher submitted that the impact of the 2009 Court of Appeal decision on Employment Court costs awards generally, but particularly in these proceedings, may mean that all previous costs awards of the Employment Court come into question. He submitted that of particular importance in this context is that *Binnie*, must now be read with reference to the new High Court rules and in the light of the *Bradbury* case. He also contended that *Binnie* was about awarding indemnity costs

to a winner, not a loser.

11 [2009] NZCA 557. (This is the case in which Mr Hickling appeared as second counsel for the plaintiff.)

12 [2009] NZCA 234; [2009] 3 NZLR 400 (CA).

[53] These submissions overlook the three leading decisions of the Court of Appeal *Binnie*, *Victoria University of Wellington v Alton-Lee*,13 and *Health Waikato v Elmsly*,14 dealing with the costs regime in the Employment Court which have been applied in many costs cases. It does not appear that those three decisions were pointed out to the Court of Appeal in relation to Ms Snowdon's successful application for leave for they are not referred to in the Court of Appeal's 2009

decision. Acceptance of Mr Fletcher's submissions would also mean the Employment Court could make no order for costs in any case until the plaintiff's fraud proceedings have finally been dealt with.

[54] This Court has a wide power to award costs contained in cl 19 of Schedule 3 of the Employment Relations Act 2000. I am not persuaded that the Court's power to award costs as it thinks reasonable is to be limited by considerations applicable to the High Court and the scale in the High Court Rules, although helpful regard may

be had to these rules in appropriate cases.15 In its 2009 decision the Court of Appeal

recognised the Employment Court's special character and stated that a lack of a statutory equivalent to the High Court Rules might mean that traditional means of fixing costs should be maintained.16 I accept that the Court of Appeal has not made a final ruling on the matter but I consider myself to be guided in the meantime by the three leading decisions of the Court of Appeal to proceed in the way in which this Court has done in reliance upon those decisions.

[55] Mr Fletcher submitted that the adjournment applications were not an abuse of process, vexatious, frivolous or improper and that therefore the cases dealing with indemnity awards should have no relevance. Mr Fletcher referred to the *Hamilton v Papakura District Council* case and endeavoured to distinguish it on the grounds that the award there dealt with additional consequential costs, not all the costs of preparing for trial. What was allowed in that case was an award of $6,000 to two defendants. He submitted that if the defendant claimed consequential losses, and

this claim had not been specifically made, this would be to a minimal figure and

13 [2001] ERNZ 303 (CA).

14 [2004] NZCA 35; [2004] 1 ERNZ 172 (CA).

15 See reg 6(2)(a)(ii) of the Employment Court Regulations 2000.

16 At [22].

would need to have been properly itemised rather than a claim of a global figure for interlocutories and trial preparation that, in his submission, was not supported by invoices or other relevant documentation. In relation to the failure to provide all the relevant information including invoices, Mr Fletcher relied on *Tse v Cieffe (NZ) Ltd*17 and *Progressive Meats Ltd v Meat & Related Trades Workers Union of Aotearoa Inc*18 and *Eastern Bay Independent Industrial Workers Union Inc v Pedersen Industries Ltd.*19

[56] Although, as I have noted, Mr Fletcher's memorandum did not quantify the costs the plaintiff was seeking, in support of his extensive submissions, Mr Fletcher filed an affidavit of Mr Hickling sworn on 23 December 2011. Mr Hickling deposed that he had been asked by Mr Fletcher to provide the costs incurred by the plaintiff in preparation for the hearing of the substantive proceedings. He deposed that the legal costs incurred since 2010 in preparation for trial totalled $321,910.11. Expert witness's costs for the period from the commencement of January 2010 to December

2011 in relation to Mr Kedzlie, at his flat daily rate of $2,400 were said to have, totalled $682,000. This brought the total costs incurred from January 2010 to December 2011 to $1,004,310.10. Mr Hickling deposed that the total forensic accounting costs incurred from when Mr Kedzlie was engaged in July 2009 were approximately $1.2 million. Total costs incurred to date were deposed to be

$2,709,910, not including Mr Carruthers's fees. Various invoices were attached to

Mr Hickling's affidavit but none from Mr Kedzlie.

[57] Mr Quigg's memorandum in reply was filed on 19 January 2012. He submitted that the plaintiff's application for orders

for costs arising out of her adjournment applications was misconceived in a number of ways. Although she was successful in her applications, he submitted it should not be for the defendant to meet the costs resulting from those adjournments. He submitted that an award of costs will invariably be made against a party which successfully seeks an adjournment where that party is at fault, and may be awarded even if that party is not at fault. He

relied again on the *Hamilton v Papakura District Council* case and, by way of

17 WC 4A/09, 16 June 2009.

18 WC 1A/08, 9 May 2008.

19 AC 11A/09, 27 April 2009.

further example, *Chu v Han*,20 where the High Court awarded costs against the party which succeeded in a late adjournment application. He observed that costs were also awarded against a party which obtained an adjournment on the basis of the ill health of former counsel in *Scott v Scott Transport Ltd.*21 He also relied on the commentary in McGechan on Procedure, in relation to HR 10.2.04 to similar effect. The commentary also observes that everything practicable must be done to avoid an adjournment.

[58] Mr Quigg submitted that sufficient detail had been provided in his memorandum of 9 December 2011 and confirmed, for the avoidance of doubt, that all the costs covered in that memorandum had been invoiced to the defendant, apart from the defendant's costs in preparing that memorandum, which had been invoiced subsequently. Copies of the invoices were attached to the 19 January 2012 memorandum. He observed that the total amount of those invoices exceeded the costs being sought by the defendant as they included other incidental attendances in relation of which costs were not claimed. He observed that the defendant's costs memorandum of 9 December 2011 related to costs solely for the preparation of the hearing of the three matters for the period from 5 November 2010 until 2 August

2011 and the attendances regarding the adjournment applications and attendances regarding the preparation of the costs memorandum.

[59] Mr Quigg accepted that a distinction must be drawn between costs which have been "thrown away" or "wasted" and costs which would have been incurred in any event. Making the distinction was a "rough and ready" exercise, as was stated in the High Court decision in *Scott*.22 He accepted that although some High Court decisions considering "costs thrown away" have often resulted in relatively modest awards, for example the $10,000 costs awarded in *Chu*, he submitted that this has reflected the relatively straight forward nature of the particular cases. *Chu*, for example, involved a hearing which had been set down for only three days and a new

fixture was able to be allocated in the immediate future.

20 HC Auckland CIV 2003-404-000476, 26 August 2003.

21 HC Hamilton CIV 2005-419-395, 25 November 2008.

22 At [8].

[60] Mr Quigg submitted that the defendant's costs thrown away as a result of the adjournments in the present proceedings were considerably higher, reflecting the extraordinary amount of time and resources that have gone into these matters. He submitted that the costs sought were reasonable given the number of steps required and the volume of material involved as a result of the plaintiff 's conduct of the proceedings. He observed that the extent of the plaintiff's costs she was seeking, as set out in Mr Hickling's 23 December 2011 affidavit, of $1,004,310.10, in the context of total costs of $2,709,910 she has incurred in a three year period, supported by comparison the reasonableness of the costs being sought by the defendant.

[61] Mr Quigg noted that costs the defendant incurred for the work carried out before 5 November 2010 were not being sought and these had included the drafting of pleadings, briefing evidence, reviewing the plaintiff's evidence, numerous interlocutory issues and the preparation of submissions. He submitted that although those costs were somewhat less than those the plaintiff incurred, the costs incurred previously were well in excess of those being sought in the present application. He submitted that the costs being sought amounted to costs being thrown away because of the history of the plaintiff amending the pleadings, the plaintiff's witnesses changing their evidence and the uncertainty as to when the matter will be brought on for a hearing.

[62] Other interlocutory matters then intervened including applications by the plaintiff to set aside the orders I made at the 25 November 2011 hearing and issues as to the plaintiff's medical condition and her ability to give instructions. There were also issues between the parties arising from the plaintiff's change of her legal representatives in 2011, and the waiver of privilege. In a minute issued after a chambers conference on 21 August 2012, I noted that these matters were still being pursued between the parties and, in the same category, the invoices of Mr Kedzlie referred to in Mr Hickling's 23 December 2011 affidavit were also being sought by the defendant.

[63] On 4 October 2012 Mr Quigg filed a further memorandum addressing the representation letters written by the plaintiff's solicitors to Messrs Hickling and Carruthers, dated 15 and 23 June 2011, and referring to some additional emails

which the defendant was provided. He submitted that this material raised questions as to whether the Court may have been mislead regarding Mr Carruthers's availability for the hearing set down to begin on 1 August 2011.

[64] Mr Quigg referred to a recently disclosed email dated 28 June 2011 from Mr Fletcher to Mr Hickling, which was annexed to Mr Quigg's memorandum and which states:

Further to my 23rd June letter I am now clear that Mr Carruthers is almost certainly not available for the hearing.

[65] Mr Quigg submitted that this appears to be in direct conflict with Mr Fletcher's memorandum seeking the adjournment dated 18 July 2011 which stated that one of the grounds for this adjournment was:

That as late as of last week it became apparent that senior counsel instructed, Mr Colin Carruthers, would not be available for the trial. Despite significant effort to seek and instruct alternative counsel, the plaintiff has not been successful to date.

[66] Mr Quigg submitted that the email of 28 June 2011 also appears to be in conflict with Mr Fletcher's advice to the Court at the trial management conference on 14 July 2011 that he was unaware of Mr Carruthers's unavailability at that time. Mr Quigg referred to Mr Hickling's affidavit of 9 August 2011 where he deposed that he was told by Mr Carruthers on 4 July that Mr Carruthers would not be available and he then informed Mr Fletcher. Mr Quigg noted that Mr Carruthers stated in an email dated 4 August 2011 to Mr Fletcher and Mr Hickling that, in agreeing to lead the case in mid-May 2011, when Mr Laurenson was granted leave to withdraw, Mr Carruthers had stated that he would not be available for a hearing beginning on 1 August 2011, but would be available to assist with the handover to other counsel for the purpose of the trial.

[67] Mr Quigg submitted that the contents of Mr Carruthers's email appeared to

directly conflict with the letter sent from Mr Hickling to the Court dated 16 May

2011 when the matters were proceeding towards the 1 August 2011 fixture which stated:

Mr Colin Carruthers QC has accepted instructions to represent Ms Snowdon. Since January 2011 Mr Carruthers has been retained with a watching brief over all proceedings.

[68] Mr Quigg stated that, in light of the various conflicting accounts of when trial counsel had indicated his unavailability for the 1 August hearing, he had sought further disclosure from Mr Fletcher and was advised by letter on 21 September 2012 that there was nothing more. Mr Quigg queried whether all the correspondence had been received in light of what he submitted was Mr Fletcher's change in position between 23 June 2011, when he was unclear as to Mr Carruthers's availability and 28

June 2011, when he was then able to state that it was now clear that Mr Carruthers was almost certainly not available. He submitted that despite the conflicting information provided, what did seem clear was that, irrespective of Ms Snowdon's health, the plaintiff was in no position to, and could not have, taken part in the hearing of 1 August 2011, as she had no counsel.

[69] Mr Quigg submitted that his argument was reinforced by the fact that Mr Kedzlie had been preparing to take a complaint to the SFO since June 2010. Mr Quigg quoted from Mr Kedzlie's report to the SFO of June 2011 in which Mr Kedzlie stated that the Employment Court was about to determine issues of fact and conduct which are criminal and that this was not the function or role of Judges in the Employment Court and that the criminal matter needed to be addressed and determined first, as the Employment Court proceedings were part of the actual series of frauds that had occurred and were an integral part of the earlier frauds that had been identified.

[70] Mr Quigg submitted that the paragraphs in Mr Kedzlie's report to the SFO indicated that there was no intention to take part in the hearing on 1 August 2011 and that, had the plaintiff been well, the hearing would still not have proceeded as Mr Kedzlie was not wishing to proceed at that time. Mr Quigg called upon this material in support of the defendant's claim for indemnity costs in excess of $261,025.04, exclusive of GST, in relation to the two adjournments.

[71] By a minute of 5 October 2012 I gave the plaintiff the opportunity to respond to these matters and to provide any affidavits, by 26 October 2012. The defendant was to have until 2 November in which to respond, strictly in reply.

[72] Mr Carruthers, in a memorandum filed on 29 October 2012, took issue with the conclusions Mr Quigg had drawn from the correspondence. He accepted that the correspondence reflected a situation that was at times confused, involved some misunderstanding and that this had resulted in what now appeared to be conflicting information. Mr Carruthers accepted that there were inconsistencies between the information provided to the Court as regards his availability. He advised that he had made it clear throughout that he would lead the case provided there was no conflict with other fixtures and that one problem was the overrun of a previous major fixture. Mr Carruthers submitted that the primary issue was the plaintiff's health and her ability to give instructions and evidence and participate in the proceedings. That, he submitted, was the

supervening factor. That the plaintiff had no counsel became a pressing issue close to the time of the 1 August hearing when it became absolutely clear that she would have no counsel who was competent to act for her. Mr Carruthers submitted that in July 2011 the plaintiff, because of her health, was not able to give instructions and Mr Fletcher emphasised this in the July-August period. He contended that she had not instructed Mr Kedzlie to refer the matter to the SFO, although she paid towards Mr Kedzlie's efforts. It was Mr Kedzlie's own complaint and it was his view, not the plaintiff's, that any criminal proceedings should be heard before the Employment Court proceedings. The issue put before the Court was whether the SFO investigation would have an impact on the Court's decision to go ahead. He submitted that any decision on costs should not take into account the defendant's counsel's memorandum of 19 January 2012.

[73] Mr Quigg responded on 2 November 2012 and contended that no valid reasons were advanced as to why his costs memorandum of 19 January 2012 in reply as to costs should not be taken into account. He observed that the Court had expressly provided a timetable for his filing of this costs memorandum in reply in the 5 December 2011 judgment. He submitted that in reaching its decision the Court should be able to take into account the issues which had been raised by the defendant since being provided with Mr Kedzlie's invoices and the representation letters,

insofar as those were relevant to costs. He noted that these issues were raised in his

9 December 2011 memorandum as well as the 19 January 2012 memorandum but were not able to be addressed fully as the documents now relied on had not been disclosed earlier.

[74] As to the representation letters Mr Quigg repeated again that Mr Fletcher had made it clear in his 28 June 2011 email to Mr Hickling that Mr Carruthers was most certainly not available for the 1 August hearing. However, neither the Court nor the defendant were informed of this until 18 July 2011 when the adjournment was sought on the basis that, as of late the previous week, it had become apparent Mr Carruthers would not be available for the trial. He referred to Mr Carruthers's communication that he had made it clear that when he agreed to lead the case, when Mr Laurenson sought and obtained leave to withdraw on 16 May 2011, that he was not available for the fixture commencing 1 August 2011 and that this was made clear to Mr Hickling and he had accepted the position throughout. This communication was attached to Mr Fletcher's memorandum as to his understanding of counsel's availability, dated 4 August 2011.

[75] Mr Quigg submitted that the evidence established that the plaintiff did not have counsel from 13 May 2011 despite what the Court was told, irrespective of the plaintiff's health, and she could not have taken part in a hearing commencing on 1

August as she had no counsel.

[76] Mr Fletcher then sought the opportunity to reply to Mr Quigg's memorandum

and was given leave on 5 November to do so by 16 November 2012.

[77] On 16 November 2012 Mr Fletcher filed a memorandum in response, signed by Mr Carruthers, together with: an affidavit of Mr Kedzlie sworn on 5 November

2012, with 31 pages of attachments, another affidavit of Mr Kedzlie sworn on 16

November 2012 but this time with some 93 pages of annexures, and an affidavit of the plaintiff sworn on 15 November 2012, all said to be in support of the opposition to the defendant's application for costs.

[78] Mr Carruthers submitted that Mr Quigg's memorandum dated 2 November

2012, was not strictly in reply and raised issues, while possibly following from previous related memoranda, that should not have been raised. Mr Carruthers noted that my 5 November 2012 minute granting leave to the plaintiff to respond did not require counsel to respond strictly in reply and therefore his memorandum addressed some issues that were outside the ambit of Mr Quigg's 2 November memorandum.

[79] Mr Carruthers then proceeded to expand on his reasons why Mr Quigg's 19

January 2012 memorandum should not be taken into account. He submitted that the matters contained in the 19 January memorandum, were clearly foreshadowed in the plaintiff's 23 December 2011 memorandum with cited authorities and that no invoices had been put before the Court to support the defendant's costs application. Therefore the Court should not take into account any material the defendant put forward in the 19 January 2012 memorandum to bolster its claim. Further, he noted that Mr Quigg had referred back to his initial costs memorandum and these were matters not in reply, but restated what had previously been submitted and added no further information and therefore should be treated accordingly.

[80] Mr Carruthers denied that there had been anything other than full disclosure of the representation letters and submitted that the issue of Mr Kedzlie's invoices should not be part of the costs application. He referred to direct evidence from Mr Kedzlie and the plaintiff that Mr Kedzlie, in laying complaints with the SFO and the Police, was not acting on instructions from Ms Snowdon and that his complaints were not being made on her behalf. Although counsel had no objection to a costs

decision being issued, such a decision should not take into account counsel for the defendant's memorandum dated 19 January 2012.

Decision

[81] Other than confirming the position, which I accept, that it was Mr Kedzlie who has made the complaints to the SFO, and the Police and that the plaintiff did not give any such instructions, although she paid for much of Mr Kedzlie's efforts, I did not find that any of the material in the affidavits filed on 16 November 2012 assisted me in the disposition of the matter of costs.

[82] I do not accept Mr Carruthers's submission that I should not take into account, in considering what costs should be awarded in relation to the adjournments, Mr Quigg's memorandum in reply of 19 January 2012. I accept that Mr Carruthers is correct in observing that it was not strictly in reply and had annexed material by way of invoices that had not previously been produced to the Court. Mr Carruthers cited *Progressive Meats Ltd v Meat & Related Trades Workers Union of*

*Aotearoa Inc,*23 where Chief Judge Colgan dealt with submissions in support of costs

which were deficient, in the sense that no proper details for supporting the claim was provided. After the defendant filed its submissions in reply, pointing out this deficiency and stating this should count against the plaintiff, the plaintiff proceeded to file further submissions without leave. The Chief Judge stated:24

However, I do not think it is fair to allow the plaintiff to now seek to bolster its case by providing detail of the sort that it should have in the first place. It is a long-standing and well known requirement of applicants in this Court and I consider it would be unfair to the defendant to allow the plaintiff a second bite at this cherry...

[83] In an ordinary case leave should be obtained to provide invoices in support of a claim for costs when they have not been provided in a claimant's initial memorandum. As perhaps my account of the steps taken to this point may indicate, this is not a normal case. The parties have exchanged memoranda of ever varying extent and lengthy affidavits have been filed on behalf of the plaintiff. To endeavour to exclude the defendant's invoices because they were not included in the first or even second memorandum when counsel for the defendant certified as to their contents, in a case of this complexity, would be inappropriate.

[84] However, as will be stated later, the invoices provided no detail and were therefore of little assistance other than in supporting Mr Quigg's certification that they had been incurred by the defendant.

[85] Further, it should be noted that Mr Quigg's 19 January 2012 memorandum was responding to the plaintiff's claim, raised for the first time in Mr Fletcher's

23 December 2011 memorandum, seeking costs arising out of the adjournment.

23 WC 1A/08, 9 May 2008.

24 At [5].

Although these were not quantified by Mr Fletcher they were said to be supported by Mr Hickling's affidavit which showed costs for trial preparation of $1,004,310.10 in the period January 2010 to December 2011. Some licence in replying to a claim of that magnitude must be allowed.

[86] Similarly, regard may be had, over Mr Carruthers's objections, to Mr Kedzlie's invoices, especially as they were initially referred to in support of the plaintiff's application for costs and disbursements, and which provide an interesting comparison to those incurred by the defendant. But again I did not see the need to examine this material because of the view I have taken of the plaintiff's claim. This is all against the background of the staggered disclosure of communications and reports on the plaintiff 's representation and health. I have therefore taken into account everything filed which may bear on the issue of the costs of the two adjournments.

[87] It is difficult to escape the conclusion that one of the principal reasons for the plaintiff wishing to adjourn the 1 August hearing, was the unavailability of counsel of her choice following the withdrawal of her instructions from Mr Laurenson and Izard Weston. There is sufficient material now before the Court from Mr Carruthers, which I accept, that Mr Carruthers very properly made it clear from the outset to Mr Hickling, in either April or May 2011 or even earlier that he was not available for a fixture commencing on 1 August that year because of other commitments. That fixture had been set down in November 2010. Mr Hickling was aware of this and should have brought it to the attention of Mr Fletcher at the earliest opportunity. He says he did so on 4 July 2011. Notwithstanding this, Mr Fletcher was able to attend a telephone management conference on 14 July 2011 for the 1 August fixture without making any mention of Mr Carruthers's unavailability.

[88] Mr Fletcher's email of 28 June 2011 also indicates, while no doubt consistent with what Mr Carruthers had been communicating with Mr Hickling from the outset, that Mr Carruthers would not be available for the 1 August fixture. This

should have been communicated at the earliest time to the defendant to avoid costs being wasted and to the Court because of the substantial judicial time set aside for the August hearing. It is possible that this was not done because the Court had previously

advised that a change in representation as a result of the plaintiff's last minute

election would not justify an adjournment.

[89] There is no evidence why the plaintiff's health declined to such a degree after she swore her affidavit on 10 June 2011 deposing that she was "perfectly fit and well" and wanting to appear and give evidence in her case in August, and her consultation with Dr Sawrey on 6 July of that year. Dr Sawrey's certificate relied on self reported symptoms from the plaintiff. The certificate was available to Mr Hickling on 11 July 2011 according to Dr Sawrey's affidavit. That certificate, however, was not made available to the Court at the time of the management conference on 14 July or earlier.

[90] I conclude that full disclosure was not made to the Court and the defendant at the appropriate time. Once Mr Laurenson's instructions had been withdrawn by the plaintiff and Mr Carruthers's unavailability made clear, it was obvious that the plaintiff was not intending to proceed on 1 August without counsel. Neither was her principal witness Mr Kedzlie wishing to go to trial until his criminal complaints had been dealt with by the SFO or the Police. Irrespective of the health issues which apparently developed between 10 June and 6 July the plaintiff was not ready for trial on 1 August 2011.

[91] Although the plaintiff was ultimately successful in obtaining the two adjournments, for the reasons I gave at the time, I granted her applications with the greatest of reluctance on the material that had been disclosed to that point. The subsequent disclosure satisfied me that the principal reason the plaintiff did not want to proceed was the unavailability of counsel of her choice after a late dismissal of her previous counsel. Her ability to obtain medical support for the situation that she had created for herself, led me to grant the adjournments she sought. The plaintiff and her representatives, excluding Mr Carruthers, failed to make adequate and prompt disclosure to the Court of the true position before her health allegedly failed in the period between 10 June and 6 July 2011. I find that she is not entitled to any costs in relation to the two adjournments.

[92] Although Mr Fletcher was correct in contending that *Binnie* was about awarding indemnity costs to a winner and not a loser and the plaintiff was successful in obtaining the adjournments she sought, that, in my view, does not make her a winner for the purposes of the adjournment costs. I accept the submissions of Mr Quigg that an award of costs will invariably be made against a party which successfully seeks an adjournment where that party is at fault and may be awarded even if a party is not at fault. The *Hamilton*, *Chu* and *Scott* cases support that proposition. Here there was fault on the part of the plaintiff or her representatives.

[93] I find because of the unsatisfactory nature of the conduct of the proceedings by the plaintiff leading up to the adjournment applications the defendant is entitled to indemnity costs for what it had reasonably incurred in properly defending the two adjournment applications (the adjournment costs). I accept Mr Quigg's submissions that this is a proper case for indemnity costs for the reasons I expressed in my

judgment of 29 July and 2 August 2011.25 The situation had arisen because the

plaintiff elected to withdraw the instructions for her previous counsel and solicitors in May, only a matter of weeks away from a lengthy trial that had been set down in November 2010. This was not the first time the plaintiff changed counsel and sought adjournments. I had previously advised the parties in a minute of 27 May 2011 that the Court was unlikely to entertain an adjournment application based on the unavailability of counsel because of other fixtures.

[94] In my costs judgment in relation to the successful striking out of all references to Mr Quigg or his firm Quigg Partners in the plaintiff's second amended statement of claim, which I issued on 25 September 2012,26 I noted that, in granting indemnity costs, I found considerable guidance from the decision of the Court of Appeal in *Saunders v Winton Stockfeed Ltd.*27 I then stated:

[11] ... The Court of Appeal confirmed, that in general, orders for costs are to be a reasonable contribution to actual costs. That general approach yields where it does not deliver a just result and in such cases the Court will exercise its discretion to make an order that is just. The Court of Appeal referred to *Prebble v Huata,* where the Supreme Court observed that

25 [2011] NZEmpC 98.

26 [2012] NZEmpC 165.

27 [2009] NZCA 148; [2009] 19 PRNZ 342 (CA).

indemnity costs have not been awarded in New Zealand except in rare cases, generally entailing breach of confidence or flagrant misconduct. The Supreme Court endorsed the statement of Cooke P in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd,* where he stated:

[The costs scheme] reflects a philosophy that litigation is often an uncertain process in which an unsuccessful party has not acted unreasonably and should not be penalised by having to bear the full party-and-party costs of his adversary as well as his own solicitor- and-client costs. If a party has acted unreasonably – for instance by pursuing a wholly unmeritorious and hopeless claim or defence – a more liberal award may well be made at the discretion of the Judge, but there is no invariable practice.

[12] The *Saunders* case also involved a strike out application but in that case it was unsuccessful. The Court of Appeal found that the unsuccessful application was not vexatious, frivolous, improper or unnecessary. It found that the particular application was not wholly unmeritorious or hopeless and therefore indemnity costs should not be awarded against the appellants. The wording used is a reference to the rules as to when the High Court may order indemnity costs in that case r48C(4)(a) of the High Court Rules. This has now become r4.16(4) which provides:

The Court may order a party to pay indemnity costs if –

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding...

[13] The Court of Appeal held that the word "unnecessarily" in the equivalent r48C(4)(a) took its meaning and flavour from the adverbs which preceded it "vexatiously, frivolously, improperly".

[14] I have applied the High Court Rules because reg 6(2) of the Employment Court Regulations 2000 provides that where no form of procedure has been provided by the Employment Relations Act 2000 or the Regulations the Court must dispose of the case in accordance with the provisions of the High Court Rules affecting any similar case.

[95] I confirm that I have found that the plaintiff through her representatives, but not Mr Carruthers, acted improperly towards the Court and the defendant in continuing to advise them that she was prepared and indeed anxious to proceed with the 1 August hearing, when in fact the counsel of her choice was not available and her principal witness, Mr Kedzlie, was not ready to proceed. This led to the unnecessary incurring of costs in terms of HR 4.16(4).

[96] Even if these conclusions, based on Mr Quigg's submissions which I accept,

were incorrect, the late adjournment application less than 2 weeks before the

commencement of the four week fixture put the defendant to unnecessary and wasted costs.

[97] As the authorities and HR 14.6(1)(b) make it clear, it is only indemnity costs reasonably incurred by a party that can be awarded. I consider it is necessary to limit the indemnity costs only to those incurred on a reasonable basis in relation to the matters that arose directly out of the adjournment application (the adjournment costs). The costs said to have been wasted for trial preparation (the preparation costs) as a result of the adjournment application I consider should be dealt with on the basis of a reasonable contribution basis. This was the basis of Mr Quigg's first memorandum dated 29 July 2011. Although Mr Quigg has submitted that that has now been replaced by his subsequent memoranda, on the basis that I have previously indicated, I intend to take all relevant material put before the Court into account in making this costs decision.

[98] As I have noted, in that first costs memorandum, indemnity costs of $18,617 plus GST were sought for the adjournment costs up to 25 July 2011, and in preparing the memorandum. There were then subsequent costs incurred in relation to the plaintiff's application to set aside my earlier ruling and to have the fraud proceedings adjourned. I regard these as part of the adjournment costs which should be awarded on an indemnity basis. Mr Quigg's subsequent memoranda did not, unfortunately, address the costs incurred in relation to what was effectively the second adjournment application as a separate item. Instead they sought indemnity costs for the whole of the costs alleged thrown away since 9 November 2010, including the preparation costs. The 9 December 2011 memorandum seeks costs separately in relation to the adjournment costs and the preparation costs and I consider that is a proper approach and one which I have endeavoured to apply to the material Mr Quigg has put before the Court.

[99] I have had difficulty in reconciling adjournment costs of 59.2 hours costs of

$18,617 plus GST, with a tax invoice dated 4 August 2011 for fees of $53,610.23. The previous tax invoice was dated 30 June 2011 so I presume that the tax invoice of

4 August 2011 includes the attendances in relation to the adjournment from 18 July through to 4 August. However, the amount claimed is considerably less than the

total amount of the invoice. In Mr Quigg's memorandum of 19 January 2012 he stated that the defendant is not seeking costs in relation to advice provided by Mr Rennie QC to the defendant's board and former board members. He confirmed the total amount of the invoices exceeded the costs being sought by the defendant, as they included other incidental attendances in relation for which costs were not sought. I have also assumed that the times claimed on the timesheet up to and from

18 July 2011 to 20 July were encapsulated in the $18,617 although the spreadsheet setting out the time entries was not attached, although the 29 July memorandum said it was.

[100] I note that the tax invoices simply describe “professional services” and then the fees. I do also note that the tax invoice of 4 August 2011 includes as disbursements “Morrison Kent security for costs” of $1,190.61. That invoice is dated 30 June 2011 and refers to charging orders, redrafting memoranda and incidental attendances. This clearly does not cover the period for the adjournment costs which started on 18 July 2011.

[101] From the timesheets attached to the 19 January memorandum and excluding the items I was apparently required to exclude and those which apparently related to preparation costs rather than the adjournment costs, as best I can, for the period from

29 July until 2 August 2011 a further $7,277.43 was incurred. If this is added to the

$18,617 it makes a total of $25,894.43. As I cannot be confident, however, that all of those attendances related to the second adjournment application I have scaled that total figure down to $24,000.

[102] Again it is not possible to reconcile the timesheets to the tax invoice for the next period, which is dated 31 August 2011, which simply shows, for professional services, the sum of $35,500. That account also includes disbursements of $1,283.40 for the Morely Investigation Group, which it appears was for forensic document examination and covered earlier periods and accordingly I have not included them.

[103] I then have to consider whether the adjournment costs of some $24,000 are reasonable for the two adjournment applications including all the ancillary submissions, memoranda, affidavits and the two appearances. I have no doubt from

the material provided to me that considerable work was done. I have little guidance as to whether or not I can determine that the costs incurred were reasonable.

[104] The costs of $12,500 I awarded in my 25 September 2012 judgment for the successful strike out were I found reasonable. I calculated these from the material then provided for one defended interlocutory application which required the examination of prolex pleadings, lengthy affidavits and briefs of evidence. Based rather arbitrarily on trying to draw an analogy of the work carried out in those proceedings and the work in opposition to the two adjournment applications I consider that a reasonable award for the adjournment costs, on an indemnity basis, would be $15,000 and award that amount.

[105] Turning to the preparation costs which were said to total $261,025.04 inclusive of disbursements and, which presumably included the adjournment costs, I consider that I should first subtract the figure of $24,000 as rounded out for the adjournment costs which I have discounted to make the indemnity award. This brings the total down to $237,025.04. That includes disbursements totalling

$86,567.65. I do not find from the material provided for me any clear guidance as to whether those disbursements are reasonable and, if they are reasonable, whether all or any of them have been wasted as a result of the adjournment. They may need to be readdressed depending on the outcome when the matters finally come to trial. I therefore have set them aside, bringing the total down to $150,457.39.

[106] Again I have little, if any, information which would enable me to conclude if any of that figure would be necessary for the reasonable costs of preparation for trial in any event and how much of that which is reasonable has been wasted as a result of the adjournment. As was stated in the *Scott* case, this is a “rough and ready” exercise.28 Even though I accept Mr Quigg that the costs thrown away in this case may be considerably higher than, for example, the $10,000 costs awarded in *Chu*, the exercise I have been asked to engage in, without adequate material must, of

necessity, be arbitrary.

28 At [8].

[107] It is also difficult to reconcile the figures provided in the defendant’s 29 July

2011 memorandum, of a total of $64,026.86 for the preparation costs between

5 November 2010 and 18 July 2011, with the figure of $174,407.39 for the period to

2 August 2011, in the 9 December memorandum. The absence of the spreadsheet from 29 July 2011 does not assist in making the comparison.

[108] I accept Mr Quigg’s submission that this is a most unusual case as the level of costs incurred by both the plaintiff and the defendant have indicated. Using the timesheets provided with 9 December as some guide, I consider that it is likely that a portion of the preparation costs have been wasted, and these may be as high as

$30,000. A reasonable contribution on a two thirds basis to that amount would be

$20,000 and I award that sum. This award is also intended to cover, as the timesheets indicate, a contribution of the defendant's costs of preparing the successful costs application and opposing the plaintiff's memoranda for costs.

[109] To summarise, the plaintiff is required to pay the sum of $15,000 towards the

defendant's costs on the adjournment applications. She is required to pay a further

$20,000 as a contribution towards the lost trial preparation costs and the costs of preparing the defendant's successful costs application and opposing the plaintiff's costs application.

B S Travis

Judge

Judgment signed at 3.45 pm on 12 April 2013
