IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 203
ARC 98/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	BRYCE TINKLER Plaintiff
AND	FUGRO PMS PTY LTD & PAVEMENT MANAGEMENT SERVICES LTD Defendant

ARC 30/12

AND IN THE MATTER OF	proceedings removed
AND IN THE MATTER OF	an application for costs
BETWEEN	FUGRO PMS PTY LTD & PAVEMENT MANAGEMENT SERVICES LIMITED Plaintiff
AND	BRYCE TINKLER Defendant

Hearing:	On the papers by way of memoranda/submissions dated 27 August, 19 and 26 October 2012
Counsel:	Mark Ryan, counsel for Mr Tinkler Caroline McLorinan, counsel for Fugro PMS Pty Ltd & Pavement Management Services Ltd
Judgment:	6 December 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS AS TO COSTS

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[1] These proceedings related to a settlement agreement entered into between Mr Tinkler and his previous employer, Fugro PMS Pty Ltd & Pavement Management Services Ltd (Fugro). Mr Tinkler contended that the agreement was void, having been entered into under duress. Fugro denied that this was so and sought to enforce the agreement by way of compliance order. The matter initially came before the Employment Relations Authority (the Authority) as a preliminary issue. The Authority declined to find that the agreement had been entered into under duress.[1] Mr Tinkler challenged the Authority's preliminary determination. The Authority removed Fugro's application for a compliance order under s 137 of the Employment Relations Act 2000 (the Act). The challenge and Fugro's application were heard together in this Court. The Court dismissed the challenge, finding that the settlement agreement had not been entered into under duress. A compliance order was issued in Fugro's favour.[2] The parties were invited to agree costs if possible. They have been unable to do so, and counsel have filed memoranda in relation to the issue.

[2] Fugro seeks a contribution towards its costs in the Court and the Authority, and payment of disbursements, totalling $35,920.84. It is accepted on Mr Tinkler's behalf that Fugro is entitled to a reasonable contribution to its costs, and disbursements, in the Employment Court but it is said that the quantum of costs sought is excessive in the circumstances, representing 700% more than would be awarded according to the High Court scale. Counsel takes issue with the level of detail provided to support the application for costs advanced by Fugro, and submits that costs should be assessed by way of reference to a notional daily rate, in accordance with the approach adopted in *Richardson v Board of Governors of Wesley College*.[3] An issue also arose as to the extent to which the Authority had dealt with costs.

[3] I consider the application for costs relating to the Employment Court proceedings first.

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[1] [2011] NZERA Auckland 502.
[2] [2012] NZEmpC 102.
[3] [1999] 2 ERNZ 199.

General principles

[4] Clause 19, Schedule 3, of the Act confers a broad discretion as to costs. It provides that:

> The court in any proceedings may order any party to pay to any other party such costs and expenses ... as the court thinks reasonable.

[5] The discretion to award costs, while broad, is to be exercised in accordance with principle. The primary principle is that costs follow the event.[4] The usual starting point in ordinary cases is 66 percent of actual and reasonable costs. From that starting point, factors that justify either an increase or decrease are assessed.[5]

Actual costs

[6] I am satisfied that Fugro has incurred actual legal costs relating to the challenge of $25,939.96. Mr Ryan, for Mr Tinkler, did not seek to contend otherwise. Rather, he focussed his submissions on whether the actual costs incurred by Fugro were reasonable in the circumstances. He submitted that they were not.

Reasonable costs

[7] No breakdown of the legal costs incurred by Fugro has been provided, in terms of the steps that were taken, the time consumed by each step, or the charge out rate that applied. The absence of such details presents difficulties for the Court in determining whether the costs incurred by a party were reasonable. Parties seeking costs are required to establish the basis for the award they seek. They fail to do so at their peril.

[8] The hearing took nearly a full day. It is apparent that Fugro's counsel was required to consider the statement of claim and prepare a statement of defence,[6] peruse the affidavit and brief of evidence filed on behalf of Mr Tinkler and to prepare and file a brief of evidence in response (from Mr Yeaman). Mr Yeaman's brief of evidence was 22 paragraphs long. Submissions were required and counsel

[4] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
[5] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
[6] Fugro also had to file a brief statement of claim in relation to its application for a compliance order.

attended one telephone conference prior to the hearing. The central issue before the Court was, as Mr Ryan submits, a relatively narrow one – namely a factual dispute as to whether the agreement was entered into under duress and was void. Mr Ryan had conceded that if duress was not established, the agreement was enforceable and a compliance order should issue. And Ms McLorinan, for Fugro, emphasised in closing submissions that the matter for the Court was "very straightforward".

[9] Mr Ryan submits that the actual costs incurred by Fugro are unreasonable by way of reference to the costs incurred by his client. He states that Fugro's costs are 400% higher than Mr Tinkler's costs. This means that the fees incurred by Mr Tinkler amounted to around $6,500 and were relatively modest, given the work involved in preparing for the hearing and the legal submissions advanced on his client's behalf. However, I do not consider that they provide a particularly useful benchmark for assessing the extent to which Fugro's costs were reasonably incurred and nor, in any event, was any supporting documentation provided.

[10] Mr Ryan submits that, in the absence of detailed information relating to the basis for the actual costs incurred by Fugro, the approach adopted in *Richardson* and *Graham v Crestline Pty Ltd*[7] should be applied. In *Richardson* Judge Travis found a notional daily rate (with one exception) of between $3,800 and $6,400 a day had recently been applied. In *Graham* the Chief Judge observed that a useful measure to apply in assessing reasonableness is what the scale costs under the High Court Rules would provide.[8] Mr Ryan submits that High Court scale costs would equate to a figure of $4,000 for a one day hearing relying on *Graham*, and that there does not appear to be any justification for awarding costs outside the notional daily rate range as confirmed in *Richardson*.

[11] I accept that it may be helpful to have regard to the sort of costs that might be awarded under the High Court scale, in terms of assessing the reasonableness of costs incurred, while acknowledging that they do not provide a direct comparison given the distinguishing features of litigation in this jurisdiction. An application of the High Court Rules in the circumstances of the present case results in a figure of

[7] AC 53A/06, 21 November 2006.
[8] At [9].

$7,788.[9] I do not consider that the daily rate range identified in *Richardson* more than a decade ago, is of material assistance in determining what is, or is not, reasonable in the present case.

[12] Standing back and considering each of the steps that Fugro was required to take to meet the claim against it, and based on the limited information provided to the Court, I conclude that costs of between $11,000-12,000 would be reasonable. That leads to a starting point of around $7,500-8,000. From this starting point I turn to consider the factors identified by counsel as justifying either an increase or a decrease.

Other factors

[13] Mr Ryan submitted that the consequences of the result of the challenge for Mr Tinkler (namely that he still has to pay approximately $100,000) are relevant to a determination as to what a reasonable contribution to costs in the circumstances might be. A party's financial position may be relevant to costs, but this factor was not expressly advanced on Mr Tinkler's behalf. And while the wider consequences of the result of litigation may be relevant to costs,[10] I do not consider that the fact that Mr Tinkler is now obliged to meet his legal obligations and that those obligations amount to a figure of $100,000 of itself warrants a discount in terms of the award that might otherwise be made.

[14] Ms McLorinan submits that there ought to be an increase in the costs awarded in her client's favour on the basis that Mr Tinkler's challenge lacked merit, referring to the finding that Mr Tinkler had belatedly raised the issue of duress in an attempt to avoid his contractual obligations.[11] She argued that Mr Tinkler should be required to contribute to Fugro's costs at the level of 80%. Mr Ryan did not advance any submissions as to why this factor ought not to be taken into account in determining an appropriate award of costs. I accept Ms McLorinan's submission that an increase in costs that would otherwise be awarded is warranted in the circumstances.

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[9] Calculated on a 1A basis and as representing two-thirds of reasonable costs.
[10] *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38 at 44.
[11] [2012] NZEmpC 102 at [39].

Balancing all matters before me, I award $9,200 in Fugro's favour in relation to proceedings in the Court**.**

Costs in the Authority

[15] Legal costs in the Authority amounted to $6,837.90, excluding the costs associated with the successful application for removal. The Authority made a costs award in Fugro's favour in relation to the removal application.[12] Costs in relation to the preliminary issue (duress) in the Authority remain outstanding, and are sought on behalf of Fugro.

[16] In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*[13] the Employment Court set out a number of factors guiding the exercise of the Authority's discretion to award costs, including that costs are frequently judged against a notional daily rate and are modest.[14] The Court confirmed that when assessing costs for the Authority proceedings after a challenge, the Court should decide Authority costs as if it were standing in the shoes of the Authority.[15] In *Wackrow v Fonterra Co-operative Group Ltd*[16] Judge Shaw noted the difficulty for the Court in setting costs for an investigation hearing and held that the realistic way to assess costs is to base it on the notional daily rate. While the approach to assessing costs in the Authority and the Court differs in material respects, the requirement that an applicant establish that costs have actually been incurred has equal application.

[17] The current daily tariff for an investigation meeting in the Authority is $3,500. In this case, the preliminary determination was heard on the papers. In those circumstances, costs of half the daily rate ($1,750) are granted to Fugro by way of contribution to its costs in the Authority relating to the preliminary issue.

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[12] [2011] NZERA Auckland 213.
[13] [2005] ERNZ 808.
[14] At [44].
[15] At [19].
[16] [2006] ERNZ 375 at [25].

Disbursements

[18] Fugro seeks reimbursement of its disbursements relating to the Authority's preliminary investigation and the challenge to this Court. I do not understand any issue to be taken with either the nature or quantum of the disbursements claimed.

[19] Disbursements in the amount of $3,142.98 as set out at paragraph 12 of Fugro's memorandum of counsel dated 27 August 2012 are accordingly granted.

Christina Inglis
Judge

Judgment signed at 1.45pm on 6 December 2012