IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 109
ARC 15/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	CAROL RIRA BAKER Plaintiff
AND	ST JOHN CENTRAL REGIONAL TRUST BOARD Defendant

Hearing: By memoranda of submissions filed on 11 and 16 April, and 1 May 2013

Appearances: Henderikus Haan, advocate for plaintiff
Michael O'Brien, counsel for defendant

Judgment: 19 June 2013

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The plaintiff pursued an unsuccessful challenge[1] against a determination of the Employment Relations Authority.[2] The defendant's cross-challenge succeeded. I invited the parties to agree costs if possible. They have been unable to do so and have filed memoranda in relation to the issue.

[2] The defendant seeks costs. It is submitted that the usual starting point (66 per cent of actual and reasonable costs) should be uplifted to reflect what is described as the aggravating features of the litigation, including an offer to settle the proceeding in advance of the hearing. However, the defendant accepts that the plaintiff's

[1] [2013] NZEmpC 34.
[2] [2012] NZERA Auckland 13.

financial position may be relevant. It also seeks costs in relation to the Authority's investigation.

[3] The plaintiff accepts that she is liable for costs but submits that the quantum of any award ought to be modest.

[4] There is a difference of approach in calculating an appropriate costs contribution in this Court and in the Authority. Accordingly, it is necessary to deal with each aspect of the defendant's application for costs separately.

Costs in the Employment Relations Authority

[5] The Authority has a broad general discretion to order a party to contribute to the costs of any other party. Clause 15 of Schedule 2 to the Employment Relations Act 2000 (the Act) provides:

> **Power to award costs**
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> 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.
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> 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.

[6] In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*,[3] 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, noting that:[4]

> 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] 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

[3] [2005] ERNZ 808.
[4] At [41].

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.[5] Each case must be considered on its own merits. The Authority has adopted a daily tariff rate approach in ordinary cases.

[8] The investigation meeting in the present case appears to have occupied half a day.

[9] The defendant refers to two settlement offers that it made to support its submission for increased costs. The first offer came well in advance of the Authority's investigation meeting. Accordingly I consider the potential impact of this offer in the context of claimed costs relating to the Authority investigation.

Effect of a "walk-away" offer

[10] The first offer (dated 7 June 2011) came just under two months before the Authority's investigation, and was on the basis that if the plaintiff withdrew her claim in the Authority, costs would lie where they fell. The defendant submits that the plaintiff's rejection of the offer was unreasonable and that the Court ought to increase the quantum of costs that might otherwise be awarded against her having regard to it.

[11] Essentially, the defendant's offer was made on a "walk away" basis. The effect of a "walk away" Calderbank offer was considered by the Court of Appeal in *Hira Bhana & Co v PGG Wrightson Ltd.*[6] The Court rejected a contention that such an offer was consistent with the overall purpose of a Calderbank offer, namely to limit a party's exposure to the potentially high cost of litigation. It held:[7]

> … where the nature of the offer made is simply a "walk away" proposition, made early in the proceedings, it cannot be the case that the mere fact that the party which rejected the offer subsequently loses means that party is required to pay indemnity costs or increased costs. If that were so, it would mean that the costs regime set out in rr 46 – 48G would be effectively

[5] At [44].
[6] [2007] NZCA 342.
[7] At [26].

> bypassed in almost all cases where the defendant succeeds, because defendants would routinely make "walk away" offers of the kind made in this case, and then claim indemnity costs if they subsequently succeed at trial.

[12] In *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council*[8] Kós J said:[9]

> … the reason the Courts take a conservative approach to imposing increased costs in the context of walk away offers is that they effectively value the opponent's claim, the opponent's prospects of success, and their own litigation risk all at nil. As the plaintiffs put it in their submissions, it ranked the plaintiffs' chances of success "at zero per cent". It will be a rare case where it is unreasonable for a plaintiff to take a more optimistic view of their own prospects than "zero per cent".

[13] In the present case the defendant's offer amounted to a nil offer. I do not consider that it was unreasonable for the plaintiff to reject it in the circumstances.

[14] I am not satisfied, based on the material before the Court, that there is a basis for departing from the usual daily rate approach generally adopted in the Authority at the relevant time, in terms of increased costs. I consider issues relating to the plaintiff's financial circumstances, and the extent to which they might impact on the quantum of any costs award against her, in greater detail below.

Costs in the Employment Court

[15] Clause 19(1) of Schedule 3 to the Act confers a 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.

[16] The discretion to award costs is to be exercised in accordance with principle. The primary principle is that costs follow the event.[10] The usual approach in this

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[8] HC Palmerston North CIV-2008-454-31, 22 December 2011 (unsuccessfully appealed in *Easton Agriculture Ltd v Manawatu Wanganui Regional Council* [2013] NZCA 79).
[9] At [17].
[10] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

jurisdiction in ordinary cases is 66 per cent of actual and reasonable costs. From that starting point, factors that justify either an increase or decrease are assessed.[11]

[17] The defendant submits that it incurred actual costs associated with defending the plaintiff's challenge, and in pursuing its counter-challenge, of $71,572.40 (plus GST and disbursements). These costs include preparation for and attendance at mediation ($4,189.60, plus disbursements) and a judicial settlement conference ($9,417.90, plus disbursements).

Costs relating to attendance at JSC/Mediation

[18] It does not appear that a contribution to costs associated with preparation for and attendance at a judicial settlement conference has previously been awarded in this Court, and counsel for the defendant has not cited any authority in support of this aspect of the application.

[19] In *Lee v Minor Developments Ltd t/a Before Six Childcare Centre*[12] Judge Shaw said that:

> [16] In *Simpson v BB's New Zealand Ltd*[13] the High Court agreed that a request for costs of a judicial settlement conference was novel. It noted that such conferences are not included in the schedule of costs in the High Court Rules and held that this was a deliberate policy to encourage parties to attend and participate in settlement conferences without being concerned about adverse consequences and costs.
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> [17] I respectfully agree with that reasoning. While there may be exceptional cases where it would be appropriate to award such costs I find that in the present case preparation for a judicial settlement conference and attending that conference does not form part of the actual and reasonable costs incurred for the purposes of quantifying an award of costs.

[20] As I observed in *O'Hagan v Waitomo Adventures Ltd*,[14] the policy imperative identified by Judge Shaw in *Lee* may now apply with diluted force. The Judicature (High Court Rules) Amendment Act 2008 has amended the costs schedule contained in Schedule 3 of the High Court Rules to include "preparation for an attendance at a

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[11] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
[12] AC 21/09, 24 April 2009.
[13] HC Wellington CIV-2005-404-6877, 23 August 2007.
[14] [2013] NZEmpC 58 at [12].

pre-trial conference". And costs associated with attendance at a judicial settlement conference have been awarded in at least two subsequent cases.[15]

[21] Attendance at a judicial settlement conference in this jurisdiction is entirely voluntary and cannot be directed by the Court. While it is arguable that the costs associated with attendance at such a conference ought to be included in the costs' calculus, there are a number of countervailing considerations.[16] Awarding costs in the present case would involve a departure from the approach previously followed in this Court. I am not persuaded, on the basis of the material filed on behalf of the defendant and in the absence of argument on the point, that costs associated with attendance at the judicial settlement conference ought to be allowed.

[22] The defendant also seeks costs in relation to its attendance at a second mediation. The costs associated with attendance at mediation are not generally recoverable. In *Jinkinson v Oceania Gold (NZ) Ltd*[17] the Court stated:[18]

> … It is reasonable to regard that first attendance at mediation as discharging the obligation referred to in the *Trotter* case. That having been done, it seems to me that costs incurred in 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. I therefore do not accept Mrs Brook's submission that costs incurred by the plaintiff in relation to further mediation ought to be excluded from consideration.

[23] No information is before the Court in relation to the circumstances surrounding the second mediation, and the basis on which it took place. In the absence of such information, I am not prepared to accept that the claimed costs ought to be allowed.

[24] For these reasons I exclude the claimed costs relating to attendance at the judicial settlement conference and second mediation. The actual costs incurred by the defendant in relation to the challenge/cross challenge in this Court accordingly amount to $57,964.90 (plus GST and disbursements).

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[15] *Scandle v Far North District Council* HC Whangarei CIV-2008-488-203, 31 March 2011 and *Roading & Asphalt Ltd v South Waikato District Council* [2012] NZHC 2243.
[16] See the discussion in *RHB Chartered Accountants v Rawcliffe* [2012] NZEmpC 31.
[17] [2011] NZEmpC 2.
[18] At [16].

Reasonable costs

[25] The hearing in this Court took one and a half days. Given that the hearing proceeded on a de novo basis, followed the Authority's investigation, and counsel appeared on both occasions, the costs that might otherwise have been incurred by the defendant would have been significantly reduced.

[26] The proceeding did not raise overly complex or legally difficult issues, although I accept that it was viewed by the defendant as a case that may have wide-ranging potential consequences. While it is, of course, open to the parties to be represented by counsel of their choosing, the level of skill and experience required in a particular case is relevant to assessing the reasonableness or otherwise of the costs incurred by a party in assessing what contribution ought to be made in a particular case. The proceeding did not require two counsel.

[27] Standing back and considering the steps required in this proceeding, including by way of attendance at a pre-trial stage, the scope of the claim and the volume of material involved, and having regard to the sort of costs that might apply under the High Court Rules (to the extent that they can be applied by analogy), I consider that a figure of around $20,000 to $30,000 would be reasonable.

Second settlement offer

[28] The defendant's second settlement offer came after the plaintiff's challenge had been filed in this Court. The offer included a $10,000 tax free payment, and was open for acceptance for a period of nine days. In the letter, counsel expressed the view that costs in the Court were likely to be in excess of $30,000 plus GST.

[29] Settlement offers are a discretionary factor for the Court in determining an appropriate costs award.[19] The making of such an offer does not automatically result in increased or indemnity costs. An offeror has the burden of persuading the Court

[19] Regulation 68, Employment Court Regulations 2000.

to exercise its costs discretion in his/her/its favour. Nevertheless, the Court of Appeal has made it clear that a "steely" approach is required to costs where reasonable settlement proposals have been rejected.[20]

[30] Whether it was reasonable to reject a settlement offer is to be assessed at the time the offer was made, not simply against the ultimate result. At the time the offer was made, and rejected, the plaintiff had a partially favourable Authority determination in her favour. It would, however, have been evident to the plaintiff that there were risks associated with the litigation, including from the Authority's determination itself (although I agree with Mr Haan's observation that the determination was not as clear as it might otherwise have been).

[31] The settlement offer was substantial, was made at an early stage and prior to any significant costs being incurred in preparation for the Employment Court hearing, and there was a reasonable period of time allowed for acceptance. The defendant put the plaintiff on notice of the potential consequences of refusing the offer, and encouraged her to seek legal advice.

[32] I am satisfied that the plaintiff's refusal of the settlement offer warrants an uplift in the circumstances. However, her refusal was not so unreasonable so as to warrant an order for indemnity costs (and none are sought on behalf of the defendant).

Additional factors

[33] The defendant further submits that a number of other factors are relevant, most notably in relation to the way in which the plaintiff's claim was conducted, the length of the hearing, and the pre-trial steps that were taken.

[34] It is said that the scope of the plaintiff's claim and the amount of documentation provided in support of it significantly added to the defendant's preparation time, which included analysing and graphing four years worth of

[20] See, for example, *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [53] affirmed by *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20].

timesheets and payroll records. I accept that the way in which the plaintiff's claim was pursued necessitated the application of additional resources. The Court was assisted at the hearing by the analysis undertaken by Ms Walker, a witness for the defendant. I have already taken this factor into account in assessing reasonable costs.

[35] I do not consider that the fact the Court hearing was originally set down for four days but ultimately was concluded in one and a half days is a factor that weighs in favour of increased costs. Nor am I persuaded, based on the material provided on behalf of the defendant, that an increase in costs is required because of various conference attendances, the filing of further memoranda in relation to remedies or by counsel having to brief five witnesses.

Financial circumstances

[36] It is plain that the plaintiff is in difficult financial circumstances and that anything other than a modest award of costs is likely to present significant hardship for her. Counsel for the defendant accepts that the plaintiff's current financial position may make it difficult to meet a substantial costs order, and submits that any order could include a payment plan over a period of up to five years to meet any such concern.

[37] There is an established approach in this jurisdiction of taking into account a party's ability to pay if payment would place an undue hardship on that party.[21]

[38] The fundamental principle of an award of costs is to recompense the party who has been successful in litigation for the cost of being represented in that litigation by counsel. There is a need to do justice having regard to the interests of both parties. A successful party may, itself, be financially stretched and struggling to meet the costs of litigation that it may not have initiated.[22] The point comes into sharp focus in this case. The defendant is a charitable organisation that operates

[21] See, for example, *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 at [29]; *Walker v Procare Health Ltd* [2012] NZEmpC 186 at [32].
[22] *O'Hagan* at [33]-[35].

independently of the Government, serving communities throughout New Zealand. It is heavily reliant on charitable donations.

[39] Counsel for the defendant submits that a costs contribution of 66 percent of reasonable costs ought to apply, having particular regard to the alleged aggravating features of the litigation balanced against the plaintiff's financial position. I have already found that the only aggravating feature is the plaintiff's refusal to accept the second settlement offer. Following the usual practice of the Court (but balancing the interests of both parties) I allow a discount to reflect the plaintiff's financial position.

[40] In the circumstances I award the defendant a contribution to its costs in this Court of $8,000 and $750 by way of costs in the Authority.

[41] I am loath to impose a payment plan on the plaintiff (assuming jurisdiction to do so) in the absence of further information relating to her position, and whether she wishes to take up the defendant's offer of facilitating payments over a five year period. I expect that this is something that the parties can agree between themselves, together with the detail of it. The plaintiff has devoted a considerable amount of time and effort to the organisation over the years, and the defendant has offered to make some accommodation to meet the circumstances that she finds herself in. If, following discussion, formal orders are sought, leave is reserved for the parties to apply to the Court within a period of 28 days from today's date.

Claimed disbursements

[42] A disbursement is defined in r 14.12 of the High Court Rules as:

> …an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs.

[43] To qualify as a recoverable disbursement, the payment must be both necessary to the conduct of the proceeding and reasonable. As Fisher J put it in *Russell v Taxation Review Authority*:[23]

[23] (2000) 14 PRNZ 515 at [16].

> The costs-paying party is not required to underwrite the other party's legal services to a Rolls Royce standard.

Library research

[44] Invoices dated 25 August 2011 and 27 January 2012 include costs relating to research as disbursements. The issue of legal research was considered in *Todd Pohokura Ltd v Shell Exploration NZ Ltd.*[24] There it was held that such expenses are not generally recoverable. I am not prepared to allow them in the present case in the absence of additional information as to why such costs would normally be charged to the client as a separate disbursement, and the basis on which it is said that they were necessary and reasonable in amount.

Travel/accommodation

[45] Counsel's travel time and accommodation expenses are not usually recoverable unless there is a good reason for retaining counsel at a distance. It will be difficult to argue necessity where there is an adequate choice of suitable counsel in the centre involved (in this case Hamilton), and in the absence of any other identifiable justification.[25] I am not aware of any special justification in this case, and accordingly disallow the claimed disbursements relating to travel and accommodation.

Administration costs

[46] I disallow the unspecified administration costs (amounting to $1521.86) referred to in the invoices presented on behalf of the defendant and the claimed "Kensington Swan General account" expenses (of $598.54). They are insufficiently particularised to enable an assessment to be made as to what they include, whether they were necessarily incurred, and whether they were reasonable.

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[24] HC Gisborne CIV-2006-485-1600, 1 July 2011 at [70].
[25] *Russell* at [27(e)].

Courier charges

[47] I allow the disbursements relating to courier charges (amounting to $189.03) as being necessary and specific to the litigation.

Conclusion

[48] I am satisfied that the ordinary daily rate that generally applies in the Authority at the relevant time ought to apply in the present case, with an adjustment for financial hardship. The defendant is awarded $750 by way of contribution to its costs in the Authority; $8,000 by way of contribution to its costs in this Court; and disbursements of $189.03.

[49] The parties may apply within 28 days of today's date for further orders facilitating satisfaction of the costs awards made against the plaintiff over time, if that is considered necessary.

[50] The defendant has not sought costs on this application, and none are awarded.

Christina Inglis
Judge

Judgment signed at 11am on 19 June 2013