IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 127
ARC 68/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ALAN MAYNE Plaintiff
AND	POLYCHEM MARKETING LIMITED Defendant

Hearing:	By memoranda of submissions filed on 15 April 2013 and 6 May 2013
Appearances:	Chris Patterson and Andrea Halloran, counsel for plaintiff John Hannan and Lauren Simpson, counsel for defendant
Judgment:	9 July 2013

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] In my substantive judgment of 14 March 2013,[1] I dismissed the plaintiff's challenge to the Employment Relations Authority's determination.[2] Costs were reserved. The parties have been unable to agree costs and have filed memoranda.

[2] The principles relating to costs awards in this Court are well established.[3] The Court has a broad discretion when making costs awards, which must be exercised judicially and in accordance with recognised principles. The usual approach is that costs follow the event and generally amount to 66 per cent of costs actually and reasonably incurred by a successful party (absent any factors that might otherwise warrant an increase or decrease from that starting point).

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[1] [2013] NZEmpC 33.
[2] [2012] NZERA Auckland 360.
[3] See *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305; *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438; *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.

[3] There is no dispute between the parties as to the general principles that apply. Where they part company is the application of those principles in the circumstances of this case.

[4] The defendant seeks an award of $122,378.14. Such an award would be well above the two-thirds approach that generally applies. It is said, on behalf of the defendant, that an increased award is justified because of the allegedly aggravating features of this litigation, most particularly the refusal to accept a Calderbank offer made on 6 August 2012. The plaintiff contends that costs ought to lie where they fall or, alternatively, ought to be significantly less than that sought. In summary, the plaintiff says that the defendant's actual costs were not reasonably incurred; the plaintiff succeeded in part of his claim and is entitled to a costs contribution on a successful interlocutory application; certain costs should not be included on a Calderbank basis; and that the defendant wrongly seeks indemnity costs from the date of the Calderbank offer when the plaintiff did not take any steps that warrant indemnity costs.

Discussion

[5] Three key points were raised on the plaintiff's challenge, namely whether the Court had jurisdiction to entertain the claim (determined at an interlocutory stage)[4]; whether Mr Mayne was an employee of the defendant company; and, if he was, whether he was entitled to ongoing medical insurance after retirement.

[6] I deal with the plaintiff's success on his interlocutory application relating to the jurisdictional issue below. I do not otherwise accept the submission that the fact that the plaintiff persuaded the Court that he was an employee ought to be a discounting factor in terms of the costs calculus. It was simply one of the factors that he had to establish in order to succeed on his claim. The Court of Appeal has emphasised that an issue by issue approach will not generally be adopted in assessing costs,[5] and I do not propose to do so in the circumstances of this case. While Mr Patterson, counsel for the defendant, suggests that the parties were put to

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[4] [2012] NZEmpC 60.
[5] *Elmsly* at [39].

unnecessary expense because the defendant did not concede that Mr Mayne was an employee, it was not an unreasonable position for the defendant to adopt in the circumstances and having regard to the evidence.

Actual costs

[7] The defendant's actual costs amount to $138,744.35 (including GST and disbursements). These costs comprise $136,373.57 (amounting to fees, including GST) and $2,370.78 (by way of disbursements, including GST). It is said that substantial discounts were applied to the charges made by the defendant's solicitors.

[8] I accept, based on the material before the Court, that the defendant incurred actual costs in relation to this proceeding of $138,744.35, including GST and disbursements.

Reasonableness

[9] The hearing occupied two days, although it was initially set down for three. On the face of it, the figure of over $138,000 for costs, in relation to a case that took two days to hear, is high. While I accept that a large number of documents had to be assembled and analysed, and witnesses briefed, a substantial component of those tasks would already have been incurred by way of preparation for the Authority's investigation. The fact that the case had already been investigated and argued in the Authority ought to have reduced the costs that would otherwise subsequently have been incurred in this Court.

[10] The claim was not overly complex. In *Kukumoa Trust v Blackmore*[6] it was observed that:[7]

> ... The Court does not pass judgment upon the reasonableness of the costs charged by lawyers to their clients. That depends on the lawyer's assessment of the degree of thoroughness required and sometimes expected by an overly apprehensive client. But that does not mean that the client's opponent, if unsuccessful, can be made to contribute to the luxurious service required by

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[6] AC 13/03, 19 February 2003.
[7] At [6].

> the client or the meticulous attending provided by the lawyer, if the case is not complex enough to warrant it. This case was not.

[11] The defendant was, of course, entitled to instruct counsel of its choosing. However, the degree of skill and expertise required in the circumstances of a particular case is relevant to the exercise of determining (objectively) reasonable costs for the purposes of assessing an appropriate award.

[12] The costs regime applied in the High Court Rules provides a useful tool in assessing reasonable costs in this jurisdiction. In this case, having regard to the steps taken in the proceedings by way of analogy (in so far as that is possible) to those provided in the High Court Rules, result in a figure of around $35,000.[8] I pause to note that the figures contained within the High Court Rules have already been subject to a one-third reduction.

[13] Standing back and considering the particular circumstances of this case, including the steps required, the nature of the proceeding, and the level of skill required, I assess reasonable costs as being around $50,000 - $60,000.

Costs in relation to interlocutory application

While the costs associated with the plaintiff's interlocutory application on the jurisdictional issue have been excluded from the defendant's claimed costs, Mr Patterson points out that the plaintiff succeeded on his application and that the Chief Judge reserved costs. He submits that the plaintiff is entitled to a contribution to the costs he incurred. I agree. The actual costs incurred by the plaintiff in relation to the opposed interlocutory application amounted to $4,345. I accept that those costs were reasonable. The plaintiff is entitled to $2,870 costs in his favour.

Adjustment for "writing down" of legal costs

[14] Mr Hannan submits that the fact that there was a "writing down" of legal costs may justify an increase from the usual two-thirds approach. No authority is

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[8] Excluding costs in relation to the plaintiff's interlocutory application, discussed below.

cited for this proposition although the issue was touched on by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*.[9]

[15] It cannot be correct, as a matter of principle, that an increase to the usual two-thirds approach will be warranted simply because there has been a writing down of fees charged on a particular file. It may be appropriate in some circumstances to add back in the costs associated with written off time in determining reasonable costs but where the costs actually charged to a party are unreasonably high, then adding in unbilled time simply compounds the issue. It cannot render reasonable what would otherwise be unreasonable.

Calderbank offer

[16] Calderbank offers are a discretionary factor for the Court in determining an appropriate costs award. The making of such an offer does not automatically result in a more favourable award of costs. An offeror has the burden of persuading the Court to exercise its costs discretion in his/her/its favour. Nevertheless, the Court of Appeal has made it clear that a "steely" approach in this jurisdiction is required to costs where reasonable settlement proposals have been rejected.[10]

[17] The Calderbank offer was made well before the hearing (by way of letter dated 6 August 2012). It was expressed to be for the sum of $20,000 (on a "cost savings" basis), together with an agreement to forego the $14,000 costs award made against the plaintiff in the Authority. The offer remained open for acceptance for four days.

[18] While Mr Patterson refers to the fact that the plaintiff had put forward two offers to settle which, if accepted, would have eliminated the need for a hearing, removed the risk of any alleged precedent effect, and "capped" the defendant's legal spend, those offers are not relevant to determining the reasonableness or otherwise of the plaintiff's refusal to accept the defendant's offer. In the circumstances, it was unreasonable of the plaintiff not to do so.

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[9] At [62].
[10] See, for example, *Health Waikato v Elmsly* at [53]; *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20].

[19] Mr Patterson opposes the imposition of indemnity costs. He submits that costs on an indemnity basis can only be sought after the expiry of any relevant Calderbank offer. I accept that this is so.[11] The point is, however, moot as I am not persuaded that it would be appropriate to order full costs against the plaintiff on the basis of the Calderbank offer. While ultimately Mr Mayne failed in his claim, he had been a member of the defendant's healthcare scheme for many years and was entitled to have the evidence tested in relation to historic events and the extent of any agreement entered into. I am however satisfied that an uplift in the contribution to costs that would otherwise be ordered from the date on which the offer closed for acceptance ought to be made. Mr Patterson provided a calculation differentiating between pre and post Calderbank offer costs by way of reference to the High Court Rules and allowing for an additional 50% contribution to costs for the period following the date on which the offer closed for acceptance. I am satisfied that an application of such an approach results in a costs award that is just in all of the circumstances.

[20] The plaintiff is to pay the defendant the sum of $45,000 by way of contribution to its costs. The plaintiff is entitled to $2,870 on his successful interlocutory application. That leads to a final figure in favour of the defendant of $42,130.

Disbursements

[21] The defendant seeks reimbursement of its disbursements totalling $2,370.78. The plaintiff does not take issue with the disbursements sought and they are accordingly ordered.

Summary

[22] The plaintiff is ordered to pay the defendant the sum of $45,000 for costs in the Court, together with $2,370.78 for disbursements. The defendant is ordered to

[11] See, for example, *Prins v Tirohanga Group Ltd (formerly Tirohanga Rural Estates Ltd)* AC 27/07, 16 May 2007.

pay the plaintiff $2,870 by way of costs on his interlocutory application.

Christina Inglis
Judge

Judgment signed at 11 am on 9 July 2013