

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2013] NZEmpC 128  
ARC 54/12**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN BRUCE TAIAPA  
Plaintiff

AND TE RUNANGA O TURANGANUI A  
KIWA TRADING AS TURANGA  
ARARAU PRIVATE TRAINING  
ESTABLISHMENT  
Defendant

Hearing: By memoranda of submissions filed on 16 May and 27 June  
2013

Appearances: Gregory Bennett, advocate for plaintiff  
Elizabeth Inger, counsel for defendant

Judgment: 10 July 2013

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**COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN**

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[1] The successful defendant seeks a contribution of \$15,458.17 to its legal costs of \$20,366.50 (excluding GST) and disbursements of \$708.70 (also excluding GST).

[2] The defendant was also successful in the Employment Relations Authority<sup>1</sup> resulting in a costs award<sup>2</sup> in its favour of \$4,650 which, despite requests, has not been paid to it, so that the defendant has now commenced proceedings for a compliance order in that forum.

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<sup>1</sup> [2012] NZERA Auckland 252.

<sup>2</sup> [2012] NZERA Auckland 289.

[3] The defendant has both established that its costs of legal representation on the challenge were reasonable and has provided proper proof of these to the Court.

[4] The case occupied two days in court in Gisborne and, as already noted, the plaintiff was completely unsuccessful.

[5] The defendant refers to the appropriateness of a 10 per cent uplift in the contribution to its costs to reflect two new aspects of the case raised by Mr Taiapa in the Employment Court, his reliance on the New Zealand Bill of Rights Act 1990 and his arguments that the defendant's conduct contravened traditional Maori healing principles. I do not, however, consider that these were such novel or significant elements of the case that they warrant an uplift. They were able to be dealt with effectively at the hearing and would not have added much, if anything, to the defendant's costs. The defendant has conceded as much by noting its claim to, but not relying on, a 10 per cent uplift.

[6] In these circumstances the defendant's claim is to 66 per cent of its actual and reasonable costs which would, together with the inclusion of GST, amount to \$15,458.17.

[7] In addition, to reflect the difficulties being experienced by the defendant in recovering costs from the Authority hearing, it asks that the Court award interest under cl 14 of Schedule 3 to the Employment Relations Act 2000 attaching to that sum of \$15,458.17.

[8] I am not aware of any case in which the Court has been asked to consider the claim for interest on costs or one in which it has been argued that cl 14 extends to a costs award. On the words of the clause, it is arguable that the Court can award interest on costs. A costs award under cl 19 may arguably amount to a part of "any proceedings for the recovery of any money". I am inclined, however, to think that interest under cl 14 is able to awarded where a monetary award is made in proceedings for the recovery of that monetary award. That was not, however, the nature of these proceedings. Mr Taiapa's claim was to unjustified dismissal and the

monetary elements of it were not for the recovery of any sum of money from the plaintiff but, rather, for compensation for lost remuneration and otherwise.

[9] Other factors said to be in favour of an award of costs are that, on some blog sites, cruel statements about one of the defendant's witnesses were made after judgment and that Mr Taiapa participated in a television programme about his case. Any element of compensation for the consequences of these incidents, however, is not a matter for consideration by the Court, deciding whether, and to what extent, Mr Taiapa should contribute to his former employer's legal costs.

[10] The defendant says that local authority property records show that the plaintiff is the owner of a piece of land in Gisborne which the defendant believes is freehold.

[11] The defendant relies on the recent judgment in *O'Hagan v Waitomo Adventures Ltd*<sup>3</sup> where this was said:

The fundamental principle of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel. I consider that care needs to be taken not to over-extend the reach of a "hardship" approach. It runs the risk of distorting generally accepted principles of costs and placing an unnecessary burden on the opposing party of shouldering the costs of defending an unsuccessful claim. It may encourage claims that lack merit but which are pursued on a nothing-to-lose basis. ...

[12] In *O'Hagan* the Judge acknowledged,<sup>4</sup> citing the costs judgment in *Merchant v Chief Executive of the Department of Corrections*:<sup>5</sup>

... the Employment Court may discount costs if payment would cause undue financial hardship ... it has been repeatedly emphasised that any such claim must be supported by acceptable evidence. The information required includes details of the party's assets and liabilities and income and expenditure.

[13] I decline to add into this Court's costs award the Authority's award referred to earlier in this judgment. It is the subject of separate recovery proceedings and is not a part of the costs of representation of the defendant in this Court.

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<sup>3</sup> [2013] NZEmpC 58 at [34].

<sup>4</sup> At [37].

<sup>5</sup> [2009] ERNZ 108 at [32].

[14] I also decline to award interest on any order that I make as to costs in this Court.

[15] The advocate for Mr Taiapa accepts that the usual starting point for an award of costs in the Employment Court is 66 per cent of those actually and reasonably incurred although this may be adjusted upwards or downwards. The submission is that there should be a downwards adjustment in this case for a number of reasons said in written submissions to include the following:

- Mr Taiapa suffered a serious heart attack shortly after being dismissed and, even now, remains on a social welfare benefit because he is unable to return to work.
- Mr Taiapa is said to reside in rented accommodation although owning a house jointly with his wife. This house is occupied by his daughter and six grandchildren who do not pay rent so that the house is effectively his daughter's.
- Mr Taiapa and his wife have two high school age children whom they support and his financial and social circumstances are very straitened.
- Even if Mr Taiapa might be able to borrow money secured against his house to pay costs, he will be unlikely to be able to afford the repayments, at least without affecting adversely those others whom he supports.

[16] Mr Taiapa's advocate is critical of the defendant's use of counsel outside Gisborne (thereby incurring accommodation and travel costs).

[17] Mr Taiapa offers to pay \$10 per week towards costs and says that any award should be "nominal". To pay what would be, all other things being equal, a reasonable contribution to costs reasonably incurred (\$15,000) but at the rate of \$10 per week would, even absent any interest, not see the debt repaid for about 30 years.

Such an arrangement would be unrealistic from a number of points of view. So, too, would the defendant's pursuit of Mr Taiapa into bankruptcy.

[18] Although the plaintiff is criticised for a lack, or at least an insufficiency, of evidence supporting his grounds for reducing a costs award, there was unchallenged evidence from Mr Taiapa of at least some of these at the hearing. He gave evidence that shortly after his dismissal, he suffered from a heart attack and has not been able to work since then, at least I assume in the same way that he did previously.

[19] Mr Taiapa was diagnosed with clinical depression after his dismissal although this appears to have been attributable to what were described as "family issues" and not simply to the fact of his dismissal. There was, likewise, evidence of his heart attack and subsequent surgery and his inability to find work as a result of the effects of that. I do not have any reason to doubt the correctness of this evidence even although, as has been pointed out, it has not been corroborated.

[20] Although there is less than satisfactory evidence about the home in which Mr Taiapa has an interest and, in some respects, a complete absence of crucial evidence (for example the extent of his equity in this property), I think it is safe to assume from the evidence and the undisputed submissions that although he has no real income to speak of, Mr Taiapa does have an interest in the property which would provide security for a relatively modest sum that he might be directed to pay in costs.

[21] I note, also, that the Employment Relations Authority directed the parties to discuss questions of costs with a mediator although that does not seem to have resolved the issue in that forum.

[22] Although I would not minimise the potential difficulties of such a scheme, no thought appears to have been given by the parties to an alternative agreed means of Mr Taiapa compensating the defendant for its costs other than by the payment of a single lump sum of money or, unrealistically, very modest regular payments such as Mr Taiapa has proposed.

[23] There may or may not be valuable services that Mr Taiapa can provide to the defendant at no cost to it which, in turn, would represent a saving of expenditure by it. That would be not unlike arrangements that are sometimes made by parents of children unable to afford their schools' fees or, indeed, like the arrangements for volunteer community work that act as a form of reparation in other courts. The Employment Court has no power to direct such arrangements but that would not stop the parties agreeing to make them and to postpone the payment of an order for costs or any part of it on condition that such arrangements were fulfilled.

[24] This case illustrates the unfortunate and difficult circumstances of any such parties. A justified dismissal has at least contributed to the impecuniosity or at least the significant difficulties that the former employee faces in paying an award of costs. The successful former employer has incurred reasonable costs and there is otherwise no reason to doubt that it is entitled to a reasonable contribution to those costs. Making an award on the usual basis will, however, be unlikely to see the former employer paid in full and within a reasonable time. If the former employer enforces the award, the bankruptcy of the former employee may ensue. The former employer may simply elect not to pursue the award, in which case it will remain substantially out of pocket.

[25] For these reasons I propose to take an unusual course but one in which I invite the parties to participate to try to avoid those stark outcomes that I have just outlined.

[26] I will make an award of costs in favour of the defendant on the basis that the plaintiff will have access to the funds to meet this award. It will not, however, be payable immediately but, rather, no earlier than a set future date. In the meantime I will direct the parties to further mediation to discuss, in an attempt to resolve in good faith, alternative ways in which the Court's costs order may be able to be met by Mr Taiapa. I invite the parties, their representatives, and the mediator to think laterally about ways in which this can be done and encourage them to reach a solution which recompenses the defendant for some of the money it has expended on its successful defence of these proceedings.

[27] The process cannot, however, be open-ended and if no such settlement is reached within the period of three calendar months from the date of this judgment, then the defendant's entitlement to costs will crystallise and the defendant will then have available to it the usual means of enforcement.

[28] The award of costs payable by the plaintiff to the defendant on the conditions outlined above is \$12,315, being \$11,500 (including GST) towards legal costs and \$815 (including GST) for disbursements.

GL Colgan  
Chief Judge

Judgment signed at 8.30 am on Wednesday 10 July 2013