

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2013] NZEmpC 205  
ARC 25/13**

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

AND IN THE MATTER    of an application for costs

BETWEEN                DANNY BELSHAM  
Plaintiff

AND                        PORTS OF AUCKLAND LIMITED  
Defendant

Hearing:                By submissions filed by the defendant on 25 October and by the  
plaintiff filed on 8 November 2013

Appearances:         Simon Mitchell, counsel for plaintiff  
Richard McIlraith and Kylie Dunn, counsel for defendant

Judgment:             18 November 2013

---

**COSTS JUDGMENT OF JUDGE M E PERKINS**

---

[1]      On 11 October 2013 Danny Belsham's challenge to the determination of the Employment Relations Authority was dismissed in a judgment of the Court.<sup>1</sup> The Court held that he had been justifiably dismissed from his employment with the defendant.

[2]      Costs were reserved and the parties were enabled to file submissions if no agreement could be reached. Submissions have now been filed.

[3]      The defendant seeks an order for costs equating to two thirds of actual and reasonable costs incurred in defending the challenge. It also seeks an order confirming the Authority's award of costs amounting to \$3,500.

---

<sup>1</sup> [2013] NZEmpC 190.

[4] The actual and reasonable costs incurred in the challenge are claimed by the defendant to be \$45,693.56. Tax invoices from the solicitors for the defendant are annexed to its submissions.

[5] Counsel for the defendant submitted that while the case was not overly complex it required careful preparation in view of the fact that Mr Belsham was seeking reinstatement. Counsel refer to the background of the acrimonious industrial climate prevailing at the Port at the time of the dismissal. It is submitted that experienced counsel needed to be involved but that, where appropriate, work was carried out at a more junior level.

[6] On the basis of Court of Appeal authority<sup>2</sup> it is submitted that costs should follow the event. It is further submitted that costs should equate to two thirds of the actual and reasonable costs incurred. Insofar as Mr Belsham's personal circumstances are concerned, counsel for the defendant understand he is financially secure.

[7] Mr Mitchell, counsel for Mr Belsham, submitted that the proper approach to costs in this case should be a scale type approach rather than the approach adopted in the authorities already cited. He submitted that this is more likely to achieve a fair result. He made reference to the level of expertise required in assessing reasonable costs. However, that submission is not taken beyond reference to the relevant authorities.

[8] While Mr Mitchell has referred to a number of authorities upon which he asked for a comparative basis to be made in this case, I am not sure that those authorities provide any substantial assistance. He has done an analysis of the High Court scale costs, which, by analogy might provide assistance in this case. That calculation on the basis of that scale results in a figure of \$23,084. However, he submitted that the scale for civil proceedings in the High Court may not be necessarily realistic for a challenge in this Court.

---

<sup>2</sup> *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

[9] In reliance upon *Walker v ProCare Health Ltd*<sup>3</sup> Mr Mitchell also referred to the fact that work required for the challenge would have involved work already carried out in the Authority's investigation.

[10] Insofar as Mr Belsham's personal circumstances are concerned, Mr Mitchell maintained that while Mr Belsham earned a reasonable income while employed at the Port and owned two properties, he does not have significant means. It was submitted that he is now of an age where he is not in a strong financial position having lost his employment.

[11] Mr Mitchell submitted that comparing the matter to the High Court scale, a daily rate of \$6,000 would be appropriate resulting in costs of approximately \$9,000 as being reasonable.

[12] Submissions that the Court should adopt a scale type approach rather than two thirds of actual and reasonable costs are often made in this Court. No scale of costs has ever been enacted for this Court. The Court's approach that generally two-thirds of actual and reasonable costs should apply is well established and has approval from binding authority in the Court of Appeal. Nevertheless, the matter is one for the Court to exercise its discretion having regard to the circumstances prevailing on a case by case basis. Matters such as the nature of the litigation, the level of seniority of counsel required, the extent of repetition of work already carried out in the Authority, the means of the party against whom costs are sought and so on are all relevant in exercising the discretion.

[13] While Mr Mitchell submitted that a scale approach should be adopted, in principle that would be a departure from established practice in this Court on the issue of costs. Nevertheless, analysing the High Court scale by analogy does provide some assistance in deciding what are reasonable costs in the circumstances. The rates in the High Court scales are regularly reviewed and updated. It needs to be remembered, however, that the daily rates considered reasonable in the High Court scales are then discounted by one third.

---

<sup>3</sup> [2012] NZEmpC 186.

[14] Applying the calculation made by Mr Mitchell arriving at a figure of \$23,084 would mean that the full costs considered reasonable if one were to apply the High Court scale by analogy would be in the vicinity of \$35,000. This is still substantially less than the sum claimed by counsel for the defendant.

[15] In this case, costs should follow the event. Mr Belsham is in a position to pay a reasonable contribution towards the defendant's costs. This is not an appropriate case to depart from the principles generally applying in this Court and simply adopt a scale type approach. It would be difficult to do so in any event in view of the fact that there is no such scale upon which the Court could rely. I accept Mr Mitchell's submission that in considering costs on the challenge the Court should be cognisant that work carried out in respect of preparation of a bundle of documents and briefs of evidence for the Authority should reduce costs incurred in respect of the challenge. However, the work specified in Mr McIlraith's and Ms Dunn's submissions would in the main have been necessary and justify substantial reimbursement. Making allowance for those factors, which are required to be taken into account in exercising the discretion, I consider an appropriate level of actual and reasonable fees would be \$40,000. Two thirds of that amount would be approximately \$26,000. That is not too far apart from the analysis Mr Mitchell carried out by analogy with the High Court scales.

[16] Accordingly, Mr Belsham is ordered to make a contribution towards the defendant's costs of \$26,000. He is also ordered to pay the costs awarded by the Authority for \$3,500, which become part of this judgment.

M E Perkins  
Judge

Judgment signed at 2.15 pm on Monday 18 November 2013