IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 237
ARC 38/13

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	AIR NEW ZEALAND LIMITED Plaintiff
AND	GRANT KERR Defendant

Hearing:	(on the papers by way of submissions filed on 4 October, 1 November and 10 December 2013)
Counsel:	Jennifer Mills and Christie Hall, counsel for the plaintiff Peter Chemis, counsel for the defendant
Judgment:	13 December 2013

COSTS JUDGMENT OF JUDGE A D FORD

Introduction

[1] In my substantive judgment dated 16 August 2013,[1] I found in favour of the defendant, Mr Grant Kerr, and awarded him costs in an amount which, perhaps over-optimistically, I anticipated that the parties might have been able to reach agreement upon. Agreement did not prove possible, and the Court has now received comprehensive submissions from both parties on the issue. The invoices produced showed that Mr Kerr's actual costs, GST and disbursements totalled $237,482.64.

[2] In the substantive proceeding Air New Zealand Limited (Air New Zealand) had sought an injunction against its former employee, Mr Kerr, enforcing a post-employment six-month non-competition restraint of trade clause contained in

[1] [2013] NZEmpC 153.

his employment agreement. It filed proceedings with the Employment Relations Authority (the Authority) on 20 May 2013 along with an application for urgency. On 4 June 2013, the defendant made an application to the Authority for removal of the matter to this Court on the grounds that one or more important questions of law were likely to arise. The principal question of law was said to require an assessment of the extent (if any) to which a period of garden leave should be taken into account when assessing the reasonableness of a post-employment restraint of trade clause.

[3] The application for removal (which was opposed by the plaintiff) was granted by the Authority under urgency.[2] The plaintiff then made an application to this Court pursuant to s 178(5) of the Employment Relations Act 2000 (the Act) alleging that the Authority had removed the proceeding improperly. Chief Judge Colgan dealt with that application on an urgency basis and dismissed the plaintiff's application awarding costs to the defendant.[3] The hearing was allocated a firm fixture for 31 July and 1 August 2013.

[4] In my substantive judgment, I noted that several other interlocutory issues then arose in the period leading up to the hearing, principally in relation to disclosure and the handling of confidential documents. Interlocutory judgments were issued on 25 June 2013[4] and 9 July 2013.[5] On the eve of the hearing, another issue arose in relation to disclosure which was dealt with in a further interlocutory judgment dated 29 July 2013[6]. All of these interlocutory hearings were dealt with under urgency and the Court appreciated the complete cooperation it received from counsel for both parties throughout. Inevitably, however, they also involved significant legal costs. It was a hard-fought case throughout; no quarter was given and both parties were well represented.

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[2] [2013] NZERA Auckland 241.
[3] [2013] NZEmpC 114.
[4] [2013] NZEmpC 116.
[5] [2013] NZEmpC 126.
[6] [2013] NZEmpC 142.

Legal principles

[5] Clause 19(1) of sch 3 to the Act confers on the Court a broad discretionary power to award costs. It provides that the Court "may order any party to pay to any other party such costs and expenses (including expenses of witness) as the court thinks reasonable."

[6] Regulation 68(1) of the Employment Court Regulations 2000 then provides:

> **68 Discretion as to costs**
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> (1) In exercising the court's discretion under the Act to make orders as to costs, the court may have regard to any conduct of the parties tending to increase or contain costs, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.

[7] The established principles, which have invariably been applied by this Court in relation to costs awards in recent years, are those confirmed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*;[7] *Binnie v Pacific Health Ltd*[8] and *Health Waikato Ltd v Elmsly*.[9] The usual approach is to determine whether the costs actually incurred by the successful party were reasonably incurred. If the Court is unable to reach that conclusion then it must make its own assessment of what, in all the circumstances, would have been reasonable legal costs in order to conduct the case for the successful party. Either way, once an assessment has been made of what the reasonable legal costs would have amounted to the Court must decide, after an appraisal of all relevant factors, at what level it is reasonable for the unsuccessful party to contribute towards those costs. The figure of 66 per cent of the reasonably incurred costs is generally regarded as an appropriate starting point and that figure may then be adjusted upward or downward, if necessary, depending upon relevant considerations.

[8] One of the submissions made by Mr Chemis, counsel for the defendant, was:

> 19. If Air New Zealand were to disclose its costs, they would undoubtedly be significantly in excess of Mr Kerr's costs. Counsel invites Air

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[7] [2001] ERNZ 305 (CA).
[8] [2002] 1 ERNZ 438 (CA).
[9] [2004] 1 ERNZ 172 (CA).

> New Zealand to disclose its costs to enable the Court to obtain perspective.

This challenge was not taken up, but in all events, such disclosure would not be determinative of the case. The Court is still required to make an objective assessment of what, in all the circumstances of the case, would amount to the successful party's reasonable legal costs.

The defendant's costs claim

[9] The defendant's total costs amounted to $237,482.64, made up of fees $197,610.50, disbursements $8,896.12 and GST, $30,976.01. A breakdown of the recorded time making up the fees has been provided. The bulk of the attendances were attributable to Mr Chemis, whose contribution is recorded as 301.4 hours at an hourly rate, as a partner, of $500, and Ms Howes, a law clerk, whose time is recorded as 191.8 hours at an hourly rate of $180. The recorded time breakdown also shows that another partner, Mr Kynaston, spent 17.3 hours on the case at an hourly rate of $625. There were some additional minor attendances by other staff totalling 6.2 hours at an hourly rate of $254. Total recorded time on the case is shown at 516.70 hours.

[10] The fees attributable to the different parts of the proceeding have not been broken down but, doing the best that I can from the invoices and other information provided, it would seem that they can be roughly apportioned as follows:

(i) Pre-proceedings costs

The plaintiff commenced its proceedings in the Authority on 20 May 2013. The plaintiff claims that prior to that date the defendant had incurred costs amounting to $14,291. That figure may well be correct. I would accept that the figure was in excess of $12,000. The attendances appeared to relate principally to examining the employment agreement in question and assisting Mr Kerr in various correspondences with Air New Zealand and Air New Zealand's solicitors. The plaintiff also claims that prior to the defendant filing its statement of reply in the Authority, the defendant had already

incurred a total of $42,431.46 in fees and disbursements. In addition to the attendances referred to, that total amount involved a mediation and preparation of the application for removal of the matter to the Court. Again, from a perusal of the invoices, I would accept that the figure of $42,431.46 is relatively accurate. The plaintiff submits that those preliminary costs "or at least a significant portion of them, ought not to be recoverable." No specific reasons are stated for this proposition but presumably the point being made is that the costs are "pre-proceeding costs."

(ii) Interlocutory matters and preparation

By a process of elimination, it would appear that between the time of the filing of his statement of reply and the commencement of the hearing, the defendant incurred additional costs amounting to $118,569.98. That sum represents the balance between the total of the invoices charged up until the commencement of the hearing, namely $161,001.44, less the $42,431.46 incurred in pre-proceedings costs. As noted in [4] above and in my substantive judgment, the interlocutory matters would have included attendances in connection with the application for removal from the Authority to the Court and the various interlocutory application relating principally to disclosure and the handling of confidential documents. It would also include the additional last-minute interlocutory application referred to in [4] above. All these interlocutory matters were dealt with on an urgency basis.

(iii) The hearing

The invoice in respect of the four-day substantive hearing and the preparation of closing submissions totalled $41,698.03.

[11] Mr Chemis submitted that it would be "fair and reasonable in all the circumstances" to apply what he referred to as a "blended hourly rate" figure in order to ascertain the appropriate legal costs. He suggested three possible approaches. First, taking a blended hourly rate of $350 which, in respect of the recorded time of

516.70 hours, would result in a total of $181,000. Secondly, counsel suggested a blended hourly rate figure of $325 which would result in a total of $168,000. The third approach suggested by Mr Chemis was to fix each partner's hourly rate figure at $400 and allow the hourly rates for staff members' to remain the same (i.e. $180 and $254). The resulting figure under this option would be $164,000. In each case the defendant also claimed GST and disbursements.

[12] Mr Chemis submitted that in terms of the terminology associated with the High Court Rules, the proceedings were "more than of 'average complexity' and that they required a practitioner of more than 'average skill and experience'".

[13] Mr Chemis accepted the 66 per cent reduction figure referred to in [7] above as the appropriate starting point for determining the issue of contribution but he submitted that there should then be an uplift in costs to allow for Calderbank offers made by the defendant; unmeritorious breach of fidelity claims pursued by the plaintiff which Mr Chemis described as "superficial and weak on their face", and an attack made by the plaintiff on "Mr Kerr's honesty and integrity". The defendant also sought a contribution towards mediation costs.

The plaintiff's response

[14] The plaintiff submitted that the award of costs should not exceed $30,000. It described the overall amount claimed by the defendant as "an exceptionally high amount given that the matter involved the assessment of the enforceability of a contractual restrictive covenant and a breach of duty of fidelity claim." Ms Mills, counsel for the plaintiff, noted that in *Alton-Lee*, which was a case involving an 18-day hearing, the Court of Appeal described the eventual costs award of $181,396.71 as being right at the top of the acceptable range. Ms Mills also made reference to the more recent decision of this Court in *C v Air Nelson Ltd*[10] which she said "was a more complex case" involving a four-day hearing. In that case the fees of senior counsel for the plaintiff (a Queen's Counsel) amounted to $60,322.50. The Court awarded costs of $40,215 plus disbursements. Other decisions, however, while providing some guidance, can never be determinative.

[10] [2011] NZEmpC 52.

[15] Contrary to Mr Chemis' submissions, Ms Mills submitted that in terms of the terminology associated with the High Court Rules, this case was one of "average complexity requiring counsel of skill and experience considered average in the [Employment Court]." She also submitted that the case could reasonably have been handled by one counsel and that the plaintiff "should not have to meet the cost of the defendant's choice of being represented by two counsel." Ms Mills also submitted that there were aspects of the defendant's costs claim which may not have been reasonably incurred for cost recovery purposes.

[16] Ms Mills submitted that, in so far as the case related to the question of whether the restrictive covenant was enforceable in light of the garden leave provision, it was a "test case" in terms of the decisions of this Court in *New Zealand Labourers etc IUOW v Fletcher Challenge Ltd and Firth Industries Ltd*;[11] *Doran v Crest Commercial Cleaning Ltd*[12] and *Service & Food Workers Union v The Vice Chancellor of the University of Otago*.[13] Counsel submitted that as a test case, there should be a reduction in the level of costs awarded.

[17] In respect of the matters Mr Chemis claimed justified an uplift in costs, Ms Mills made the following submissions. First, in relation to Calderbank offers, counsel submitted that they were not "genuine" Calderbank offers but proposals to allow the plaintiff to "walk away" from the proceedings with costs to lie where they fall and as such they did not justify a costs uplift. Reference was made in this regard to the comments made by this Court in *Foai v Air New Zealand Ltd.*[14] In relation to the allegations made in respect of the breach of duty of fidelity claim, Ms Mills submitted that it was raised as a matter of good faith and should not result in a costs uplift. Likewise counsel for the plaintiff stressed that the plaintiff had not challenged Mr Kerr's honesty and integrity but it was bound to explore "concerns" it had over several aspects of the way in which the defendant had conducted himself during his notice period.

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[11] [1990] 1 NZILR 557 at 570.
[12] [2012] NZEmpC 200.
[13] [2003] 2 ERNZ 707.
[14] [2013] NZEmpC 50 at [19].

[18] Ms Mills noted that an amount of $6,000 plus GST had been claimed by the defendant in respect of attendance at mediation but she submitted, citing the decisions of this Court in *Naturex Ltd v Rogers*[15] and *RHB Chartered Accountants Ltd v Rawcliffe*,[16] that as the parties had voluntarily agreed to attend mediation without being directed to do so by the Authority, costs incurred ought not to be taken into account.

[19] Ms Mills stressed that a number of issues involved in the litigation had been decided in the plaintiff's favour; in particular the plaintiff's submission that its restrictive covenants were not directed at preventing competition.

[20] In reference to the High Court Rules, Ms Mills noted that the rules did not prescribe specific hourly rates but are based on a daily rate and that the amount payable in respect of any particular aspect of a proceeding is to be assessed by reference to the appropriate prescribed daily rate. Counsel submitted that on the basis of a time allocation of 26.8 days at a daily rate of $1,990, an appropriate costs award would be "in the region of $53,332."

Discussion

[21] I agree with Ms Mills that in all the circumstances of this case, the overall legal costs incurred and claimed by the defendant are unreasonable. Parties to litigation are perfectly entitled to instruct counsel of their choice and they can elect to instruct more than one counsel if they so wish. I can fully understand Mr Kerr's desire to be advised and represented by the firm and counsel he elected to instruct in this case. The litigation was critically important to him and I have no doubt that he made a conscious decision to retain the best representation that he could. For their part, his representatives may well have deliberately adopted what has sometimes been referred to as a "Rolls-Royce" approach to the case. Again, that conduct is understandable and cannot be criticised. However, as was stated by this Court in *Kaipara v Carter Holt Harvey Ltd*,[17] for the purposes of determining a costs award the assessment of reasonable legal costs is not an exercise in second-guessing the

[15] [2011] NZEmpC 9.
[16] [2012] NZEmpC 31.
[17] [2012] NZEmpC 92 at [39].

reasonableness or otherwise of the actual legal costs incurred. Rather, the Court must make its own assessment of what would have been reasonable legal costs to conduct the case for that party in all the circumstances.

[22] Although the case was undoubtedly of significant importance to Mr Kerr, in fact to both parties, it was not one which in my view, adopting the language of the High Court Rules, was of such complexity or significance that it required counsel to have special skills and experience. The facts were largely uncontroversial and the matters that were in issue were resolved through an assessment of credibility rather than by concessions obtained under cross-examination. All the interlocutory matters were dealt with on the papers without the need for a formal hearing. In the end, the principal matter raised in the pleadings, namely the important question of law referred to in [2] above was, unsurprisingly, decided on the law. Largely for the reasons mentioned by Mr Chemis in his submissions, however, I do not accept that this was a test case warranting a reduction in costs.

[23] As noted in [20] above, counsel for the plaintiff submitted that the appropriate costs award for a Category 2B proceeding based on the High Court Rules would have been "in the region of $53,332", calculated on the basis of 26.8 days at a daily rate of $1,990. No explanation was provided as to how the 26.8 days figure was determined but, in my view, it is a reasonably accurate assessment.

[24] Mr Chemis submitted that the proceeding should be regarded as a Category 3C proceeding with the steps taken amounting to 69.45 days or, in the alternative, Category 2C. He calculated the resulting respective costs as $204,183 and $138,205.50.

[25] For the reasons stated above, however, I do not accept Mr Chemis' proposition. In my view, the proceeding can properly be categorised as a Category 2B proceeding. The daily rates under the High Court Rules approximates 66 per cent of the successful party's deemed reasonable costs. I am prepared to allow an additional amount to cover certain steps (other than mediation) which Mr Chemis submitted could not conveniently be categorised in terms of sch A of the High Court Rules.

[26] Using the High Court Rules as a reliable guide and rounding up the figures, I consider that, in all the circumstances, the defendant's reasonable legal costs can appropriately be fixed at $85,000. After allowing the standard one third reduction, it leaves a costs figure of $57,000.

[27] I turn now to the issue of whether there needs to be any additional adjustment upwards or downwards of that costs figure on account of other contingencies. My conclusion is that no further adjustment is necessary. I refer briefly, however, to counsel's submissions on this aspect of the case.

[28] One of the points made by Mr Chemis was that on the first day of the hearing, a significant amount of Court time was lost while counsel for the plaintiff, with leave, perused confidential documentation made available at the last moment which they suspected might have been helpful to their case or, as Mr Chemis put it, "which might have cast Mr Kerr in poor light." Mr Chemis submitted that the exercise turned out to be a waste of time. There was substance in that submission but it was offset, in my view, by time subsequently spent on the final day of the hearing in dealing with a significant legal issue that had been raised by the defendant which, in the event, was determined in the plaintiff's favour.

[29] The points Mr Chemis made about Air New Zealand's attack on Mr Kerr's honesty and integrity and his alleged breach of the duty of fidelity were dealt with in my substantive judgment. The allegations were firmly rejected. It is not necessary or appropriate, in my view, for either matter to feature in the costs assessment. As Ms Mills submitted, relying on *New Zealand Airline Pilots' Association IUOW v Registrar of Unions*,[18] the purpose of a costs award is not to punish the unsuccessful party.

[30] Also, largely for the reasons advanced by Ms Mills, I do not consider it appropriate to allow any of the defendant's claims for mediation costs.

[31] There is substance in the points made by Ms Mills in relation to the "walk-away" Calderbank offers. A Calderbank offer does not automatically result in the

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[18] [1989] 2 NZILR 550.

Court making a costs order favourable to the offeror. Each case will turn on its own facts. Given the limited nature of what was actually being offered through the defendant's walk-away letters and the significance to the plaintiff, both in terms of this case and its many other ongoing employment arrangements, of the question of law identified, I am not satisfied that the plaintiff acted unreasonably in rejecting the offer. For that reason, I decline to make any uplift in the award of costs on that account.

[32] The defendant claims disbursements totalling $8,896.12. The bulk of this amount, namely, $4,940.26 is made up of what is referred to in the invoices as "Service charge". In explanation, counsel advised:

> Service charge for general office services. This fee, which is set as a small percentage (1.5%) of the charge for our legal services, covers costs such as routine photocopying, tolls, faxes, postage and couriers.

[33] Ms Mills correctly pointed out that the percentage figure appears to be 2.5 per cent rather than 1.5 per cent. In any event, as this Court stated in *New Zealand Professional Firefighters Union v The New Zealand Fire Service Commission*,[19] normal office overheads such as telephone, fax and photocopying costs are not recoverable as disbursements. Such claims should be limited to disbursements in the true sense of the term involving the payment of money to a third party. I, therefore, disallow that part of the claim for disbursements.

[34] The remaining disbursements relate principally to travel and accommodation costs resulting from the defendant's counsel being based in Wellington and the hearing having taken place in Auckland. Counsel for the plaintiff submitted that none of these expenses should be recoverable as the defendant knew from an early stage in the proceedings that the case would be heard in Auckland. I reject that submission. At a late stage in the proceedings, the Registrar was having difficulty arranging a courtroom in Auckland for the fixture. A courtroom was available in Wellington, however. Although the defendant was happy to accept Wellington as a venue, this was not acceptable to the plaintiff. The Court did not insist on transferring the venue but, if such an order had been made, the plaintiff's counsel

[19] EmpC Wellington, WC9A/08.

would have been perfectly entitled to claim the travel expenses the defendant's counsel now seeks.

[35] I also accept the submission made by Mr Chemis that Mr Kerr lived in Nelson and initially Air New Zealand proposed mediation in Wellington. Mr Kerr was reasonably entitled to assume that any proceedings would be filed closest to where he resided and he consequently sought advice from Wellington counsel. In my view, the travel expenses claimed are reasonable.

[36] In relation to the claim for GST, it appears that there is some divergence in approach taken in the High Court and in this Court. The High Court, in *Burrows v Rental Space Ltd*,[20] held that costs between parties are GST-neutral, as the unsuccessful party making a contribution to costs is not paying for a service provided to it by the successful party. In *Entwisle v Dunedin City Council*,[21] this Court acknowledged the approach taken by the High Court in *Burrows*, but deferred to an earlier decision of Chief Judge Goddard in *Davidson v Christchurch City Council*[22] where it was considered that the Court, on the basis of its broad discretionary power to award costs, could have regard in a general way as to whether any GST that forms part of the actual costs incurred is recoverable. The Court in *Entwisle* concluded while, in that case, actual costs were to be assessed from a GST-neutral "starting point", such an approach should not be regarded as setting "an imperative course to inflexibly and consistently adopt in all future cases."[23]

[37] From a reading of *Entwisle*, it is not immediately apparent what circumstances would justify the inclusion or exclusion of GST in an assessment of actual and reasonably incurred costs. In my view, the overall clarity, consistency, and certainty of the approach adopted by the High Court in *Burrows* is to be preferred. Any mitigating circumstances which might have otherwise justified the inclusion of GST in an assessment of costs can still fall to be ameliorated by the Court through an uplift in its eventual award beyond the standard two-thirds starting point. I pause to note, however, that in the present case, even if I were to adopt the

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[20] (2001) 15 PRNZ 298 (HC) at 301.
[21] [2002] 2 ERNZ 33.
[22] [1995] 1 ERNZ 523.
[23] *Entwisle*, above n 21, at [64].

discretionary approach to GST previously taken by this Court, I would not be willing to depart from a GST-neutral assessment of actual and reasonably incurred costs.

Summary

[38] Rounded up, the total amount I award to the defendant on account of costs and disbursements is $60,000 made up of costs totalling $56,000 and disbursements of $4,000.

A D Ford
Judge

Judgment signed at 1.15 pm on 13 December 2013