

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 243
ARC 23/13**

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

AND IN THE MATTER of an application as to costs

BETWEEN JARROD HOOK
Plaintiff

AND STREAM GROUP (NZ) PTY LIMITED
Defendant

Hearing: By submissions filed by the defendant on 8 November 2013 and
by the plaintiff 9 December 2013

Appearances: Mr Bennett, advocate for plaintiff
Mr Harrison and Ms McWatt, counsel for defendant

Judgment: 16 December 2013

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] I gave my substantive judgment in this matter on 9 October 2013.¹ I directed that if the parties were unable to agree to costs they were to file memoranda according to a timetable. Counsel for the defendant filed a memorandum in accordance with the timetabling orders. Mr Bennett, advocate for the plaintiff, did not. He has however since filed submissions and counsel for the defendant has confirmed that they do not oppose the late filing.

[2] Clause 19(1) of sch 3 to the Employment Relations Act 2000 (the Act) confers a broad discretion as to costs. It provides that:

¹ [2013] NZEmpC 188.

The court in any proceedings may order any party to pay to any other party such costs and expenses ... as the court thinks reasonable.

...

[3] The discretion to award costs, while broad, is to be exercised in accordance with principle. The primary principle is that costs follow the event.² The usual starting point 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.³

[4] I am satisfied, based on the material before the Court, that the defendant has incurred actual legal costs relating to the challenge of \$13,360.

[5] The hearing occupied one full day. The costs associated with junior counsel's attendance at the hearing were not charged for, although it is apparent that she attended to a number of preliminary steps in the litigation. Having regard to the steps that were taken in responding to the challenge, the time consumed by each step, and the respective charge out rates that applied, I consider that total legal costs of \$13,360 were reasonable. Mr Bennett did not seek to contend otherwise. That leads me to a starting point of around \$8,800.00.

[6] Mr Harrison, counsel for the defendant, submits that there ought to be an uplift in costs having regard to the history of the proceedings. It is submitted that the defendant did not pursue costs in the Employment Relations Authority and was content for costs to lie where they fell in that forum, in the hope that this would enable the parties to "move on". It is said that the plaintiff was well aware that his challenge would involve considerable expense and inconvenience for the defendant as its key witnesses no longer worked for it and two of the three witnesses resided overseas. It is further submitted that the plaintiff's challenge was motivated by an apparent sense of disenchantment and resentment.

[7] I accept that additional costs were involved in liaising with witnesses and making the necessary arrangements for them to attend the hearing. I have already considered those costs in assessing whether the defendant's total legal costs were

² *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

³ *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

reasonable. The plaintiff was entitled to challenge the Authority's determination. This factor does not warrant an uplift in costs, and nor does the fact that the defendant elected not to seek costs in the Authority.

[8] Mr Bennett submits that the plaintiff is struggling financially and that he is unable to meet a full award of costs against him. While there is authority for the proposition that financial hardship may be taken into account in this jurisdiction in determining an award of costs, it is well established that where a claim of financial hardship is raised it must be supported by sufficient evidence.⁴ Mere assertions about undue hardship do not suffice. There is no evidence or other material before the Court to support the submission relating to the plaintiff's financial position and I accordingly put this factor to one side.

Disbursements

[9] The defendant seeks disbursements of \$1,844.71. The claimed disbursements relate to the costs associated with a video link to Australia, courier charges to Australia and costs incurred by a witness in having to make alternative arrangements to attend training that had been scheduled by her employer but which coincided with the date of hearing.

[10] A disbursement is defined in r 14.12(1)(a) 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.

[11] To qualify as a recoverable disbursement, the payment must be both necessary to the conduct of the proceeding and reasonable.

[12] Mr Bennett submitted that the expenses relating to courier charges to and from Australia (totalling \$74.60) ought to be excluded on the basis that the claim was taking costs issues to a "more pedantic level". That is not a basis for declining to allow a claim for disbursements. I accept that these claimed expenses were necessary, specific to the litigation and reasonable.

⁴ See, for example, *Gates v Air New Zealand Ltd* [2010] NZEmpC 26 at [22].

[13] No issue is taken with the claim relating to video link services (\$526.11). It is accordingly allowed.

[14] The defendant claims a further sum of \$1,244.00 by way of disbursements. This is said to relate to the travel, parking, meal and accommodation costs incurred by a witness (Ms Watts). It is submitted that Ms Watts' employer allowed her to appear as a witness at the hearing on the basis that she would attend the same training programme to be run in Christchurch at a later date. The claimed costs relate to the expenses associated with attending this training. Mr Bennett submits that these expenses cannot be regarded as reasonable as no indication has been provided as to whether any alternative dates in Auckland were available and because there is a lack of clarity as to whether the invoices relate to Ms Watts or some other person who is referred to in them. In this regard a close inspection of the documentation filed in support of the claim for disbursements reveals that the boarding pass is in the name of someone other than Ms Watts and expenses listed in the accommodation invoices includes costs apparently incurred by that person. Mr Bennett also points out that the expenses have been incurred by Ms Watts' employer, not Ms Watts herself.

[15] I am not prepared to allow the disbursements claimed in relation to Ms Watts' attendance at a later training session in Christchurch. I am not satisfied on the basis of the material before the Court that they were necessarily incurred, were reasonable in the circumstances, or properly fall within the scope of witness expenses. Any issues relating to Ms Watts' attendance to give evidence could have been dealt with in alternative ways, including by way of a witness summons. They were incurred by Ms Watts' employer, not Ms Watts herself as witness. In addition there is a lack of clarity as to which expenses relate to Ms Watts as opposed to someone else.

Conclusion

[16] The plaintiff is ordered to pay the defendant a contribution to its costs of

\$8,800.00, together with disbursements of \$600.71, comprising \$74.60 (courier charges) and \$526.11 (video link services).

Christina Inglis
Judge

Judgment signed at 4.30 pm on 16 December 2013