IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 58
ARC 1/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	BRENT O'HAGAN Plaintiff
AND	WAITOMO ADVENTURES LTD Defendant

Hearing: By memorandum dated 16 November, 19 December 2012 and 25 January and 14 March 2013

Counsel: David Hayes, counsel for plaintiff
Roger Clark, counsel for defendant

Judgment: 12 April 2013

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The plaintiff pursued an unsuccessful challenge against a determination of the Employment Relations Authority. The defendant counter-challenged in relation to various allowances, holiday pay, a bonus and salary increase. The counter-challenge succeeded. I invited the parties to agree to costs if possible. They have been unable to do so, and counsel have filed memoranda in relation to the issue.

[2] The defendant seeks costs in respect of the challenge and counter-challenge. It submits that the usual starting point, of 66 per cent of actual and reasonable costs, should be uplifted to reflect what it describes as the aggravating features of the litigation, and having regard to an offer to settle the proceedings in advance of the hearing.

[3] The plaintiff submits that a modest award of costs should be made, of around $2,000. The plaintiff contends that the actual costs said to have been incurred by the

defendant are unreasonably high and not adequately supported by the material that has been filed. It is further submitted that there are a number of factors which warrant a decrease in the quantum of any award in the defendant's favour.

General principles

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

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

[5] The discretion to award costs is to be exercised in accordance with principle. The primary principle is that costs follow the event.[1] The usual approach in this jurisdiction in ordinary cases is 66 percent of actual and reasonable costs. From that starting point, factors that justify either an increase or decrease are assessed.[2]

[6] In *Snowden v Radio New Zealand*[3] the Court of Appeal indicated that it will consider whether this "traditional means" of fixing costs should be maintained, in light of changes to the costs policy reflected in the High Court Rules and s 6 of the Interpretation Act 1999.[4] While leave to appeal was granted by the Court on this issue (on 25 November 2009), the appeal has yet to be heard and is unlikely to be for some time.

[7] The determination of costs should be predictable and expeditious. This goal can become illusive where parties disagree on what amounts to reasonable costs, as is not uncommon in this jurisdiction. I perceive some advantages in adopting the High Court approach to costs, including for the reasons referred to by Judge Ford in *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Steelfort Engineering Company Limited*.[5] There he observed that:

> [24] In conclusion, I feel compelled to express some concern over the fact that, when invited by the Court to reach agreement on costs, in what was a

[1] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
[2] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
[3] CA318/2009, [2009] NZCA 557.
[4] At [21], [22], and [25].
[5] NZEmpC 14.

> relatively straightforward challenge, two senior counsel, with considerable expertise in this jurisdiction, have been unable to do so. Instead they have ended up, in colloquial terms, being poles apart in relation to the costs exercise. From my observations, I suspect that this may not be an isolated case.
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> [25] Given then additional time involved in preparing costs submissions and the inevitable additional costs consequences for the litigant, it may be timely for this Court to heed the suggestion made by the Court of Appeal in *Elmsly* and consider adopting the High Court approach to costs.

[8] A scale approach provides parties with an identifiable yardstick against which to assess likely costs exposure if litigation proceeds, and can usefully inform settlement offers. And while litigation in this forum has some distinguishing characteristics, the Rules allow for flexibility where, for example, a step provided for in Sch 3 does not apply or cannot be applied by analogy.[6]

[9] However, as the matter was not raised before me I proceed on the usual basis, following the earlier judgment of the Court of Appeal in *Waikato Health v Elmsly.*[7] There the Court said that:

> While it would be open to the Employment Court, if it chose, to adopt the High Court approach to costs, it has not done so and it is, indeed, perfectly entitled to follow its existing practice, in terms of which costs actually and reasonably incurred are the relevant starting point.

Actual costs

[10] The defendant submits that it incurred actual costs associated with defending the plaintiff's challenge, and in pursuing its counter-challenge, of $42,899.00 (excl GST), together with disbursements of $38,878.96 (GST incl) by way of expert witness fees, and other disbursements of $590.81 (GST incl).

[11] The fees incurred by the defendant include the sum of $1,750.00 (excl GST) relating to attendance at a judicial settlement conference. The issue of costs in relation to judicial settlement conferences has only been directly considered once by this Court. In *Lee v Minor Developments Ltd*[8] Judge Shaw observed that:

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[6] HCR 14.5(1).
[7] At [51].
[8] AC 21/09, 24 April 2009.

> [16] In *Simpson v BB's New Zealand Ltd* the High Court agreed that a request for costs of a judicial settlement conference was novel. It noted that such conferences are not included in the schedule of costs in the High Court Rules and held that this was a deliberate policy to encourage parties to attend and participate in settlement conferences without being concerned about adverse consequences and costs.
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> [17] While there may be exceptional cases where it would be appropriate to award such costs I find that in the present case preparation for a judicial settlement conference and attending that conference does not form part of the actual and reasonable costs incurred for the purposes of quantifying an award of costs.

[12] The policy imperative identified by Judge Shaw in *Lee* may now apply with diluted force, as the Judicature (High Court Rules) Amendment Act 2008 has amended the costs schedule contained in Sch 3 of the Rules to include "preparation for and attendance at a pre-trial conference." In the more recent case of *Scandle v Far North District Council*[9] the High Court noted that the costs schedule permitted costs to be sought for attendance at a judicial settlement conference and made an order that the first defendant was entitled to costs for the day spent at the conference. Similarly, in *Roading & Asphalt Ltd v South Waikato District Council*[10] an order for costs for one and a half days' preparation for a judicial settlement conference was made.

[13] There are a number of competing and interlocking policy considerations at play in determining whether the costs associated with attending alternative dispute resolution, such as judicial settlement conferences and mediation, in this jurisdiction apply when assessing an appropriate contribution to costs. These were traversed in *RHB Chartered Accountants v Rawcliffe*[11] where it was observed (in relation to mediation costs) that:

> Whilst there are differing views about the competing public interest considerations and practical issues that arise in respect of mediation costs I do not consider that a blanket rule can or should be adopted. That is because costs are inherently discretionary and should be neither automatically awarded or withheld. Much will turn on the facts of the individual case.

[14] While there is room for argument that the costs of preparing for and attending a voluntary judicial settlement conference in the context of proceedings in this Court

[9] CIV-2008-488-203, 31 March 2011.
[10] [2012] NZHC 2243.
[11] [2012] NZEmpC 31.

are necessarily incidental to the proceedings, and may fall for consideration within the actual and reasonable costs rubric, the point was not the subject of submission by counsel (although invited to do so). In these circumstances I am not persuaded to depart from the approach previously followed in this Court, and I accordingly decline to award costs associated with the defendant's attendances at a judicial settlement conference. This leads to a figure of $41,149.00 actual costs incurred by the defendant.

[15] Mr Hayes, counsel for the plaintiff, focussed his submissions on whether the actual costs incurred by the defendant were reasonable in the circumstances. He submitted that they were not.

Reasonable costs

[16] The hearing took four days. The costs incurred by the defendant included those relating to consideration of the statement of claim and preparation of a statement of defence and counter-challenge, consideration of the plaintiff's evidence and drafting briefs of evidence in reply, instructing an expert witness and consideration of the experts' joint report, drafting submissions and preparation for, and appearances at the Court hearing.

[17] Mr Hayes made the point that counsel for the defendant had appeared in the Authority and submitted that the costs that might otherwise have been incurred by the defendant ought to have been significantly reduced. The reality is, however, that the scope of the hearing increased significantly, largely contributed to by the plaintiff's detailed focus on the defendant's accounting system and cash takings, by way of reference to numerous spread sheets that he had prepared, together with the expert evidence that was given in response to the issues that he raised.

[18] The plaintiff mounted a concerted challenge to the company director's honesty and integrity, and levelled allegations of deliberate financial mismanagement against him. While those allegations were not made out at the hearing, an additional application of resources was required to respond to them and the material produced by the plaintiff.

[19] Mr Hayes submitted that because the invoices were issued to the defendant by its barrister, rather than a solicitor, there was no binding obligation to pay them. That may technically be so but I accept, based on the material before the Court, that the defendant has incurred the costs claimed.

[20] Mr Hayes characterised the defence as "gold-plated" and "extravagant." I do not accept that that is an accurate description of the defendant's approach to the litigation. He also submitted that the Law Society should be invited to assess whether the invoices submitted for payment were fair and reasonable. It is the Court's task, in deciding an application for costs, to determine the actual costs incurred and whether they were reasonable in the circumstances.

[21] Standing back and considering each of the steps that the defendant was required to take to meet the challenge and to pursue its cross challenge, I am satisfied that actual costs of $41,149.00 were well within the range of reasonable costs.

Other factors

[22] Mr Clark submitted that there ought to be an increase in the costs awarded in his client's favour to reflect the way in which the plaintiff conducted the challenge. In particular, it is submitted that the plaintiff pursued a number of arguments that lacked merit and that he unreasonably rejected an offer to settle the proceedings.

Calderbank offer

[23] The defendant's offer to settle came early in the process. The offer was presented on the basis that the Employment Court proceedings would be withdrawn, without any issue as to costs; the payments awarded in the Authority would not be pursued by either party; and that the costs award made by the Authority would not be pursued by the defendant. While the offer was initially expressed to remain open for a short period of time, the timeframe for acceptance was later extended at the plaintiff's request. The plaintiff subsequently rejected the offer, and counter-offered to settle the proceedings on substantial terms.

[24] Essentially the defendant's Calderbank offer, made "without prejudice save as to costs", was that neither party would pursue their claim in the Employment Court and all matters would be at an end. Judge Ford recently had cause to consider such an offer, described as a "walk away" offer, in *Foai v Air New Zealand Ltd*.[12] As he pointed out, Calderbank offers are a discretionary factor for the Court in determining an appropriate costs award and, regardless of whether the offeror is the plaintiff or the defendant, the making of such an offer does not in itself 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.[13]

[25] The effect of a "walk away" Calderbank offer was considered by the Court of Appeal in *Hira Bhana & Co Ltd v PGG Wrightson Ltd*.[14] The Court rejected a contention that a "walk away" Calderbank offer was consistent with the overall purpose of a Calderbank offer, that being to limit a party's exposure to the potentially high cost of litigation. It held that:[15]

> ...where the nature of the offer made is simply a "walk away" proposition, made early in the proceedings, it cannot be the case that the mere fact that the party which rejected the offer subsequently loses means that party is required to pay indemnity costs or increased costs. If that were so, it would mean that the costs regime set out in rr 46-48G would be effectively bypassed in almost all cases where the defendant succeeds, because defendants would routinely make "walk away" offers of the kind made in this case, and then claim indemnity costs if they subsequently succeed at trial.

[26] The underlying policy was more recently considered by the High Court in *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council.*[16] There Kós J said that:[17]

> ... the reason the Courts take a conservative approach to imposing increased costs in the context of walk-away offers is that they effectively value the opponent's claim, the opponent's prospects of success, and their own litigation risk all at nil. As the plaintiffs put it in their submissions, it ranked the plaintiffs' chances of success "at zero percent". It will be a rare case

[12] [2013] NZEmpC 50.
[13] At [16]-[17].
[14] [2007] NZCA 342.
[15] At [50].
[16] CIV-2008-454-31, 22 December 2011. The costs judgment of the Court was recently, and unsuccessfully, appealed in *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2013] NZCA 79.
[17] At [17].

> where it is unreasonable for a plaintiff to take a more optimistic view of their own prospects than "zero percent".

[27] In the present case the defendant's offer came after the Authority had issued its determination,[18] dismissing the plaintiff's claim of constructive dismissal and awarding the defendant $17,995 by way of overpaid salary and other benefits. The plaintiff was awarded $9,585.60 for unpaid salary. The defendant also had the benefit of a costs award in its favour.[19] In these circumstances the offer of 12 July 2011 was made from a position of some strength, against the backdrop of a favourable substantive, and costs, determination of the Authority. It did not amount to a nil offer. It had a monetary value to the defendant, which it was willing to forego in order to avoid the proceedings in this Court. In this sense it amounted to a genuine compromise by the defendant.

[28] Was it unreasonable for the plaintiff to reject the offer at the time? Mr O'Hagan asserted that Mr Andreef, the company's director, had admitted financial mismanagement at a meeting with him. This gave rise to issues of credibility which were ultimately determined in Mr Andreef's favour. While it was not unreasonable for Mr O'Hagan to wish to have this issue of credibility tested at a hearing, there were broader matters at issue in the proceedings, including the basis on which Mr O'Hagan had made various payments to himself and other factors said to have supported his claim of constructive dismissal. In all of the circumstances, I do not consider that it was reasonable for Mr O'Hagan to reject the offer of settlement that was made. I am satisfied that an uplift in costs is appropriate.

[29] Conversely, the plaintiff submits that the defendant unreasonably rejected an offer of settlement of 23 December 2010, and that this should be relevant to an assessment of costs. In particular it is submitted that the defendant's costs exceed the amount that it would have been obliged to pay, had it accepted the offer. Neither the offer, nor any details relating to it or the defendant's response, are before the Court. Accordingly I disregard it.

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[18] AA512/10, 15 December 2010.
[19] [2011] NZERA Auckland 111.

Conduct of the litigation

[30] Reputational issues came into sharp focus in these proceedings, for both parties. The plaintiff made a number of serious allegations of financial mismanagement against Mr Andreef. None of these allegations were made out at hearing. While, as counsel for the plaintiff points out, costs are not to be awarded on a punitive basis, the Court may take such matters into account in assessing whether an uplift in costs, or indemnity costs, is appropriate.[20] The defendant was essentially placed in a position of having to publicly defend the allegations of fraudulent activity levelled against its managing director, particularly given its relationship with various stakeholders and the importance of its reputation to its business. The defendant seeks increased, rather than indemnity, costs. I accept that an uplift in the costs that might otherwise be imposed is appropriate.

[31] The defendant submits that an increase in costs is also warranted having regard to the volume of material that the plaintiff placed before the Court, and which required additional time to work through. I have already had regard to this factor in assessing the reasonableness of the costs actually incurred by the defendant.

Financial circumstances

[32] Mr Hayes submits that the plaintiff is in difficult financial circumstances and that anything other than a modest award of costs will present significant hardship for him.

[33] There is an established approach in this jurisdiction of taking into account a party's ability to pay if payment would place an undue hardship on that party.[21] I pause to note that financial hardship is not a consideration specifically provided for in the High Court Rules.

[34] 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

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[20] *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 234 (CA) at [29].
[21] See, for example, *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 at [29]; *Walker v Procare Health Ltd* [2012] NZEmpC 186 at [32].

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. The successful party may, itself, be financially stretched and struggling to meet the costs of litigation that it may not have initiated.

[35] Concerns relating to access to justice apply across all jurisdictions and underlie the principle that full recovery of costs will generally not be awarded. This is already reflected in this Court's adoption of a starting point of 66 percent of actual and reasonable costs incurred. As the Court of Appeal observed in *Victoria University of Wellington v Alton-Lee*:[22]

> ... a monetary judgment will often be of little practical moment to a successful party unless the losing party is required to make a substantial contribution to the costs of obtaining it. Further, litigation is expensive, time-consuming and distracting and the requirement that a losing party not only pays his or her own costs but also makes a subsequent contribution to those of the successful party undoubtedly acts as a disincentive to unmeritorious claims or defences.

[36] Counsel for the plaintiff submitted that any award of costs should be reduced to a nominal level of $2,000 to reflect the plaintiff's financial position. That would effectively represent in excess of a 95 per cent discount for financial hardship. Any such discount would largely defeat the underlying principles relating to costs, discussed above, and is not otherwise justified.

[37] While it has previously been accepted that 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.[23] No such evidence is before the Court. And even accepting the financial information contained in the memorandum filed on behalf of the plaintiff, it is apparent that he has equity in his home (of around

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[22] At [48].
[23] *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 at [32].

$100,000), is working (although scaling back his hours) and is in receipt of national superannuation. While it appears that he has some outstanding bills to meet as a result of the litigation, it seems that he has sufficient financial resources to satisfy a costs award against him.

[38] There is a need to do justice to all concerned.[24] Ultimately each case must be considered in light of its own particular circumstances. While there have been cases in which this Court has been prepared to make a discount for financial hardship this is not such a case.

Disbursements

Expert fees

[39] Both parties engaged experts. The defendant raised issues as to whether expert evidence was required, but essentially followed the plaintiff's lead in engaging an expert to consider the issues raised by the plaintiff's expert. I do not consider that that was unreasonable in the circumstances.

[40] The defendant incurred expert witness fees of $38,878.96 (GST incl). I am satisfied that a significant amount of work was required by the defendant's expert to analyse the material produced by, and on behalf of, the plaintiff; provide input into the joint report of the experts; and to prepare for and attend at the Court hearing. Invoices totalling $38,878.96 (GST incl) were generated by the defendant's expert, and further detail in relation to the attendances was subsequently provided. It is apparent that the costs relate to receiving instructions; reviewing the evidence and preparation of a brief of evidence; the review of further evidence and discussions with the plaintiff's expert; preparation of a joint report; and preparation for and attendance at hearing. These costs are plainly necessarily incidental to the hearing, and I am satisfied that they are reasonable in the circumstances.

[24] *Binnie* at [29].

Miscellaneous claimed disbursements

[41] The defendant also claims additional disbursements of $590.81.

[42] A disbursement is defined in R 14.12 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.

[43] The invoice for 3 August 2011 includes reference to $40.00 "legal research" as a disbursement. The issue of legal research was considered by Dobson J in *Todd Pohokura Ltd v Shell Exploration NZ Ltd*.[25] There it was held that such expenses are properly ones which should be absorbed into office overheads. I am not prepared to allow them in the present case. I accept that the other claimed disbursements, relating to photocopying, binding, tolls, and courier charges are necessary and specific to the litigation and I accordingly allow them.

Conclusion

[44] I consider that a contribution towards the defendant's costs of $32,000 is appropriate. The plaintiff is to pay the defendant $32,000 costs and the sum of $39,429.77 by way of disbursements (being $38,878.96 witness expenses and $550.81 miscellaneous expenses).

[45] The defendant also seeks costs on this application, which I set at $750.00.

Christina Inglis
Judge

Judgment signed at 12 noon on 12 April 2013

[25] CIV-2006-485-1600, 1 July 2011 at [70].