IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 232
EMPC 199/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	HUNMO KANG Plaintiff
AND	SAENA COMPANY LIMITED Defendant

Hearing: On the papers

Appearances: Seungmin Kang, counsel for plaintiff
M Y Kim, counsel for defendant

Judgment: 14 December 2022

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves two costs issues.

[2] The first relates to costs arising from a challenge to a determination[1] of the Employment Relations Authority. The second relates to a challenge to a costs determination of the Authority.[2]

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1 *Kang v Saena Company Ltd* [2021] NZERA 196 (Member Campbell).
2 *Kang v Saena Company Ltd* [2021] NZERA 274 (Member Campbell).

Costs in the Court

[3] In my judgment, I concluded that Mr Kang's dismissal grievance should be allowed, but that his disadvantage grievance should not.[3] He was awarded remedies totalling $23,351.06.[4]

[4] I then stated Mr Kang was entitled to costs on a 2B basis, unless there were any particular factors of which the Court was unaware.[5] Counsel were asked to use their best endeavours to resolve the issue. Unfortunately, resolution did not prove possible. Memoranda have now been filed.

Submissions

[5] Mr S Kang, counsel for the plaintiff, submitted that Mr Kang is entitled to $31,309 costs, as assessed under Category 2B of the Court's Guideline Scale.[6]

[6] However, he advised that the plaintiff was legally aided and that the amount invoiced for legal aid purposes was $19,780.15, inclusive of disbursements. He argued this should be the appropriate starting point.

[7] It was also submitted that two Calderbank offers had been made, and that, if the defendant had accepted either of them, it would have been in a better position than it is now. Declinature had been unreasonable. An uplift was therefore justified.

[8] Counsel for the defendant, Mr M Kim, submitted that, because the unjustified disadvantage challenge had been unsuccessful, the defendant had obtained a "partial win". He said that a significant portion of Court time was devoted to this aspect of the hearing.

[9] He also said that it had not been unreasonable for the defendant to decline to accept the Calderbank offers and that the higher of the two Calderbank sums were not significantly different from the compensation awarded by the Court.

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3 *Kang v Saena Company Ltd* [2022] NZEmpC 151 at [184].
4 At [185].
5 At [186].
6 "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

[10] Mr Kim said that costs should accordingly lie where they fall.

Principles

[11] Clause 19 of sch 3 of the Employment Relations Act 2000 (the Act) governs the award of costs in the Court. The principles are well known and are set out in Court of Appeal judgments including *Victoria University of Wellington v Alton-Lee*,[7] *Binnie v Pacific Health Ltd*,[8] and *Health Waikato Ltd v Elmsly*.[9] Where the Court is not assisted by an assessment of costs under the scale, a "starting point at 66 per cent [of actual costs] is generally regarded as helpful in ordinary cases".[10]

[12] The primary principle is that costs follow the event.[11]

[13] It is well established that the costs discretion is broad and it is able to be exercised in light of the Court's equity and good conscience jurisdiction.[12]

[14] In *Health Waikato Ltd*, the Court of Appeal stated:

> [39] It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.

[15] That said, there are cases where the Court has, in light of a mixed outcome, considered it appropriate to discount the quantum of costs sought.[13]

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7 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
8 *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
9 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [17] and [35].
10 *Binnie*, above n 8, at [14].
11 *Alton-Lee*, above n 7, at [48].
12 *Health Waikato Ltd*, above n 9, at [33] and [45].
13 As discussed in *Best Health Products Ltd v Nee* [2016] NZEmpC 16, [2016] ERNZ 72 at [7]–[8]. See also *Kaipara District Council v McKerchar* [2017] NZEmpC 102; and *Zhang v Telco Asset Management Ltd* [2020] NZEmpC 9.

Analysis

[16] The starting point is normally based on a scale assessment. However, as Mr Kang correctly submitted, actual costs were less being based on a grant of legal aid, so it is inappropriate to use the scale.

[17] Legal aid costs were $17,763.31, plus disbursements of $2,016.84.

[18] However, this sum includes $1,340 plus GST for an unsuccessful application for a freezing order. It is inappropriate to consider the possibility of the defendant contributing to this unsuccessful step.

[19] Since it is inappropriate to use the scale, I take two-thirds of the actual costs involved, which produces an appropriate starting point for the assessment of costs of $10,814.87.

[20] Next, I must consider whether this figure should be adjusted in light of the mixed outcome. I do not accept Mr Kim's submission that a significant portion of Court time was allocated to the plaintiff's claim of unjustifiable disadvantage. As can be seen from the substantive judgment, the more complex aspect of the challenge related to the dismissal grievance.

[21] In these circumstances, I conclude this is not a case where costs should lie where they fall. There should, however, be some reduction to reflect the partial success which the defendant obtained in successfully resisting the disadvantage grievance challenge. For this reason, I reduce the starting point figure to $8,000.

[22] Finally, I must consider the two Calderbank offers. The first such offer was advanced on 17 June 2021, concurrent with service of the statement of claim bringing the challenge. It was proposed that the defendant pay $15,703 on the basis this would settle the challenge, costs in the Court, and costs in the Authority.

[23] Later in this judgment I consider the question of costs in the Authority. It is my view that the defendant should pay the plaintiff the sum of $5,990.76.

[24] Taking into account that sum, plus the amount which was ultimately awarded by this Court in resolving the challenge, $23,351.06, and a notional allowance for costs in bringing the proceeding of say $1,000, it is clear that it would have been more beneficial for the defendant to accept the offer. It was unreasonably rejected, especially in light of the fact the plaintiff was legally aided. Costs were needlessly incurred by the plaintiff from that point onwards, justifying an uplift.

[25] A second Calderbank offer was submitted on 16 November 2021, of $17,000 but the operative offer is the earlier of the two.

[26] Mr Kim submitted it was not unreasonable to reject the offer given the difficult cultural considerations which made it difficult to assess credibility and thus prospects of success. He said the "unique Korean cultural setting" meant the rejection was appropriate. I disagree. The offer needed to be assessed in light of the applicable principles which would be applied by the Court under the Act. As I explained in my judgment, the circumstances were well able to be assessed by reference to orthodox credibility principles, notwithstanding the cultural context. The defendant could, and should, have evaluated the pros and cons of the relationship problem in light of those factors in determining whether to accept the offer.

[27] In light of the first Calderbank offer, I conclude that the appropriate contribution to costs payable by the defendant to the plaintiff is accordingly $14,000.

[28] Mr Kim also developed a submission to the effect that the plaintiff's conduct had been a contributory factor to the events giving rise to the grievance. This topic was considered and resolved by the Court in its substantive judgment.[14] It is not appropriate to reconsider contribution at the costs stage.

[29] Turning to disbursements, these were:

a.	Court filing fee:	$204.44
b.	Translation costs:	$173.02
c.	Half share of interpretation costs:	$1,138.50

[14] *Kang*, above n 3, at [182]–[183].

d.	Hearing fee:	$500.88
	TOTAL:	**$2,016.84**

[30] In my view, these disbursements were all reasonably incurred and are recoverable.

[31] Accordingly, the defendant is to pay to the plaintiff the sum of $16,016.84 for costs in the Court.

Costs in the Authority

[32] In its costs determination, the Authority recorded that it had held Mr Kang had not been unjustifiably dismissed or disadvantaged by his employer.[15] It had imposed penalties on the defendant for breaches of minimum standards and declined counter-claims brought by the defendant against Mr Kang. It concluded that neither party could be considered the successful party.[16]

[33] The Authority held that Mr Kang's key claims were that he had been unjustifiably disadvantaged and then dismissed; these had been successfully defended by the defendant. However, it had been unsuccessful in defending the claims that it had breached minimum standards or in its key claims against Mr Kang. Thus, costs should lie where they fall.[17]

Submissions

[34] In the costs challenge brought in the Court, it was submitted for Mr Kang that the starting point should be the application of the Authority's daily tariff, which normally starts with a notional amount of $4,500 for the first day of an investigation meeting, and $3,500 for each subsequent day.[18]

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15 *Kang,* above n 2.
16 At [6].
17 At [7].
18 Andrew Dallas "Practice Note 2: Costs in the Employment Relations Authority – Te Ratonga Ahumana Taimahi" (29 April 2022) Employment Relations Authority www.era.govt.nz at [4].

[35] Mr Kang submitted that the investigation meeting occupied half a day on 24 February 2021, and another quarter day on 1 March 2021. He said it was commonplace to add 0.25 for filing written submissions on a later day rather than making oral submissions during the investigation meeting, as happened in this case.[19]

[36] Mr Kang concluded, therefore, that a full day for the investigation meeting was justified, so that $4,500 should be awarded.

[37] Then Mr Kang submitted there should be an uplift on this figure, due to unreasonable delay during the mediation process, a failure to accept two Calderbank offers, and the pursuit of unreasonable and unmeritorious claims. Counsel submitted that a little over $3,000 was justified for these reasons.

[38] Finally, Mr Kang submitted that reasonable disbursements of $1,490.76 should be paid.

[39] I note that Mr Kang was also legally aided for the purposes of the Authority's investigation.

[40] Mr Kim did not, in his submissions, address the question of costs in the Authority, although he did make some remarks about the extent of the disbursements incurred.

Principles

[41] The principles relating to the factors to be taken into account when considering costs in the Authority are well known.[20]

[42] Relevant to the present case is the observation made by the full Court in *Fagotti* that there is significant value in a commonly applied, and well published, notional daily rate for costs in the Authority.[21]

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19 *Rangitaawa-Kaui v UBP Ltd* [2022] NZERA 101 at [11]. (The Authority did award an extra 0.25 for submissions lodged after the meeting, but there is no indication, at least in the determination, that this is commonplace).

20 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808 (EmpC) at 819-820; *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, [2015] ERNZ 919 at [106]–[108].

21 *Fagotti*, above n 20, at [108].

Analysis

[43] Before commenting on quantum, however, I address the question as to whether costs should follow the event, as in essence Mr Kang submits.

[44] For the purposes of the challenge, the Court must review costs in the Authority in light of the ultimate conclusion reached by the Court.[22]

[45] Thus, the challenge should now proceed on the basis that Mr Kang's dismissal grievance was valid, although the disadvantage grievance was not; that the entitlement to a penalty was valid; and that the defendant's counter-claims were not.

[46] In the result, Mr Kang achieved a greater margin of success in the Authority than he did in the Court. He did, however, fail to establish the disadvantage grievance.

[47] The assessment is no longer one where it is appropriate to conclude costs should lie where they fall. But there should some reduction for the fact the disadvantage grievance was not established.

[48] Next, I address quantum by reference to the Authority's tariff, which should apply since Mr Kang's legal aid costs exceeded the amount Mr Kang could recover via the tariff.

[49] I agree that for starting point purposes $2,250 is appropriate for the half day investigation meeting held on 24 February 2021. There was a second quarter day and a similar period for submissions. I therefore allow a further half day at the lower tariff rate, being $1,750.

[50] The starting point is therefore $4,000.

[51] I reduce this to $3,750, to reflect the unsuccessful disadvantage grievance.

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[22] *The Commissioner of Salford School v Campbell* [2015] NZEmpC 186 at [27]. This point was not considered in the dismissal appeal: *The Commissioner of Salford School v Campbell* [2016] NZCA 126.

[52] With regard to uplift factors, I agree that consideration must be given to the Calderbank offers that were made, but not the remaining factors.[23]

[53] Mr Kang proposed resolution in the sum of $16,000 following mediation on 31 July 2020. This was on the basis of a compensatory award to both Mr Kang and Ms Chung. Plainly, given the ultimate outcome and Mr Kang's legal aid status, it was unreasonable to have rejected the offer. An offer that was even more attractive from the defendant's point of view was that all matters be settled for $1,000; this was raised on 7 September 2020. Again, it was unreasonable to have rejected that offer.

[54] On orthodox Calderbank principles, the plaintiff is entitled to an uplift. Accordingly, I conclude that the sum of $4,500 is appropriate.

[55] The disbursements which are sought are:

a.	Authority filing fee:	$71.56
b.	Translation costs:	$494.50
c.	Counsel's travel costs for investigation meeting (flights and taxis) capped at the applicable legal aid rate of $260 per night:	$924.70
	TOTAL:	**$1,490.76**

[56] Mr Kim submitted that these expenses are not referred to in the Court's Guideline Scale, nor were they sought in the amended statement of claim. That overlooks the point that these disbursements relate to costs in the Authority.

[57] The normal approach is that reasonable disbursements may be considered for reimbursement.[24]

[58] Mr Kang submitted that it was necessary for counsel to travel to Whangarei for the investigation meeting, because there was no civil legal aid lawyer in that region

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23 As described above at [37].
24 *Alton-Lee*, above n 7, at [60].

who could be briefed. He also said that it had been proposed, for this reason, that the case be heard in Auckland, but this was opposed.

[59] On the information before the Court, I conclude that the disbursements were reasonably incurred.

[60] In the result, the defendant is to pay costs in the Authority of $5,990.76.

Result

[61] The defendant is to pay the plaintiff the sum of $16,016.88 for costs in the Court.

[62] The challenge in respect of the Authority's costs determination is allowed, and the defendant is to pay the plaintiff the sum of $5,990.76.

[63] No award was sought for costs in respect of advancing the costs application, and none is granted.

B A Corkill
Judge

Judgment signed at 9.00 am on 14 December 2022