

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**[2014] NZEmpC 226  
EMPC 197/2014**

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

BETWEEN                      LUND SOUTH LIMITED  
   Plaintiff

AND                                DAVID MOWATT LOW  
   Defendant

Hearing:                      (on the papers dated 31 October and 14, 18, 27 November  
   2014)

Appearances:                S C Langton and C J Hogg, counsel for the plaintiff  
   J A Farrow, counsel for the defendant

Judgment:                    11 December 2014

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**COSTS JUDGMENT OF JUDGE B A CORKILL**

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**Introduction**

[1]     In my judgment of 18 September 2014,<sup>1</sup> I ruled on a preliminary issue in favour of Mr Low. The context was that Mr Low alleged he was entitled to a bonus, subject to relevant conditions being satisfied, from 1 August 2003 to 7 September 2010. Lund South Limited (LSL) claimed that the entitlements ceased on 30 September 2008. In my judgment I came to the same conclusion as had the Employment Relations Authority (the Authority) that the entitlement to a bonus continued until 7 September 2010.<sup>2</sup> The challenge was accordingly dismissed.

[2]     I also determined that Mr Low is entitled to costs. The parties have endeavoured to resolve this issue directly. There is agreement:

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<sup>1</sup> *Lund South Ltd v Low* [2014] NZEmpC 173.

<sup>2</sup> *Low v Lund South Ltd* [2014] NZERA Christchurch 57.

- a) That costs should be awarded to Mr Low.
- b) That an appropriate award is two-thirds of Mr Low's actual and reasonable costs.
- c) That the rates charged by Mr Low's lawyers were reasonable.<sup>3</sup>
- d) That there does not need to be either an increase or a decrease from the two-thirds starting point.

[3] The key issue to be resolved by the Court relates to the question of what constitutes reasonable costs in the circumstances of the case.

[4] The costs relate to attendances in connection with:

- a) An unsuccessful application for stay brought by the plaintiff;<sup>4</sup> and
- b) The substantive hearing.

[5] Evidence has been placed before the Court by a lawyer from the office of the firm which represents Mr Low. Three issues are referred to:

- a) A number of the relevant invoices include time which relates to preparation for the Authority hearing, which is yet to take place. It is submitted that a deduction has been made for items which it is said relate to preparation for the investigation meeting.
- b) In answer to a contention that the costs claimed are not reasonable overall, it is submitted:
  - The invoices have been reviewed, and discounts have already been applied.
  - The employer's evidence changed substantially between the investigation meeting on the preliminary point, and this Court's

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<sup>3</sup> These included the partner's rate of \$330 per hour then \$340 per hour; the associate's rate of \$270 per hour then \$285 per hour; and a solicitor's rate of \$155 per hour.

<sup>4</sup> *Lund South Ltd v Low* [2014] NZEmpC 94.

substantive hearing, which required further investigation and responses.

- Further discovery was provided by the employer which required consideration, analysis and investigation.
  - There were a multitude of factual issues in dispute between the parties.
  - The hearing also involved legal argument.
- c) The third issue is that two counsel appeared for Mr Low at the hearing. The response to this is that only one-third of second counsel's time has been invoiced, and it was not unreasonable for the reduced charge in respect of second counsel to be included.

## **Discussion**

[6] I recognise that discounts of between six and 20 per cent have been applied in respect of each invoice rendered to Mr Low.

[7] On a discounted basis it is asserted for Mr Low that reasonable legal costs are \$39,740 plus disbursements of \$797.80.<sup>5</sup> Two-thirds is accordingly \$26,493, plus disbursements.<sup>6</sup>

[8] The submissions which were filed for LSL attached copies of the correspondence between counsel. Counsel for Mr Low contended that evidence for the purposes of the costs application had not been properly adduced; and that in any event the correspondence between counsel was privileged because it was intended to be a confidential attempt to settle the issue of costs.<sup>7</sup>

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<sup>5</sup> As per the annexed schedule.

<sup>6</sup> Counsel for the defendant have submitted that two-thirds is \$26,603.02 which is not consistent with the arithmetical summary of the defendant's invoices in the annexed schedule.

<sup>7</sup> Evidence Act 2006, s 57.

[9] This resulted in an affidavit being filed and served for LSL, which annexed the relevant correspondence thereby overcoming the question of whether evidence had been placed before the Court properly.

[10] In order to determine the question of privilege, I have reviewed the correspondence. None of it is expressed to be on a without prejudice basis; and there is no assertion of confidentiality in any of those communications. I am satisfied that there is no basis for concluding that the correspondence is privileged.

[11] The schedule attached to this judgment summarises the analysis by the parties of the invoices rendered to Mr Low. Counsel for LSL submits that a reasonable fee is \$21,351, producing a two-thirds figure of \$14,234.67.

[12] The information placed before the Court shows that, apart from the hearing itself, a substantial proportion of the preparatory work for Mr Low was undertaken by an associate. The invoice relating to the substantive hearing itself, dated 25 September 2014, shows an approximately equal proportion of hours between a partner on the one hand, and an associate on the other. In the correspondence, LSL's lawyers said one lawyer only needed to appear, and that should have been the associate.

[13] I agree that Mr Low's case could have been presented by one counsel. But it is appropriate to assume that the costs relating to the partner should be included, because the case justified representation at his level of seniority. Accordingly, in relation to the final invoice it is preferable to reduce the time in respect of the associate, and not reduce the time incurred by the partner who represented Mr Low.

[14] In determining a fair and reasonable figure, I must take into account the various points raised by both sides, but also have regard to the extent of work which could reasonably be required in respect of both the application for stay and a substantive hearing which lasted two days; the case was not particularly complex. The adjustments made by counsel for LSL, which produces an assessment of "reasonable costs" in the sum of a little over \$21,000, are too punitive. On the other

hand, the figure utilised for Mr Low for this work, totalling nearly \$40,000, is excessive for the purposes of the costs assessment to be undertaken by the Court.

[15] I also note that the sum of \$2,127 has been claimed with regard to the application for costs itself. Given the conclusions I have reached, costs with regard to the fixing of costs should lie where they fall.

[16] Standing back I consider an appropriate assessment of reasonable costs for the work involved is \$30,000, two-thirds of which is \$20,000.

### **Conclusion**

[17] Accordingly, I order that LSL pay Mr Low the sum of \$20,000 for costs, and disbursements of \$797.80.

B A Corkill  
Judge

Judgment signed at 11.45 am on 11 December 2014

## Schedule

Invoice Date	Defendant's Summary of Hours and Quantum	Plaintiff's Review of Hours and Quantum
29 May 2014	Partner: 7 hours Associate: 24 hours Solicitor: 1 hour <span style="float: right;">\$8,879</span>	Partner: 2.5 hours Associate: 15 hours <span style="float: right;">\$4,884</span>
8 July 2014	Partner: 1 hour, 36 mins Associate: 5 hours, 12 mins <span style="float: right;">\$1,958</span>	(No time specified) <span style="float: right;">\$1,845</span>
29 August 2014	Partner: 5 hours Associate: 28 hours, 18 mins <span style="float: right;">\$9,765</span>	Partner: 4 hours Associate: 15 hours <span style="float: right;">\$6,183</span>
25 September 2014	Partner: 24.5 hours Associate: 30.5 hours <span style="float: right;">\$17,011</span>	Partner: 5 hours Associate: 25 hours <span style="float: right;">\$8,439</span>
31 October 2014 (Preparation of costs documentation)	<span style="float: right;">\$2,127</span>	
	<span style="float: right;">\$39,740</span>	<span style="float: right;">\$21,351</span>
	Two-thirds: <span style="float: right;"><b>\$26,493</b></span>	Two-thirds: <span style="float: right;"><b>\$14,234</b></span>