IN THE EMPLOYMENT COURT
WELLINGTON

[2017] NZEmpC 118
EMPC 6/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	JASON NATHAN Plaintiff
AND	BROADSPECTRUM (NEW ZEALAND) LIMITED (FORMERLY TRANSFIELD SERVICES (NEW ZEALAND) LIMITED Defendant

EMPC 116/2017

IN THE MATTER OF	an applicatin for orders for breach of a compliance order
AND BETWEEN	JASON NATHAN Plaintiff
AND	BROADSPECTRUM (NEW ZEALAND) LIMITED (FORMERLY TRANSFIELD SERVICES (NEW ZEALAND) LIMITED Defendant

Hearing:	On the papers filed on 25 November 2016, 23 December 2016, 9 August 2017, 17 August 2017, 21 August 2017, 1 September 2017, 14 September 2017
Appearances:	T Cleary, counsel for plaintiff R Upton, counsel for defendant
Judgment:	29 September 2017

COSTS JUDGMENT OF JUDGE K SMITH

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[1] Jason Nathan has applied for costs having succeeded in his claim for reinstatement to his former position.[1] He is also seeking costs for subsequent successful applications he has made, for further orders that Broadspectrum breached a compliance order and for fines to be imposed. Broadspectrum (NZ) Ltd has opposed these costs applications.

[2] This decision also deals with costs arising from an application by Broadspectrum for a stay, pending an application for leave to appeal and an appeal, that was successfully opposed by Mr Nathan.

[3] It is necessary to briefly describe the background to this litigation. Mr Nathan was a linesman employed by Broadspectrum. On 27 August 2013 he was dismissed following an incident that took place while he was repairing a damaged span wire on a lines network used for trolley buses.

[4] Mr Nathan raised a personal grievance following his dismissal which lead to a determination of the Employment Relations Authority on 11 December 2015.[2] He was reinstated by the Authority but to a position no less advantageous to him rather than to his former position based in the company's premises at Glover Street, Wellington. He successfully challenged that determination and in a judgment dated 28 October 2016 was reinstated to his former position at Glover Street.[3]

[5] Broadspectrum sought leave to appeal the judgment of 28 October 2016 to the Court of Appeal. That application was dismissed on 23 May 2017.[4]

Costs of the proceeding

[6] Mr Nathan is seeking costs for the proceeding that led to the October judgment of $25,300 including GST. That is the amount of the costs actually incurred by him. In addition, disbursements amounting to $694.05 are sought. A further $1,000 is claimed for preparing the application for costs.

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1 *Nathan v Broadspectrum (New Zealand) Ltd* [2016] NZEmpC 135, (2016) 10 NZELC 79-070.
2 *Nathan v Transfield Services (New Zealand) Ltd* [2015] NZERA Wellington 120 (Transfield is the defendant's former name).
3 *Nathan v Broadspectrum (New Zealand) Ltd*, above n 1.
4 *Broadspectrum (New Zealand) Ltd v Nathan* [2017] NZCA 202.

[7] Broadspectrum accepts it is liable to pay costs but it is opposed to paying what has been claimed. It considers the amount claimed is a request for indemnity costs and there is no basis to award them. Instead it says costs should be two-thirds of reasonable costs which it calculates as $16,867. It is opposed to the disbursements claimed and the claim for the costs for preparing the application for costs.

[8] The starting point is cl 19 of sch 3 to the Employment Relations Act 2000 (the Act), which confers a broad discretion on the Court to fix costs. Additionally, reg 68(1) of the Employment Court Regulations 2000 provides that, in exercising that discretion, regard may be had to the conduct of the parties tending to increase or contain costs.

[9] There is no disagreement that the discretion to order costs must be exercised judicially and in accordance with principle, or that costs usually follow the event.

[10] Before the adoption of the Court's Guideline Scale, costs were determined by applying *Victoria University v Alton-Lee*,[5] *Binnie v Pacific Health Ltd*[6] and *Health Waikato Ltd v Elmsly.*[7]

[11] From 1 January 2016 the Court's Guideline has assisted in exercising this discretion. The Guideline provides for costs to be assessed by applying a daily recovery rate to the time considered appropriate for each step reasonably required in the proceeding. Reasonable time for a step is generally stated in Schedules 3 and 4 of the Guideline Scale. A determination of what is a reasonable time for each step is made by reference to Bands; A, B and C.

[12] The Guideline identifies that in fixing costs the principles relating to increased and indemnity costs, the refusal of and reduction in costs, and the effect of making a Calderbank offer will be taken into account.

[13] The purpose of the Guideline was noted in the following passage from *Xtreme Dining v Dewar*:[8]

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5 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
6 *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
7 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

> …the guideline scale was intended to support, as far as possible, the policy objective that the determination of costs be predictable, expeditious and consistent; but it was not intended to replace the Court's ultimate discretion under the statute as to whether to make an award of costs and, if so, against whom and how much. The Guideline Scale would be a factor in the exercise of that discretion.

[14] Mr Nathan's application is based on Category 2, Band B of the Guideline. There is no dispute about the appropriateness of that categorization. He has claimed for steps taken in the proceeding relying on Schedule 4. His claim set out each step in the proceeding from its commencement, preparation for a directions conference, filing a memorandum, appearances at a directions conference, filing a notice of opposition to an application to strike out, seeking leave to amend pleadings, preparation of briefs of evidence and a bundle of documents, preparation for the hearing, participating in an urgent pre-hearing conference and an appearance at the hearing.

[15] Two steps in that claim are not provided for in the Guideline. They are for an application for leave to amend the pleadings and attendances at an urgent pre-hearing telephone conference. Mr Cleary submitted that Mr Nathan needed to amend his pleadings because Broadspectrum had dismissed him a second time. As to the conference, that step was added because Mr Nathan was successful in opposing a change to the scope of the evidence to be given.

[16] The total allocation for time for all of these steps is 11.9 days. The daily rate applied, from Schedule 2, was $2,230. Applying the daily rate to the steps taken produced a potential award of costs under the Guideline of $26,537. However, Mr Nathan's actual expenses were $25,300 including GST. He is not GST registered. He therefore seeks an order for $25,300 on the basis that his actual costs are less than would be produced by applying the Guideline scale.

[17] Mr Upton's submissions for Broadspectrum began by referring to any costs order being in accordance with established principles. He noted that the Guideline is not intended to replace the Court's discretion that must be exercised in a principled way.

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[8] *Xtreme Dining v Dewar* [2017] NZEmpC 10 at [25].

[18] Broadspectrum's concern with this claim is that it would indemnify Mr Nathan and such costs are only awarded in rare cases. This case, it was said, does not fall within the class of cases described in *Bradbury v Westpac Banking Corp* as justifying an order for an indemnity.[9] It was on this basis that the company said an order of two-thirds of Mr Nathan's actual costs should be made. Mr Upton did not make submissions on the inclusion of the two additional steps mentioned earlier.

[19] The Guideline is designed to assist in exercising the discretion conferred by cl 19 of sch 3 and not to replace that discretion, but I do not accept that Mr Nathan's actual and reasonable costs should be the starting point from which an assessment of an appropriate order is made. The starting point should be the Guideline especially given its stated purpose.

[20] The Guideline draws on the costs scale in the High Court Rules and observations about the use of a scale in that Court are pertinent. In *Joint Action Funding Ltd v Eichelbaum* the purpose of costs rules in the High Court were discussed by the Court of Appeal.[10]

[21] In that case the Court observed that a central aim of the High Court costs regime is to deliver to the successful party approximately two-thirds of those costs which were reasonably payable as between solicitor and client.[11] To underscore that point the Court of Appeal referred with approval to the comments of Chambers J in *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd:*[12]

> [33] [Counsel for Elders] submitted that "the starting point" under the new costs regime "remains that party and party costs are a reasonable contribution, in all the circumstances, to the party's costs actually and reasonably incurred". In support of that submission, he cited *Morton v Douglas Homes Ltd (No2)* …. That submission reveals a misunderstanding of the new costs regime. The Court is not interested in a party's actual costs. Far from a party's costs "*actually* and reasonably incurred" being the starting

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9 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400.
10 *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249.
11 At [46].
12 *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 (HC) as referenced in *Joint Action Funding Ltd v Eichelbaum*, above n 9, at [47].

> point, they are not relevant save in one respect. It would, of course, be improper for a party or its solicitor to claim an award of costs exceeding the costs in fact incurred by that party: …
>
> (Emphasis in original)

[22] The Court of Appeal also cited with approval the following passage in *Nomoi Holdings*:

> [34] I fully understand that, particularly in the last years of the old costs regime when the old scale had become increasingly out of date and parsimonious, it was reasonably common for the winning party, when seeking costs, to inform the Court of the actual costs it had incurred. But it is no longer necessary, indeed it is inappropriate, for counsel to continue giving what is now irrelevant information on a costs application. To take into account a party's actual costs would be contrary not only to the principle enunciated in r [47(e)] but also to the principle in r [47(g)] which emphasises the importance of predictability and expedition in determining costs.

[23] While *Joint Action Funding Ltd* was concerned with costs claims by a barrister, or barrister and solicitor, representing himself or herself the views expressed are relevant to the application of the Guideline Scale.

[24] The Guideline has adopted the rates in the High Court Rules and, therefore, already contains a discount as Judge Perkins observed in *Singh v Trustees of the Wellington Rudolf Steiner Kindergarten Trust*.[13] Bearing in mind the Guideline already contains a discount, accepting Broadspectrum's submission would mean imposing a further discount without justification. Its submission does not provide a principled basis to depart from the Guideline when exercising the discretion under cl 19 merely because Mr Nathan has secured legal services that have been charged for at a more modest rate than the scale amounts.

[25] Broadspectrum is concerned about ordering the amount claimed would indemnify Mr Nathan when the circumstances in *Bradbury*[14] do not apply. I do not agree that the way in which Mr Nathan's costs claim is framed can be properly described as seeking an order to pay indemnity costs. The costs claim was not premised on the basis that Broadspectrum's actions in defending Mr Nathan's

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13 *Singh v Trustees of the Wellington Rudolf Steiner Kindergarten Trust* [2017] NZEmpC 91.
14 *Bradbury v Westpac Banking Corp*, above n 9.

challenge merited an indemnity. All that has been confirmed is that Mr Nathan cannot recover more than he has actually paid.

[26] Knowing Mr Nathan's actual expense is only relevant to be satisfied that, as the successful party entitled to costs, he is not seeking to recover more than he has spent. Otherwise that information is irrelevant. It would be equally irrelevant if Mr Nathan's actual costs had greatly exceeded the amount he might be awarded by applying the Guideline.

[27] Mr Upton did not make any submissions about the two extra steps included in the claim. They were modest in any event at less than half a day for each of them. Even if they were removed from the claim it would still be less than the Guideline.

[28] I have considered whether a result achieved by using Category 2, Band B that exceeds the actual costs incurred suggests either that category or band was not appropriate, or alternatively, that a different allocation might have been made for some of the steps taken. Those were not matters advanced by Mr Upton. Category 2, Band B was clearly appropriate and there is no basis to reconsider them.

[29] I am satisfied that an appropriate amount to order for costs is $25,300.

[30] Mr Nathan is not registered for GST and the award includes paying to him the GST component of the fees incurred.

Disbursements

[31] Mr Nathan sought $694.05 in disbursements for preparing the bundle of documents, printing/photocopying expenses, courier expense, word processing and attendances for a law clerk.

[32] Broadspectrum challenged the disbursements claimed. In particular, it resisted the claim of $40, for law clerk attendances, courier and computer fees. This opposition was based on an absence of proof that those fees were reasonably incurred in pursuit of this litigation.

[33] I reject that submission. It was necessary to prepare a substantial bundle of documents for the trial. The presentation of Mr Nathan's case would have entailed printing and photocopying as well as word processing. While the amount claimed for a law clerk is modest, and only explained in the tax invoice which accompanied Mr Cleary's submissions, I accept that it would have been appropriate to use a law clerk either for the purposes of research or to assist in preparation generally.

[34] It is appropriate to award disbursements of $694.05.

Costs of preparing the memorandum

[35] The claim for costs for preparing the memorandum claiming costs is $1,000. Broadspectrum's opposition is that it considered agreement on costs should not have been difficult in light of the Guideline, but, in any event, no real attempt to agree costs was made.

[36] I reject that submission. There were differences of opinion between the parties over the appropriate amount to order for costs as is evidenced by Broadspectrum's opposition. In the absence of agreement Mr Nathan had no alternative but to apply for them.

[37] Mr Cleary's costs memorandum was succinct. I accept that it would have taken time to prepare by reference to the Guideline and by analysing each of the steps taken in this litigation; $1,000 for preparation of the memorandum is reasonable.

Outcome

[38] Broadspectrum is ordered to pay to Mr Nathan costs and disbursements for the proceeding as follows:

(a) costs of $25,300;
(b) disbursements of $694.05; and
(c) for preparing the supporting memorandum $1,000.

Costs of seeking further orders

[39] On 30 May 2017 Mr Nathan applied for a compliance order pursuant to s 139(4) of the Act because Broadspectrum continued to refuse to reinstate him to active duties. Urgency was granted and on 6 June 2017 an order was made requiring Broadspectrum to comply with the judgment of 28 October 2016 by returning Mr Nathan to active duties at Glover Street no later than Wednesday 7 June 2017 at 8:00 am.[15] Costs associated with that application were reserved.[16]

[40] On 8 June 2017 Mr Nathan sought further orders against Broadspectrum for breaching the compliance order. This further application was made because Mr Nathan presented himself for work at Broadspectrum's Glover Street premises on 7 June 2017, having completed a medical assessment the previous day, but did not resume active duties. When he presented himself for work he undertook an induction as a new employee would and was required to participate in an appraisal of his competency.

[41] The application for further orders was opposed. The opposition was based on Broadspectrum's view that it had to take Mr Nathan's competency seriously and it was entitled to test his competency. It maintained that it had not singled out or targeted Mr Nathan. Concerns about health and safety were raised because Mr Nathan had been absent from work for approximately four years since his dismissal in mid-2013.

[42] From the time of the compliance order on 6 June 2017, until at least the date of the judgment on 28 July 2017, Mr Nathan had been returned to work in a narrow sense. He attended Broadspectrum's Glover Street premises each day. However, he did not undertake any work on the lines network either by himself or under supervision. For most of the time he was required to complete skills assessments about his competency. He did so under protest.

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15 *Nathan v Broadspectum* [2017] NZEmpC 72 at [33].

16 On 14 September 2017 Mr Cleary filed a memorandum confirming that costs associated with the application for a compliance order have been settled.

[43] Broadspectrum was found to be in breach of the compliance order. Against that background Mr Nathan has applied for costs on an indemnity basis. That application was divided into two parts. The first part was for costs to attend mediation directed by the Court pursuant to s 188(2) of the Act. The second part was for the substantive hearing.

[44] Mr Nathan's claim for costs was calculated on a Category 2, Band B basis.

[45] Mr Cleary's submission was that neither party wanted mediation but participated because they were directed to do so[17] and, in those circumstances, costs for attending mediation should be recoverable. Attendances on Mr Nathan's behalf including receiving the Court's minute and directing mediation, discussions with Mr Upton, liaising with the mediation service and attendances at the mediation. The total expense incurred by Mr Nathan was $3,128.

[46] The second part of this costs claim was for attendances to apply for the further orders. Applying the Guideline Scale those attendances produce a potential costs order of $16,948, as shown in the following table from Mr Cleary's submissions:

Step	**Allocation**
Filing interlocutory application	0.6
Plaintiff's preparation of briefs or affidavits (other proceedings)	2.5
Plaintiff's preparation of list of issues, authorities and common bundle (other proceedings)	2.0
Preparation for hearing (other proceedings)	2.0
Appearance at hearing (other proceedings)	0.5
Total	**7.6 days**
7.6 days @ Band B daily rate $2,230	**$16,948**

[17] Minute dated 12 June 2017.

[47] Mr Nathan's actual costs were $13,225 (that is $11,500 plus GST).

[48] Mr Cleary's submissions observed that, while the Guideline refers to indemnity costs, it does not describe the circumstances in which they might be ordered. However, there are cases where the Court has awarded indemnity costs by analogy with the High Court Rules.[18]

[49] Regulation 6 of the Employment Court Regulations 2000 requires that every matter coming before the Court must be disposed of as nearly as maybe in accordance with the regulations. Where no form of procedure is provided by the Act or Regulations, reg 6 provides for the High Court Rules 2016 to be used.

[50] The High Court Rules deal with circumstances in which indemnity costs might be awarded in r 14.6(4)(b) as follows:

> **14.6 Increased costs and indemnity costs**
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> …
>
> (4) The court may order a party to pay indemnity costs if —
>
> …
>
> (b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; …

[51] While accepting that costs follow the event Broadspectrum disputes the appropriateness of indemnity costs. Its position is that any order should be 50 per cent of Mr Nathan's actual costs. Mr Upton also submitted that, in the exercise of the Court's discretion, costs should not be awarded for attendances at mediation.[19]

[52] Mr Upton submitted that what is sought by Mr Nathan is an increase in costs. The proceeding was still categorised as Category 2, Band B and an order ought to reflect that.

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[18] *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 153 at [8] relying on r 14.6(4)(a).
[19] See for example *RHB Chartered Accountants Ltd v Rawcliffe* [2012] NZEmpC 31.

[53] Turning to the breakdown of the costs claimed, Mr Upton's submissions challenged the compilation of steps included in the table. In particular, two days were allowed for preparation of a list of issues, authorities and a common bundle. The criticism made of this calculation was that the bundle was a collection of affidavits in the proceeding and that it could not have been complicated or have taken two full days to prepare. The submission is that the claim should be discounted accordingly.

[54] As indemnity costs the point was made that this case does not fall within *Bradbury*.[20]

[55] Finally, Mr Upton challenged relying on r 14.6(4)(b) because, it was said, the rule does not apply to the facts of this case. That is because Broadspectrum claims to have adopted a position it genuinely believed was correct and appropriate and that there was nothing deliberate or intentional in its action. It was also submitted that its position was motivated by a genuine desire to keep Mr Nathan safe and that the current proceedings do not justify an indemnity award.

Analysis

[56] Dealing first with costs for attending mediation, I accept that it is appropriate to make an order where the Court has directed the parties to attend.[21]

[57] Broadspectrum considered it was not necessary for Mr Nathan to be supported at mediation by counsel. Therefore, it follows, that the costs incurred were unnecessary or at least more than was required.

[58] I reject that submission. Mr Nathan has been involved in a long, and no doubt very difficult, dispute with Broadspectrum to be returned to his former position. Aside from being successful in his substantive proceeding Mr Nathan has found himself involved in on-going litigation to compel his employer to comply with the Court's order. It is not at all surprising that he considered he needed counsel's assistance at mediation.

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20 *Bradbury v Westpac Banking Corp*, above n 9.

21 *Jinkinson v Oceania Gold (NZ) Ltd* [2011] NZEmpC 2 and *National Mutual Life Assoc of Australasia Ltd v Burke* [2003] 2 ERNZ 103 (EmpC).

[59] As to the second claim, I am satisfied it is appropriate to award indemnity costs relying on r 14.6(4)(b) of the High Court Rules. While this case does not fall within the types of cases referred to in *Bradbury*, it is captured by that rule. Mr Nathan's costs have been incurred entirely because Broadspectrum disobeyed an order of the Court.

[60] I reject the contention that Broadspectrum did not act deliberately or intentionally when not complying with the judgment. That is exactly what it did. It required Mr Nathan to undergo competency assessments which it acknowledged was not training. That deliberate action should be reflected in a costs order.

Disbursements

[61] A total of $357.08 has been claimed for disbursements. Broadspectrum did not make submissions about that claim for disbursements. I consider them to be reasonable.

Costs of preparing the application

[62] A further order of $750 was sought for the costs of preparing the application. Broadspectrum did not make submissions on that costs claim.

[63] Given that I have already concluded costs should indemnify Mr Nathan it follows that he should not be out of pocket for the costs of preparing the memorandum in which he sought the orders that are now to be made. The amount claimed, $750, is reasonable.

Outcome

[64] Broadspectrum is ordered to pay Mr Nathan costs and disbursements for seeking further orders as follows:

(a) attendances at mediation $3,128;
(b) attendances to obtain further orders $11,500 plus GST for a total of $13,225;
(c) disbursements of $357.08; and
(d) preparing the application $750.

Costs of stay of proceedings

[65] The final matter is costs for the application made by Broadspectrum for a stay of proceedings or of execution of a decision relating to the judgment of 28 July 2017.[22]

[66] That stay was sought pending an application for leave to appeal and to appeal to the Court of Appeal. Broadspectrum first filed what was referred to as an interim application, designed to attempt to achieve a "holding position", while the substantive application was prepared.

[67] In the end the substantive application was dealt with promptly and it was not necessary to decide that interim application although there were attendances relating to it.

[68] In the judgment of 25 August 2017 a stay was declined,[23] costs were reserved and a timetable for an exchange of submissions was directed.[24]

[69] As the successful party Mr Nathan has applied for costs. He is seeking an order derived from using Category 2, Band B of the Guideline Scale.

[70] Mr Cleary set out the elements of the claim as follows:

Step	**Allocation**
Filing Notice of Opposition	0.6
Preparation of written submissions	1.0
Obtaining judgment without appearance	0.3
Total	**1.9 days**
1.9 days @ Band B daily rate $2,230	**$4,237.00**

[22] *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 90.
[23] *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 104.
[24] At [59].

[71] Attached to the application was a copy of the tax invoice rendered to Mr Nathan for attendances about that application. The total cost incurred by Mr Nathan was $3,818. Mr Nathan sought his actual costs.

[72] The amount claimed is less than would have been otherwise payable if the Guideline had been used. However, as previously noted, Mr Nathan is not entitled to recover in a costs order more than he has actually paid.

[73] Broadspectrum did not file submissions.

[74] I am satisfied that it is appropriate to order costs to Mr Nathan on this application of $3,818.

Outcome

[75] Broadspectrum is ordered to pay Mr Nathan $3,818 for the costs incurred by him in opposing its application for a stay.

Summary of all costs

[76] In summary Broadspectrum is required to pay to Mr Nathan the following costs:

(a) For the proceeding:
   i. costs of $25,300;
   ii. disbursements of $694.05; and
   iii. costs of preparing the supporting memorandum $1,000

(b) For costs of seeking further orders:
   i. attending mediation $3,128;
   ii. attendances to obtain further orders $13,225;
   iii. disbursements of $357.08; and
   iv. preparing the application for costs $750

(c) For successfully resisting the application for a stay $3,818.

K G Smith
Judge

Judgment signed at 1 pm on 29 September 2017