IN THE EMPLOYMENT COURT
AUCKLAND

TE KOTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 30
EMPC 82/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	ALLAN DANIEL NICHOLSON Plaintiff
AND	MATTHEW FORD Defendant

Hearing: On the papers

Appearances: D Hayes, counsel for plaintiff
T Braun, counsel for defendant

Judgment: 22 March 2019

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

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[1] The defendant has applied for costs. The application follows the Court's judgment of 12 November 2018, setting aside the determination of the Employment Relations Authority ordering the plaintiff to pay a penalty of $10,000 for breach of s 134 of the Employment Relations Act 2000 (the Act) and substituting a penalty of $7,500.[1] I provisionally assigned the proceeding category 2B for costs purposes. Mr Braun, counsel for the defendant, contends that an increased order of costs is

[1] *Nicholson v Ford* [2018] NZEmpC 132.

appropriate in the circumstances. The plaintiff takes a different view. The plaintiff contends that costs ought to be awarded in his favour.

Approach

[2] The starting point for costs in the Court is cl 19 of sch 3 to the Act. It confers a broad discretion as to costs. A scale has been adopted to guide the setting of costs in the Court. As the guidelines scale makes clear, it is intended to support (as far as possible) the policy objective that the determination of costs be predictable, expeditious and consistent.[2] It is not intended to replace the Court's ultimate discretion as to costs. While costs will generally be assessed by applying the appropriate daily rate to the time considered reasonable for the steps reasonably required in relation to the proceeding, principles applying to increased costs apply in appropriate cases.[3] Increased costs may be appropriate in cases where, for example, a party has pursued an argument or a claim that lacks merit. Mr Braun submits that this case falls into that category.

Analysis

[3] It is first necessary to deal with the plaintiff's submission that he won and that he is entitled to costs. The plaintiff filed a challenge to the Employment Relations Authority's determination.[4] The Authority had ordered penalties of $10,000 against the plaintiff, which were to be paid to Mr Ford. I formally set the Authority's determination aside. I found that the maximum available penalty was $10,000, that a penalty of $7,500 was appropriate, and I reduced the amount payable to Mr Ford to 75 per cent. The plaintiff's challenge centred on an argument that no penalties ought to have been ordered against him and that it was the defendant who had been at fault. While the challenge resulted in a reduction in the award ordered in the defendant's

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2 Employment Court Practice Directions at 18 <www.employmentcourt.govt.nz/legislation-and-rules>.

3 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400. See also Employment Court Regulations 2000, reg 68(1) which provides that, in deciding costs, the Court may have regard to any conduct of the parties tending to increase or contain costs.

4 *Ford v New Zealand Dental Partners Ltd Partnership (in liquidation) t/a Clinico Denture and Hearing* [2018] NZERA Auckland 68.

favour, the plaintiff comprehensively failed on its argument that no penalty at all ought to be imposed.

[4] Mr Hayes, counsel for the plaintiff, submits that if costs are not awarded in the plaintiff's favour, it would be inappropriate to award any costs to the defendant. I do not accept the plaintiff's submission. The point is that it was the plaintiff who pursued the challenge to the imposition of a penalty against him; the defendant was the responding party and it was the defendant who incurred the legal costs of defending the challenge. While the Court set aside the Authority's determination and reassessed the penalties imposed, and 75 per cent (rather than 100 per cent) of the penalties awarded were payable to the defendant, I do not see any of that as a valid reason for denying the defendant an appropriate contribution to his costs having regard to all of the circumstances. Nor do I accept the suggestion that a settlement offer of $5,000 made by the plaintiff in advance of the hearing materially alters the position. That amount is less than the plaintiff was ordered to pay by way of penalty and less (although not substantially less) than the amount ultimately awarded in the defendant's favour.

[5] It is said that the defendant could have abided the decision of the Court and thereby avoided an exposure to costs. While that may be so, the defendant was entitled to actively defend the plaintiff's challenge. Given the nature of the matters at issue and the surrounding circumstances it is hardly surprising that he did so.

[6] I agree with the point made by Mr Hayes, that at least some of the matters at issue had not come before the Court previously and were, in that sense, novel. I also accept that judicial discussion of those issues may have provided a degree of clarity for persons beyond the parties themselves. However, I do not accept the submission that this fact ought to result in a reduction in the costs awarded in the defendant's favour.

[7] I consider it appropriate that the defendant receive a contribution to his costs in the particular circumstances of this case. The defendant submits that costs calculated on a 2B scale would amount to $25,422 (with disbursements totalling $126.50). That calculation includes the costs associated with the appearance of second

counsel and case management memoranda, together with what appears to be an element of double counting for time spent preparing the common bundle of documents. I do not allow for the costs for second counsel. I also reduce the calculated costs in respect of the bundle and having regard to the amount of time I assess as reasonably being required for the preparation of memoranda, and the extent to which they were directed at matters of relevance to the determination of the challenge. This leads to a figure of around $20,250. While that figure exceeds the plaintiff's costs, I consider it within the range.

[8] Is an increase in costs appropriate? In summary the defendant says that it is because the plaintiff's challenge lacked merit, the belated acceptance that a breach of good faith had occurred, the impact of the plaintiff's actions on the defendant, and the public interest in deterring the sort of behaviour at issue in this case.

[9] The Court may have regard to the conduct of a party in setting costs. While the plaintiff's behaviour in dealing with the defendant during the employment process fell well below the required standard, and amounted to a breach of good faith, I do not regard that as relevant to the costs-setting exercise. The purpose of a costs award is not to punish. Disapproval of the plaintiff's conduct in committing the breach was reflected in the penalty imposed. The same point can be made in relation to the defendant's concern to deter conduct of this sort. I do not consider it appropriate to effectively penalise the plaintiff twice for the same conduct.

[10] During the course of the hearing it was conceded that the plaintiff had breached his obligations of good faith and was liable to a penalty under s 134 of the Act. That meant that the defendant was put to unnecessary costs associated with defending a major plank of the challenge which fell away at a very late stage; ultimately the matters at issue boiled down to the appropriate quantum of penalty. I accept that the late abandonment of one of the key arguments during closing submissions (liability as opposed to quantum) is relevant as an uplifting factor.

Conclusion

[11] Standing back, I am satisfied that an order of costs of $22,000 is appropriate, together with disbursements of $126.50. Such amounts are to be paid to the defendant within 15 working days of the date of this judgment.

[12] No costs were sought in relation to the application for costs.

Christina Inglis
Chief Judge

Judgment signed at 12.45 pm on 22 March 2019