

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2020] NZEmpC 59
EMPC 177/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	STANLEY JOHNSON Plaintiff
AND	CHIEF OF THE NEW ZEALAND DEFENCE FORCE Defendant

Hearing: (on the papers)

Appearances: T Cleary, counsel for the plaintiff
N Lucie-Smith, counsel for the defendant

Judgment: 6 May 2020

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves an application for costs following a successful challenge.

[2] In the substantive judgment, I found that Mr Johnson had established a disadvantage grievance.¹ The New Zealand Defence Force (NZDF) had conducted an inquiry as to whether he had sent an email to the office of the Deputy Prime Minister. It was concerned there had been a security breach. Mr Johnson presented statements

¹ *Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192.

from himself and an information technology specialist in support of his position that his email account had been spoofed or hacked. Ultimately NZDF concluded it was very likely he had sent the email, but it would not pursue a disciplinary process.

[3] I concluded that the inquiry was flawed; that an outcome letter sent to Mr Johnson had been deliberately crafted to mitigate a risk of him seeking remuneration for his costs; and that the employer's trust in him had been affected to the point where he had, in effect, been given an unjustified warning, all of which amounted to a disadvantage grievance. He was therefore entitled to remedies: compensation of \$20,000 for humiliation, loss of dignity and injury to feelings; and \$5,932.51 for legal and information technology costs, and interest thereon.²

[4] I also stated Mr Johnson was entitled to costs on a Category 2, Band B basis under the Practice Directions Guideline Scale.³ The parties were invited to discuss the issue in the first instance.

[5] There was some attempt to resolve the issue between counsel in correspondence, and again on the Court's urging after Mr Johnson had filed his costs application. However, agreement did not prove possible.

[6] Mr Johnson sought costs both with regard to the Court proceeding and the Employment Relations Authority's investigation. NZDF accepted it was liable for these. The issue between the parties related to the correct amount.

Costs in the Court

[7] I begin with costs in the Court. The proceedings were assigned costs on a Category 2B basis.

[8] Counsel for Mr Johnson, Mr Cleary, submitted that costs should be awarded in accordance with the steps described in this table:

² At [177].

³ Employment Court Practice Directions, No 16 <www.employmentcourt.govt.nz/legislation-and-rules>

Step	Description	Time	Cost
1	Commencement of proceedings	2.0	\$4,780.00
11	Preparation for directions conference	0.4	\$956.00
12	Filing memorandum for directions conference	0.4	\$956.00
13	Appearance directions conference	0.2	\$478.00
43 ⁴	Plaintiff's preparation of briefs or affidavits	2.0	\$4,780.00
44	Plaintiff's preparation of list of issues, agreed facts, authorities and common bundle	2.0	\$4,780.00
46	Preparation for hearing	2.0	\$4,780.00
47	Appearance at hearing for sole representative	2.0	\$4,780.00
	TOTAL	11	\$26,290.00

[9] Disbursements totalling \$878.44 were also sought.

[10] Mr Cleary, however, also argued there should be an uplift of costs from the scale amount to reflect the questionable merits of defending the case. He said this factor warranted a "medium uplift" to \$35,000.

[11] He stated that Mr Johnson's total legal costs were \$44,850, including GST; and that Mr Johnson is not registered for GST.

[12] Mr Lucie-Smith, counsel for NZDF, submitted that costs based on scale should be paid, without uplift. He also argued that the appropriate calculation should be restricted to preparation of lists of issues, agreed facts, authorities and common bundle, preparation for the hearing, and for the appearance. This amounts to a total of six days which on the applicable daily rate of \$2,390 per day, produced a total of \$14,340.

⁴ A claim may be made under step 43 for 2.5 days, but in this case an allowance for 2.0 days only was sought.

[13] Under sch 3, cl 19 of the Employment Relations Act 2000 (the Act), the Court has a broad discretion in awarding costs. As has often been noted, that discretion must be exercised on a principled basis and in the interests of justice.

[14] The Court's Guideline Scale is designed to support the objective that costs should be predictable, expeditiously determined, and consistent.

[15] Also relevant is reg 68 of the Employment Court Regulations 2000 which provides that the Court may take into account conduct which has contained or increased costs.

[16] In the exercise of the statutory discretion, the Court can either increase or decrease an award of costs in the circumstances of a particular case. It has long been the case that "increased costs may be ordered where there is a failure by the paying party to act reasonably": *Bradbury v Westpac Banking Corp.*⁵

[17] Here, an uplift on scale is sought on the well-recognised ground that the party opposing the application for costs put up a case that lacked merit.⁶

[18] An example in that category arises from an appeal from a judgment of this Court to the Court of Appeal: *Broadspectrum (NZ) Ltd v Nathan*.⁷ There, the appellant sought a stay of the Court's decision to reinstate an employee, by way of interim relief pending the hearing of a substantive appeal. The Court of Appeal dismissed the application, holding that it amounted to an abuse of process because it was an attempt to revisit issues already ruled on. It found that the application for a stay was inherently unlikely to succeed.⁸ An uplift of 50 per cent of standard costs was therefore appropriate.

[19] Turning to this case, I begin by assessing the correct amount under the scale. No reasons have been provided by NZDF as to why an orthodox approach should not be adopted in calculating the contribution to costs under the scale. In my view, there

⁵ *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [27].

⁶ For example r 14.6(3)(b)(ii) of the High Court Rules 2016.

⁷ *Broadspectrum (NZ) Ltd v Nathan* [2017] NZCA 434, [2017] ERNZ 733 at [56]–[57].

⁸ See also the majority decision in *NR v MR* [2014] NZCA 623, (2014) 22 PRNZ at [50]–[51].

is nothing controversial about the items included in Mr Cleary's assessment, which totals 11 days, rather than Mr Lucie-Smith's assessment of six days. I approve this aspect of the claim made for Mr Johnson.

[20] It is next necessary to consider whether there should be an uplift. Mr Cleary's primary point is that the actions of NZDF when conducting and ending its inquiry did not demonstrate good faith; that NZDF must have been aware its actions contravened these principles; and that therefore its defence lacked merit.

[21] Mr Cleary's submission that NZDF had deliberately breached its good faith duties focused on an email sent by Group Captain Woon to an HR advisor, Mrs Colebrook, in which she was asked to draft a letter with regard to the outcome of the inquiry; she was asked to "cleverly articulate Defence believes he is guilty of sending the email without actually saying it". As is explained in my judgment, that is what happened.

[22] It is regrettable that the concluding letter was drafted exactly as had been requested, and that it was then sent to Mr Johnson. As I found, he understood NZDF was asserting he had in fact sent the email and that he was being warned not to repeat the offence. Plainly, this amounted to a breach of good faith obligations.

[23] However, in the absence of any evidence that the breach arose from the deliberate flouting of a legal obligation, the inference I draw from this aspect of the matter is that appropriate HR advice was not given to Group Captain Woon when it should have been. The merits have to be assessed from that perspective.

[24] It is also necessary to reflect on the history of the litigation.

[25] Following its investigation meeting, the Authority determined that Mr Johnson's claim was not established; this meant NZDF was the successful party.

[26] The challenge was then filed. Given NZDF had succeeded at first instance, it is unsurprisingly that it elected to resist the claim in this Court.

[27] Although NZDF's position in defending the challenge was difficult it cannot be concluded that it was so bereft of merit that it should not have done so, and that Mr Johnson's legal costs were unreasonably increased because it did.

[28] Mr Cleary also relied on the fact that NZDF initially refused mediation despite the procedure being expressly referred to in Mr Johnson's employment agreement when a relationship problem arose. Whilst, as I found in my judgment, this was regrettable, I am not confident the parties would have resolved their differences and thus avoided the litigation which followed. This factor does not warrant an uplift.

[29] Mr Cleary is on stronger ground when pointing out that Mr Johnson is not registered for GST. As explained by Chief Judge Inglis in *Stormont v Peddle Thorp Aiken Ltd*, registration status of a successful party is a material factor in determining whether or not an uplift is appropriate, whether from scale or otherwise.⁹ It is appropriate to take this factor into account, based on the scale amount.

[30] Standing back, I consider a fair contribution to Mr Johnson's costs in the Court is \$30,000 and that his disbursements of \$878.44, which were reasonable and necessarily incurred, should also be reimbursed.

Costs in the Authority

[31] Costs were reserved by the Authority but were not determined. Mr Johnson's total legal fees from his previous lawyers totalled \$50,131.65; and he paid a filing fee of \$71.56.

[32] It was submitted that costs should not follow the event because the Authority was clearly wrong in law, and that instead Mr Johnson should be awarded costs.

[33] The investigation meeting took place over one day, but Mr Cleary submitted there were compelling reasons not to default to the Authority's daily tariff. Rather, he said Mr Johnson should be recompensed for a reasonable portion of the legal fees actually expended, whether on the basis of the principles outlined as to costs in the

⁹ *Stormont v Peddle Thorp Aiken Ltd* [2017] NZEmpC 159 at [37].

Authority in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, or on the basis of equity and good conscience principles to the effect that Mr Johnson ought not to be disproportionately out of pocket for resisting NZDF's manifestly unreasonable position.¹⁰ The point is again made that NZDF also initially refused mediation. Accordingly, Mr Johnson seeks an order that NZDF pay him \$20,000 costs and the disbursement.

[34] Mr Lucie-Smith does not contest an entitlement to costs in the Authority, but states in essence that the processes prior to and before the Authority were relatively straightforward, and that the daily tariff should apply without uplift. He submitted that a fourfold increase on the daily tariff was well beyond the principles established in case law that cost awards should be modest.

[35] I consider first the quantum of Mr Johnson's legal fees in relation to the Authority proceedings. I have reviewed the invoices rendered to Mr Johnson in respect of the Authority's proceedings. There appear to be some attendances that do not relate to the Authority's proceedings, such as the preparation of a will and an enduring power of attorney. Even allowing for those particular factors, I am not satisfied that the assessment of costs should proceed on the basis of costs actually incurred when it is not clear why they are so high.

[36] The following extract from *Stevens v Hapag-Lloyd (NZ) Ltd* is apposite, as endorsed by the full Court in *Fogotti v Acme & Co Ltd*:¹¹

[94] ... Proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is the first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Courts. It is plain (including from the Authority's informed assessment of an appropriate notional daily rate...) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount the parties may reasonably be expected to expend on legal resources. While it is each party's right to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources in the pursuit or the defence of the claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate.

¹⁰ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC).

¹¹ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, [2015] ERNZ 224 (footnotes omitted); endorsed by the full Court in *Fogotti v Acme & Co Ltd* [2015] NZEmpC 135 at [107].

[95] In my view, it will generally be inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority.

[37] In the earlier decision of *PBO Ltd*, the full Court also emphasised that costs in the Authority should be modest.¹²

[38] In my judgment, the extent of costs invoiced to Mr Johnson for the proceedings in the Authority is not a reason to depart from the daily tariff in this particular case.

[39] Nor am I persuaded that the Authority's determination was so obviously wrong that NZDF should not have resisted Mr Johnson's challenge.¹³ Its view of the facts differed from the Court's assessment, and that may well have been due to the way the case was run before the Authority. It would appear the challenge was presented to the Court in a more focused and thorough fashion.

[40] The Authority's determination suggests that the investigation was straightforward. It occupied one day, and submissions were filed thereafter by counsel. I consider an assessment of this factor, with reference to the tariff, provides an appropriate starting point.

[41] The only factor which justifies consideration of a subsequent uplift relates to GST. It is appropriate to consider this factor with regard to costs in the Authority, as it was when assessing costs in the Court.¹⁴

[42] The Authority's tariff amount is \$4,500 for the first day of an investigation, and \$3,500 for each day thereafter.¹⁵

[43] Allowance should be made for the first day according to the tariff, and half a day for the preparation of the submissions which were filed thereafter. I also allow an uplift in light of the GST issue.

¹² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, above n 8, at [44]–[46].

¹³ *Johnson v New Zealand Defence Force* [2019] NZERA Wellington 267.

¹⁴ *Stormont*, above n 9, at [44].

¹⁵ Employment Relations Authority "Practice Note 2 – Costs in the Employment Relations Authority" (30 June 2016) <https://www.era.govt.nz/assets/Uploads/ERA/ERA-Costs-Practice-Note-0616.pdf> at [4].

[44] Mr Johnson is awarded \$7,200 as a contribution to his costs in the Authority, and reimbursement of a filing fee, \$71.56.

Outcome

[45] In respect of costs and disbursements in the Court, Mr Johnson is to be paid \$30,878.44.

[46] Due allowance is to be made for the sum already paid by NZDF: \$15,014.

[47] In respect of costs and the disbursement in the Authority, Mr Johnson is to be paid \$7,271.56.

[48] I also order NZDF to make a contribution to Mr Johnson's costs in bringing the present application of \$1,000.

[49] The net amount due to Mr Johnson is to be paid within 14 days of this judgment.

B A Corkill

Judge

Judgment signed at 10.45 am on 6 May 2020