IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 112
EMPC 4/2019
EMPC 360/2019

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	ANA SHAW Plaintiff
AND	BAY OF PLENTY DISTRICT HEALTH BOARD Defendant

Hearing: On the papers

Appearances: SR Mitchell, counsel for plaintiff
M Beech and CL McGregor, counsel for defendant

Judgment: 28 June 2022

COSTS JUDGMENT OF JUDGE K G SMITH

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[1] Ana Shaw was employed as a cardiac physiologist by the Bay of Plenty District Health Board until she was dismissed for serious misconduct. Ms Shaw pursued two personal grievances with the DHB. She alleged that she had suffered an unjustified disadvantage and had been unjustifiably dismissed. The Employment Relations Authority dismissed those claims.[1]

[1] *Shaw v Bay of Plenty District Health Board* [2017] NZERA Auckland 322 (Member Fitzgibbon); *Shaw v Bay of Plenty District Health Board* [2018] NZERA Auckland 390 (Member Fitzgibbon).

[2] Ms Shaw unsuccessfully challenged both Authority determinations.[2] The issue of costs was reserved. The parties have not been able to agree about them and the DHB has now applied for an order.

[3] The starting point is cl 19(1) of sch 3 to the Employment Relations Act 2000 (the Act) which confers a broad discretion to order costs. The Court is empowered to order any party to pay to any other party such costs and expenses as are considered reasonable. That power is augmented by reg 68(1) of the Employment Court Regulations 2000 enabling the Court to have regard to the conduct of the parties tending to increase or contain costs.

[4] The Court's discretion must be exercised judicially and in accordance with principle. Since 2016 the Court has used a scale to assist in exercising the discretion conferred by the Act.[3] The scale is intended to support the policy objective that determining costs should be predictable, expeditious and consistent. It does not, however, replace the Court's discretion.

[5] Having been successful the DHB now seeks costs against Ms Shaw for proceedings in the Authority and Court.[4] The costs claimed for steps taken in the Authority are $15,000. That claim relates to both determinations referred to earlier. The costs claimed for the proceeding before the Court are $66,630.30.

[6] Mr Beech, DHB's counsel, submitted that the Authority's standard tariff ought to be departed from in this case.[5] Applying the tariff for a two-day investigation might result in an order for Ms Shaw to pay $8,000. An uplift was sought of a further $7,000 because it was claimed that:

(a) the personal grievances were raised out of time so that a determination was required on a preliminary issue;

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2 *Shaw v Bay of Plenty District Health Board* [2022] NZEmpC 10.

3 "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.

4 Relying on *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC); and *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120, [2017] ERNZ 726.

5 The tariff is $4,500 for the first day of the matter and $3,500 for subsequent days.

(b) a number of actions on the part of Ms Shaw's representative (not Mr Mitchell) caused the DHB to have to seek intervention from the Authority;[6]

(c) she changed representation four times during the dispute including on two occasions since those proceedings were filed;

(d) her advocate failed to advise the Authority of his availability to schedule the investigation meeting;

(e) evidence was filed in a form outside of that expected (an affidavit) and that was unnecessarily prolix; and

(f) she pursued personal grievance claims that were without merit and raising new matters not traversed in her claims or evidence including at the hearing.

[7] The claimed additional amount of $7,000 was acknowledged to be an imprecise calculation but was an estimate for the additional steps required of the DHB.

[8] The application for costs for the Court proceeding was calculated on a Category 2 Band B basis. The claim was for $43,976, including an allowance for preparing written submissions relating to costs.[7] That was consistent with a provisional allocation under the scale made during a directions conference with the parties' representatives.

[9] An uplift from the scale was sought of a further $22,654.30, described in submissions as "an increase in scale costs to 100 per cent of assumed reasonable costs".

[10] What was relied on to justify the requested uplift was that:

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6 Referred to in submissions as inappropriate direct contact by the representative with the DHB's Chief Executive Officer and certain postings on social media.

7 The amount of time sought was one day at the 2B rate of $2,390.

(a) a without prejudice settlement offer was made on 29 March 2019, amounting to a 'walk away' proposal so that in exchange for discontinuing the proceeding no costs would be sought;

(b) the hearing was scheduled to be held on 21 September 2020 but had to be adjourned, with the Court noting that the plaintiff's case had the hallmarks of not being prepared until the last moment and then being inadequately prepared;[8] and

(c) Ms Shaw had initially challenged the Authority's determination on 4 January 2019, but the addition of the unjustified disadvantage claims led to further cost arising from amended pleadings.

[11] Ms Shaw is opposed to any costs being awarded. Mr Mitchell submitted that such an outcome would be just in the circumstances taking into account:

(a) her financial position;

(b) her conduct of the case;

(c) the DHB's position;

(d) the chilling effect on access to justice of the costs award sought;

(e) the equity and good conscience jurisdiction of the Court; and

(f) the effect of the dismissal on Ms Shaw.

[12] In explaining Ms Shaw's response to the DHB's claims, attention was drawn to what Mr Mitchell described as the Court's approach of taking into account the financial circumstances of an unsuccessful plaintiff. His submissions were supported by an extremely brief affidavit from Ms Shaw consisting of ten sentences. Her evidence was that her financial circumstances are strained. She stated her only assets are household effects and a car of limited value. She deposed to working as a retail

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8 *Shaw v Bay of Plenty District Health Board* [2020] NZEmpC 150 at [29].

assistant, having no savings or funds available to meet a costs order and a substantial credit card debt.

[13] Mr Beech was critical of the financial information provided as inadequate in the absence of greater detail. He also pointed out, correctly, that Ms Shaw was represented by two counsel at the hearing and was not legally aided.

[14] While Mr Mitchell did not depart from his primary submission that no costs should be awarded, he made submissions about the requests for uplifts. Two pertinent points were made about the costs claimed for attendances in the Authority. The first was that it is a low-level forum which should be reflected by a modest costs award if one is to be made. The second point was that the DHB's settlement proposal should not result in an increase in costs because it failed to acknowledge that, at the time it was made, Ms Shaw was entitled to pursue her grievances to seek vindication.[9]

[15] Turning to the costs claim as it relates to the Court proceeding, Mr Mitchell pointed to the significant effect of the dismissal on Ms Shaw. She lost a professional position and income which was replaced with a modestly paid job in retail work. I pause to note that this submission is accurate but does not tell the full story. Ms Shaw gave evidence that after the dismissal she eventually successfully applied for a position with a South Island-based DHB. She did not accept the job for a combination of reasons including dissatisfaction with the pay and being located away from her family.

[16] Before considering whether an order ought to be made there are two adjustments required to the DHB's claim for the Court proceeding, even though Ms Shaw did not question any of the steps claimed by it. The first of them is that the DHB claimed for additional counsel involved in interlocutory attendances and at the hearing. While the DHB was represented by more than one counsel in the lead up to the hearing, and during it, I am not persuaded that the complexity of the issues raised justify making such an allowance. Removing the claim for second counsel reduces the DHB's claim from $43,976 to $38,718.[10]

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9 See *Bluestar Print Group New Zealand Ltd v Mitchell* [2020] NZCA 385, [2010] ERNZ 446.

10 Reducing the claimed hearing days from six to four and removing the claim for additional counsel at interlocutory hearings; 2.2 days in total.

[17] The second adjustment is the claim made for the costs of preparing the application for costs. The amount claimed was one day under the Guideline Scale for 2B proceedings.[11] While the submissions were detailed that allocation, if accepted, would be excessive. In my view $1,000 better represents an appropriate amount to allow for this step taken by the DHB. These adjustments produce the amount that can be claimed to $37,328.[12]

[18] Should Ms Shaw's present financial situation influence the decision on costs? In support for this proposition Mr Mitchell referred to *Tomo v Checkmate Precision Cutting Tools Ltd*.[13] He emphasised comments in that decision about the Court's previous practice of assessing the unsuccessful party's financial circumstances.

[19] In *Tomo* the Court said:[14]

> There may be circumstances in which a reduced, or no, costs order is appropriate. However, the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. …

[20] That comment followed an evaluation of earlier cases where the financial circumstances of the unsuccessful party were material in an assessment of costs.[15] *Tomo* contrasted those situations with what happens in other Courts. The comparator referred to was the High Court where financial circumstances are seldom relevant until the enforcement stage of costs orders.[16]

[21] Instructively, the Court in *Tomo* said:[17]

> The approach to financial circumstances raises a number of issues, including the extent to which the opposing party's interests can be protected. While the approach to undue financial hardship in this jurisdiction is said to be based on the broad discretion conferred on the Court, supported by the statutory imperative that the Court exercise its powers consistently with equity and good conscience, there is a risk that the countervailing interests of the successful party … and broader public policy considerations become

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11 $2,390 per day.
12 $38,718 - $2,390 = $36,328 + $1,000 = $37,328.
13 *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196; and relying, for example, on *Head v Chief Executive of the Inland Revenue Department* [2021] NZEmpC 198.
14 At [22].
15 See for example the discussion at [12].
16 At [13]. And see for example *Foni v Foliaki* [2018] NZHC 3126; impecuniosity was irrelevant to an order for costs.
17 *Tomo*, above n 13, at [16] footnotes omitted.

> marginalised. The principles of equity and good conscience must transcend the interests of simply one party. A broader approach is required.

[22] The Court also commented:[18]

> Under what appears to be the current approach, an impecunious litigant can embark on lengthy, and doomed, proceedings free from the spectre of a significant, or any, costs liability. …

[23] Having made that comment the Court drew a contrast with policy considerations identified by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*.[19] The Court of Appeal said that litigation is expensive, time-consuming and distracting and the requirement that a losing party not only pays his or her costs but also makes a contribution to those of the successful party acted as a disincentive to unmeritorious claims.[20]

[24] The position was succinctly wrapped up in the following passage from *Tomo*:[21]

> Finally, there may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

[25] Despite Mr Beech's criticisms of the adequacy of Ms Shaw's disclosures about her financial position, I accept her evidence that she presently has limited means. However, by itself that is not a sufficient reason to justify declining to make any costs order or, for that matter, reducing the amount that might otherwise be payable. The observations in *Tomo* referred to at paragraph [24] are apposite.

[26] Mr Mitchell's submissions about access to justice, and a concern about a chilling effect on potential litigants, are not borne out by what actually happened in

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18 At [18].
19 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA).
20 *Tomo*, above n 13, at [48].
21 At [21].

this case. The prospects of being exposed to costs did not deter Ms Shaw from lodging proceedings in the Authority or challenging the determinations.

[27] Costs were the subject of discussion with the parties' representatives at a telephone conference in the early stages of the challenge where 2B under the scale was provisionally assigned to them. There is no indication that the allocation of a costs category in this way was a matter of concern to Ms Shaw. She embarked on the proceeding knowing that if successful a claim for costs could be made by her against the DHB on a 2B basis, but failure would see them visited on her on the same basis.

[28] Finally, the submission inviting the Court to decline costs to the DHB potentially risks diminishing the financial impact of this litigation on it. Mr Mitchell recognised that possibility and acknowledged there would be a detriment to the DHB if his submissions were accepted, but drew attention to its resourcing and greater ability to absorb costs compared to Ms Shaw. I do not agree that looking at the matter in this way is appropriate. The DHB is a publicly funded health-service provider. There is no reason why that public funding should bear the full burden of this litigation without the DHB being able to attempt to defray some of the expenses by obtaining a costs order against Ms Shaw.

[29] While the DHB is entitled to costs, I am not satisfied that the claimed uplifts are appropriate. As to the Authority, it would appear that the Court is being asked to award an amount that would indemnify the DHB, but that request is not supported by the matters relied on in submissions.

[30] The fact that personal grievances were raised out of time requiring a preliminary decision of the Authority is neither here nor there; it is just part of the investigative process. The personal grievances arose from the overall dispute which Ms Shaw was pursuing and is dealt with by applying the tariff. Likewise, complaints about Ms Shaw's former representative do not justify an uplift. I have reservations about whether there was a sufficient connection between the alleged poor-quality behaviour of that representative and Ms Shaw such that it would be just to make her responsible for that conduct through a costs order. The rest of the matters raised strike me as part and parcel of dealing with a difficult Authority investigation but no more than that.

[31] I am not persuaded that an uplift of the amount claimed is justified for the Court proceeding. The first ground relied on was that a settlement offer was made. In reality that offer valued Ms Shaw's prospects of success at somewhere near zero, which was undoubtedly an unattractive proposition for her at the time. The submissions have the benefit of hindsight, but it could not have been confidently said when the offer was made that her claims would inevitably fail. It was not, therefore, unreasonable for her to reject it.

[32] The third ground relied on was that amended pleadings required further attendances by the DHB. This ground is reflected in the steps claimed by the DHB and does by itself warrant an uplift.

[33] For completeness, the way the hearing was conducted did not expose Ms Shaw to the risk of an uplift in costs. Once Mr Mitchell assumed responsibility for running Ms Shaw's case it was efficiently handled. The hearing did not dwell on unnecessary or distracting issues and the submissions advanced for her were succinct and arguable.

[34] Where Ms Shaw is at risk of an uplift arises from the second ground relied on by the DHB, the adjournment of the hearing from September 2020. The request to adjourn was made on the basis that her representative was required to give evidence which only become apparent when briefs of evidence for the DHB were reviewed. In the end he did not provide a brief of evidence or give evidence at the hearing. In granting the adjournment I noted that her case had all the hallmarks of being under prepared. The issue of wasted costs arising from the adjournment was reserved.

[35] The DHB is entitled to make a claim for its wasted costs, but they were not separately itemised in Mr Beech's submissions. I consider they were likely to take the form of counsel's time in preparing for the hearing that had to be repeated and that a 10 per cent uplift would reflect that wasted expense. That brings the amount to order for costs of the Court proceeding to $39,960.[22]

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[22] This amount excludes an allowance for the preparation of costs submissions ($36,328 x 10 per cent ($3,632.80) = $39,960.80).

Outcome

[36] Ms Shaw is to pay costs to the DHB in the following amounts for:

(a) the proceedings before the Authority $8,000;

(b) the proceedings before the Court $39,960; and

(c) costs arising from preparing the application for costs $1,000.

K G Smith
Judge

Judgment signed at 4 pm on 28 June 2022