IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2022] NZEmpC 144
EMPC 144/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	VULCAN STEEL LIMITED Plaintiff
AND	MANUFACTURING & CONSTRUCTION WORKERS UNION Defendant

Full Court:	Judge J C Holden Judge B A Corkill
Hearing:	On the papers
Appearances:	C Patterson and A Reid, counsel for plaintiff P Cranney, counsel for defendant
Judgment:	16 August 2022

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves costs arising from the Court's judgment regarding drug tests.[1] A Procedure document had been attached to a series of collective employment agreements (CEAs), and two problems arose about the testing issues it described. The first was an interpretation issue, where an analysis of text and background was

[1] *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 78.

required, to establish whether the parties had agreed that an employee was able to choose the method of drug testing on a particular occasion.

[2] The Manufacturing and Construction Workers' Union (Christchurch) (the union) argued that employees did have a choice; alternatively, there was a gap on that issue.

[3] The Court found that there was, in fact, a gap.

[4] The Court then moved on to consider the second issue, which was whether a term should be implied that the employer had the right to choose the method of testing.

[5] The Court was not persuaded that this was the case. Therefore Vulcan Steel Limited's (Vulcan Steel) application for a declaration to that effect was dismissed.

[6] The union has now filed an application for costs and disbursements on the basis it was the successful party. It says that actual costs were $25,500 plus GST, and $5,752.50 for the cost of the two experts it called. A contribution to costs of $17,000 is sought, together with disbursements relating to the calling of two expert witnesses.

[7] The application is opposed by Vulcan Steel. It argues the outcome was mixed so that costs should lie where they fall. Alternatively, having regard to several factors to which we will come to shortly, the Court should decrease any award for costs that would otherwise be made.

[8] Before dealing with each issue, we summarise the key principles as to costs.

Legal principles

[9] The Court has a broad discretion as to costs.[2] The Court's discretion is to be exercised judicially and in accordance with principle. The primary principle is that costs follow the event.[3] The usual starting point in ordinary cases is 66 per cent of

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2 Employment Relations Act 2000, sch 3, cl 19; Employment Court Regulations 2000, reg 68(1).
3 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

actual and reasonable costs. From that starting point, factors that justify either an increase or a decrease may be assessed.[4]

[10] Two other particular considerations arise here. The first concerns those cases where there is a mixed measure of success. In *Health Waikato Ltd v Elmsly*, the Court of Appeal noted that costs usually follow the event and that in most cases it is clear who has been successful and thus prima facie entitled to an award.[5] The Court went on to say, however:[6]

> [35] ... But cases where the parties have mixed success are by no means rare and in such instances it is not necessarily easy to determine who "won" the case so as to be entitled presumptively to costs.
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> ...
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> [39] It is not unusual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.

[11] A third issue which arises from counsel's submissions relates to the question of whether costs should lie where they fall in a case involving the interpretation, application, and operation of CEAs.

[12] We think the following dicta in *Postal Workers Union of Aotearoa v New Zealand Post Ltd* is appropriate.[7] In that decision, Judge Inglis as she was then said:[8]

> [6] Some doubt has been cast on whether these [costs] principles apply to disputes relating to the interpretation, application, and operation of collective agreements. In *Maritime Union of New Zealand v C3 Ltd*, Judge Travis accepted that the principles expressed in *Binnie v Pacific Health Ltd* may not be applicable to disputes. And in *Maritime Union of New Zealand Inc v TLNZ Ltd*, the Chief Judge drew a distinction between cases involving an individual employee and ones in the nature of a generalised dispute applicable to a workforce generally.

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4 *Binnie v Pacific Health Ltd* [2022] 1 ERNZ 438 (CA) at [14]. See also *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 at [42].
5 *Health Waikato Ltd,* above n 4.
6 At [35] and [39].
7 *Postal Workers Union of Aotearoa v New Zealand Post Ltd* [2012] NZEmpC 68.
8 At [6]–[8].

> [7] I prefer to approach the issue of costs in this case in accordance with the general approach endorsed by the Court of Appeal in cases such as *Binnie*, and to have regard to factors such as the benefit both parties will obtain from the proceedings and the nature of the claim, in assessing the extent to which the starting point of 66 percent of the actual and reasonable costs incurred by the successful party might be affected. That is because it is consistent with the principles applying to costs awards in all courts, that party and party costs should generally follow the event and amount to a reasonable contribution to costs actually and reasonably incurred by the successful party.
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> [8] While a challenge involving a dispute as to the interpretation of a collective agreement raises different issues to a case involving (for example) a personal grievance by an employee, it is not otherwise unusual or out of the ordinary. There is nothing to suggest that in referring to the usual approach to be adopted in "ordinary" cases, the Court of Appeal in *Binnie* was intending to limit that approach to a particular class of case (namely personal grievances).

[13] Judge Ford, in the subsequent decision of *New Zealand Meat Workers Union v AFFCO New Zealand Ltd*, agreed with this approach. He pointed out that this would provide the flexibility which is necessary to produce a just result.[9]

[14] In summary, the starting point is that costs should follow the event. The Court has, however, a discretion which can be exercised with flexibility so as to reflect any particular circumstances which may be appropriate – to the point where the Court may direct that costs should lie where they fall.

[15] We apply the foregoing principles.

First issue: should costs lie where they fall?

[16] Mr Patterson, counsel for Vulcan Steel, submitted that the company was successful in two ways. First, the Court had in effect overturned a key determination made by the Employment Relations Authority, namely that a union member employee could elect the method of testing to be undertaken at any given drug testing event.[10]

[17] The second point of success was that the Court did not accept a submission raised for the union that there was an agreement between the parties that employees could only be asked to offer oral fluid for testing of drugs and not urine samples.

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9 *New Zealand Meat Workers Union v AFFCO New Zealand Ltd* [2012] NZEmpC 154 at [21].
10 *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2021] NZERA 2 at [55].

[18] However, both these issues were relevant to the interpretation issue. As already noted, the union's position on the interpretation argument was put in the alternative. It submitted that under the Procedure document the union member did have an election; alternatively, there was a gap.

[19] As the substantive judgment confirms, the interpretation issue was complex. The Court was required to traverse a broad range of provisions, several of which were inconsistent and confusing. Potentially relevant to the interpretation point were the background circumstances. Vulcan Steel called several witnesses who described the development of the various CEAs. The union understandably called evidence in reply. However, in the end the Court was not particularly assisted by the evidence called by either party on this point.

[20] Whilst there is some force in Mr Patterson's submission that the union did not succeed in establishing that the Procedure document bestowed an election on union members, that was only one of two positions advanced by the union, the second of which was in line with the case advanced by Vulcan Steel itself. Because the union's alternative submission was accepted, we do not think it can be said that it achieved no success on the interpretation issue.

[21] Accordingly, we do not think the outcome that was reached on the first issue should result in costs lying where they fall.[11]

Issue two: decrease in costs

[22] Mr Patterson submitted there were several factors which would justify a costs reduction.

[23] The first of these related to the line of cases which concluded that where there is a dispute over the interpretation of a CEA, costs should lie where they fall.

[24] The ultimate issue in this case was whether a term should be implied in the parties' agreement. The issue of interpretation was simply a precursor to the

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[11] *Health Waikato Ltd*, above n 4.

consideration of whether an order of implication should be made. On that key issue, Vulcan Steel was unsuccessful.

[25] Mr Patterson submitted that the case was of mutual benefit to both parties and that the problem arose in the context of an ongoing, and somewhat longstanding, employment relationship. He noted this was a relevant consideration in *E Tū Inc v New Zealand Transport Agency*.[12]

[26] However, in this case, it is clear that Vulcan Steel was primarily responsible for the multiple drafting issues that arose.

[27] Although the Court's conclusions may be of assistance to both parties in any subsequent bargaining, we do not think, in the particular circumstances, this factor should result in a decrease.

[28] Finally, Mr Patterson argued that additional steps had to be undertaken by Vulcan Steel because a more explicit statement of defence had to be filed, and this was not straightforward.

[29] We accept that Mr Patterson did raise issues as to the sufficiency of the statement of defence; this was referred to in correspondence between counsel and ultimately in a memorandum prepared for the Court on timetabling issues. However, in the overall context of the proceeding, this was a relatively minor issue. It does not provide a basis for a reduction.

Issue three: quantum of costs and disbursements

[30] As already noted, Mr Cranney, counsel for the defendant, submitted that costs incurred were $25,500 plus GST. He also said that when assessed under the Court's Guideline Scale as to Costs (the Guideline), the amount would total $25,095.[13]

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12 *E Tū Inc v New Zealand Transport Agency* [2017] NZEmpC 80 at [29].

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

[31] The amount sought, however, is $17,000 which is approximately two-thirds of actual costs, net of GST.

[32] The Guideline is predicated on the basis of a two-thirds contribution to reasonable costs.[14] In this case, applying the Guideline would result in a full reimbursement of costs, rather than a contribution only. Mr Cranney's approach is a reasonable one. We consider that $17,000 is the appropriate contribution to costs here.

[33] The costs of two expert witnesses are claimed as disbursements.

[34] Mr Patterson submitted that Vulcan Steel also incurred the cost of experts and that given what he described as "the mutual success of the parties", each side should be responsible for their own experts costs.

[35] We have already ruled against the possibility of treating this case as one where there was a mixed measure of success so that costs should lie where they fall.

[36] We also proceed on the basis that the expert evidence was primarily called for the purposes of the implication issue.

[37] We see no reason therefore why the incurring of disbursements should not follow the ultimate outcome of the proceeding, which was the dismissal of the claim for implication.

Result

[38] Vulcan Steel is to pay the union the sum of $17,000 as a contribution to its costs, together with $5,752.50 for the disbursements incurred.

B A Corkill
for the full Court

Judgment signed at 1.50 pm on 16 August 2022

[14] High Court Rules 2016, r 14.2(1)(d).