IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 69
EMPC 397/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	AHMED ALKAZAZ Plaintiff
AND	ENTERPRISE IT LIMITED Defendant

Hearing:	On the papers
Appearances:	Plaintiff in person R Bryant, counsel for defendant
Judgment:	22 April 2022

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Interlocutory application for stay of proceedings – costs challenge)

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[1] This judgment deals with an outstanding costs issue following an interlocutory application by the plaintiff for a stay of proceedings. The application was declined.[1] That judgment was the ninth interlocutory judgment in these proceedings and was followed shortly afterwards by a tenth.[2] In the ninth interlocutory judgment I held that the defendant company was entitled to costs on its application, calculated on a 2B basis. I reserved leave to the parties to return to the Court if there were issues in relation to the calculation. There are issues with the calculation and so the matter has

1 *AlKazaz v Enterprise IT Ltd (No 9)* [2021] NZEmpC 62.
2 *AlKazaz v Enterprise IT Ltd (No 10)* [2021] NZEmpC 94.

returned to the Court. In addition to costs on the unsuccessful stay application, the company now seeks a contribution to its costs in seeking costs.

[2] The defendant incurred actual costs on the interlocutory application of $12,058.84. It is submitted that costs calculated according to the scale amount to $14,698.50.[3] The defendant seeks costs of $12,058.84 and a contribution to costs on seeking costs of $3,900.

[3] The plaintiff disputes that the defendant is entitled to costs. He says that the tenth interlocutory judgment effectively overtook the ninth and that the decision that the defendant was entitled to costs was effectively overtaken too. Mr AlKazaz calls in aid the Court's wide discretionary powers in relation to costs and the well-established principle that costs are not to be used as a punishment. He further says that there are no special circumstances which would justify an award of costs on costs.

[4] I do not accept the submission that the findings in the ninth interlocutory judgment were overtaken by those in the tenth. In the ninth interlocutory judgment I declined to order a stay, held that the company was entitled to costs, and set out the basis on which that entitlement was to be quantified. The tenth interlocutory judgment dealt with a different application for a stay, pending determination of an application for recall filed in the Supreme Court. In the event, the stay application did not need to be dealt with because a parallel application for an extension to the timetabling orders was made to accommodate difficulties the plaintiff was confronting with another set of proceedings in this Court. As Mr Bryant, counsel for the defendant, points out, a stay of proceedings materially differs from a variation of timetabling orders, although I accept that there may be an overlap in terms of practical impact. The finding that Mr AlKazaz was liable for costs was not disturbed by the subsequent interlocutory judgment and remains in place.

[5] The Court's guideline scale for costs sets out various categories of proceedings, including interlocutory applications, and the steps related to each for which costs are allocated. An application for stay falls into the interlocutory application category and

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

is to be dealt with accordingly. The steps specifically provided for, which are applicable in this case, are the filing of an opposition and preparation of written submissions. The defendant seeks costs for these steps and I agree that that is appropriate. This amounts to 1.6 days under Band B = $3,824.

[6] The Court may allow for additional steps where it is considered appropriate to do so. The defendant seeks an allocation, on a 2B basis, for a number of additional steps.[4] These steps are said to equate to 4.55 days.

[7] I accept that the defendant incurred costs in respect of material filed at the direction of the Court following the adjournment of the stay application hearing on 18 February 2021,[5] and in dealing with various steps taken by Mr AlKazaz. However, I do not consider that the time allocations provided under the guideline scale for general proceedings ought to be applied. And there is a need for proportionality – this was an interlocutory application in respect of a confined matter. I consider that a contribution to costs of no more than $4,000 is appropriate in the circumstances.

[8] It follows from the foregoing that issues raised by the defendant in relation to the allocation of costs when actual costs equate to less than scale costs do not arise, and do not need to be dealt with.[6] It is however convenient to repeat an observation made in *Gate Gourmet v Sandhu* about the factors that are broadly relevant to costs in this jurisdiction:[7]

> [16] In a jurisdiction such as this, the financial pressure on parties is often intense - a worker may have been dismissed and wish to bring proceedings seeking reinstatement; a small union (such as in this case) may wish to pursue a claim for minimum entitlements for its members; a financially strapped employer may wish to defend a claim against it in respect of a redundancy process. The list goes on. All of this reinforces in my mind the imperative for the Employment Court to have regard to the two additional functions identified by the Supreme Court of Canada (behaviour modification and access to justice) in dealing with costs applications. That imperative applies equally, in my view, to those practicing in this jurisdiction, requiring them to keep the two functions clearly in focus when incurring costs and expenses on behalf of their clients.

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4 Set out in a table annexed to the application for costs.
5 *AlKazaz v Enterprise IT Ltd (No 7)* [2021] NZEmpC 15.
6 *Cornish Trucks & Van Ltd v Gildenhuys* [2019] NZEmpC 57 at [9].
7 *Gate Gourmet New Zealand Ltd v Sandhu* [2022] NZEmpC 50.

[9] The plaintiff is ordered to pay the defendant the sum of $4,000 in responding to the application for a stay.

[10] The defendant seeks an order for costs on costs; the plaintiff says that there are no "special circumstances" to warrant such an order. Special circumstances do not, however, need to exist. An order for reasonable costs, reasonably incurred, may be made in the Court's discretion where a party has been put to the cost of pursuing an application for costs. The defendant was required to engage in correspondence in relation to the issue of costs, with the plaintiff denying liability. However, the costs contribution sought was substantially higher than the contribution that I have now determined ought to be paid by the plaintiff. In the circumstances I decline to make an order of costs on costs.

[11] The plaintiff is accordingly ordered to pay the defendant:

(a) The sum of $4,000 by way of costs on the unsuccessful interlocutory application for a stay in interlocutory judgment no 9.

(b) Such sum is to be paid within 20 working days of the date of this judgment.

Christina Inglis
Chief Judge

Judgment signed at 10.45 am on 22 April 2022