IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2023] NZEmpC 170
EMPC 298/2021

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	FGH Plaintiff
AND	RST Defendant

Hearing:	On the papers
Appearances:	SM Henderson, counsel for plaintiff M Richards and K Allan, counsel for defendant
Judgment:	4 October 2023

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves costs issues following my substantive judgment of 6 December 2022.[1] Three grievance claims were dismissed. I reserved costs.

[2] I indicated this topic should be discussed in the first instance between the parties, taking into account a particular observation I made about the third cause of action, to which I will return shortly. I said that my preliminary view was costs should be considered on a 2B basis. Memoranda were able to be filed if agreement could not be reached.[2]

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1 *FGH v RST* [2022] NZEmpC 223, [2022] ERNZ 1076.
2 At [405]–[406].

[3] On 13 January 2023, FGH (Ms H) filed an application in the Court of Appeal seeking leave to appeal the judgment.

[4] On 31 January 2023, RST filed an application for costs in this Court.

[5] On 15 February 2023, Ms H filed an application for stay of the costs determination, and an extension of time to file a response to RST's costs application. I granted a stay on 20 April 2023, until such time as the Court of Appeal was able to consider the application for leave.[3]

[6] On 2 June 2023, the Court of Appeal issued a judgment declining Ms H's application for leave to appeal.[4] I subsequently discharged the stay order.

[7] Updated memoranda were then filed by the parties as to the outstanding costs issues.

RST's application

[8] Counsel for RST, Ms Richards, provided a schedule for costs on a 2B basis, in accordance with the Court's Practice Direction Guideline Scale.[5] Those costs totalled $49,114.50.

[9] In her supporting memorandum, Ms Richards said that the proceeding had been removed from the Authority, but in the circumstances RST would not seek costs for the steps taken in the Authority.

[10] Costs were sought on a band C basis for the preparation of the common bundle of documents. This was said to be a time-consuming step, requiring a comparatively large amount of time, given there were 156 documents amounting to 786 pages; and that RST had been primarily responsible for its preparation.

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[3] *FGH v RST* [2023] NZEmpC 61.
[4] *FGH v RST* [2023] NZCA 204.
[5] "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

[11] It was explained that costs for appearances were sought on the basis of 5.5 days for the principal representative, and 2.75 days for the second representative, these totals being computed in light of actual in-court time.

[12] Reference was then made to interlocutory steps taken by Ms H after the substantive hearing for leave to adduce further evidence and for a direction requiring RST to cease a disciplinary investigation pending release of the Court's judgment. After discussion with the bench, RST then decided to pause its investigation. Costs for attendances in connection with the application which had been advanced by Ms H were not, in those circumstances, pursued by RST.

Ms H's position

[13] In the course of the costs phase, two affidavits were filed by Ms H outlining her circumstances. Submissions were also advanced on her behalf by her counsel, Mr Henderson.

[14] In brief, Ms H said that unbeknown to her when she was giving evidence in the proceeding in July 2022, she had been pregnant. Subsequently she gave birth to a child. At the time of her affidavit, she was in the course of exercising her right to obtain parental leave for a six-month period.

[15] She referred in detail to her mental health issues as outlined in the multiple medical reports the Court has considered over the course of the present litigation. She alluded to services she was currently receiving from a maternity mental health service, and from other entities, as well as her family.

[16] She then referred to her "attempts to settle" the matter in June and July 2021. I will consider this step in more detail later by reference to the relevant correspondence.

[17] Finally, she outlined her present financial position. In summary, she said that once she received paid parental leave entitlements, her income would reduce. Her fortnightly expenses already exceed her usual income, and this would be exacerbated by her reduced income. She said the shortfall is being paid from savings of about

$30,000. Additionally, she has a KiwiSaver balance of $37,000. The father of the child contributes $500 per fortnight in child support.

[18] Ms H's liabilities are $9,000 for a student loan, and approximately $76,000 for work carried out by her lawyer with regard to this proceeding, although this does not include work with regard to her application for leave to appeal. Finally, she confirmed she was required to pay costs to RST following its dismissal of that application, totalling $4,500.

[19] Ms H emphasised that she is a new mother with a mental health condition; her liabilities exceed her assets; she faces "serious misconduct" disciplinary proceedings on returning to work after six months' parental leave; and, she said, she faces the real possibility of being declared bankrupt.

[20] In his submissions, Mr Henderson accepted that the costs sought by RST are in accordance with the Court's Guideline Scale. No challenge to the assessed quantum was advanced.

[21] However, Mr Henderson submitted that costs should nonetheless lie where they fall, by reference to three points.

[22] First, he relied on the correspondence annexed to Ms H's affidavit, wherein she had made an offer on 14 June 2021, confirmed on 2 July 2021, to settle all of the matters at issue between the parties by way of private arbitration and mediation which, if accepted, would have avoided the legal costs now claimed. Mr Henderson submitted this was a circumstance that fell for consideration under reg 68(1) of the Employment Court Regulations 2000 (the Regulations), being made a reasonable time before the hearing.

[23] Secondly, it was argued that RST had ignored those offers, leaving Ms H with no option but to bring legal proceedings to make out her case.

[24] Thirdly, on the facts of this matter, to award the costs payment would raise an access to justice issue, and would be oppressive having regard to her financial circumstances and the fact she is now a mother in uncertain circumstances.

[25] Each of these issues requires careful consideration by the Court.

Legal principles

[26] The Court's power to award costs is discretionary, as set out in cl 19 of sch 3 to the Employment Relations Act 2000 (the Act). Regulation 68 of the Regulations provides that in exercising the Court's discretion under the Act, it may have regard to any conduct of the parties tending to increase or contain costs, including any offer made to settle all or some of the matters in issue.

[27] The primary principle when the Court exercises its discretion is that costs should follow the event.[6]

[28] The Court's Guideline Scale also applies when exercising the discretion. I provisionally assigned these proceedings Category 2B for costs purposes under that scale.

Issue one: The correct starting point

[29] Before dealing with the particular points raised by Mr Henderson, it is necessary to evaluate RST's claim for costs, as assessed under the Court's Guideline Scale as to costs.

[30] The claim proceeds on the basis that RST successfully resisted each of the three causes of action raised for Ms H, and that costs should follow each such event.

[31] However, the matter is not so straightforward. When dealing with the third cause of action, which related to whether or not a fair and reasonable employer could have proceeded with the disciplinary action once matters were unable to be resolved

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6 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48]; and *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196 at [5].

at a judicial settlement conference, I reviewed the decision to proceed with RST's disciplinary process alongside the Court process.[7] This included consideration of the somewhat surprising step that had been taken by RST to have an independent investigator undertake a disciplinary process at the time the Court was considering the legitimacy of that process. In the course of my consideration of this issue, I said:

> [392] In the absence of a formal application for stay being applied for and granted, as a matter of law it was open for RST to proceed with a fresh disciplinary process. As a matter of process, however, it was potentially unfair that Ms H, a vulnerable employee involved in significant litigation, would be required to participate in a disciplinary process which would have been comprehensive, whilst at the same time preparing for the hearing in this proceeding. Had RST required its investigator to press on under the original timetable given to her, there might well have been an issue as to whether it was acting as a good employer and/or engaging with its employee in good faith.
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> [393] That issue was overcome by the effect of the advice given to Ms H not to attend a meeting with the investigator. In the end, the process was not advanced alongside the present proceeding. Nor was it advanced whilst this Court's judgment was pending. The disadvantage contemplated by the third cause of action did not ultimately eventuate.
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> [394] Accordingly, I conclude that the disadvantage grievance is not established. The third cause of action is dismissed.
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> [395] However, that is not necessarily the end of the issue. It was appropriate in my view for the concerns reflected in that cause of action to be raised. The implications of a disciplinary proceeding being advanced under an intended timetable that coincided with the timetable for the hearing of this proceeding were potentially significant. This may well be an issue I will need to consider further at the costs stage of this matter if the parties are unable to reach agreement on that topic.

[32] Surprisingly, neither party referred to this issue in their costs submissions. I remain of the view that it was fair for Ms H to have raised the third cause of action concerning the parallel process instituted by RST, despite the fact that process was ultimately discontinued. In my view it would not be fair and reasonable for RST to recover a contribution to its costs in connection with the third cause of action.

[33] In *Health Waikato Ltd v Elmsly*,[8] the Court of Appeal observed that cases where the parties have "mixed success" are by no means rare. It noted that in such a case, it

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7 *FGH v* RST, above n 1, at [384] onwards.

8 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172, (2004) 17 PRNZ 16 (CA).

is not necessarily easy to determine who "won" the case so as to be entitled presumptively to costs.[9]

[34] That, and other similar dicta, are not directly on point because Ms H did not in fact "succeed" outright with regard to the third cause of action. But the circumstances should nonetheless be taken into account under the Court's broad discretion to make a fair and reasonable award of costs.

[35] I consider the interests of justice will be met by concluding that the costs involved in dealing with the third cause of action should lie where they fall. I have concluded that a reduction of one-third is appropriate to the costs claimed by the defendant. This reduction is intended to ensure no contribution to RST's costs in respect of the third cause of action is made.

[36] This means that the starting point for the assessment of costs is $32,743.

Issue two: Reg 68(1)

[37] The first of the two letters relied on for Ms H was that of 14 June 2021, where Mr Henderson advanced what was described as a constructive proposal. This was to break a deadlock which had arisen between the parties and to avoid litigation. His proposal was as follows:

(a) The parties would jointly commission a senior employment lawyer to urgently hear and determine the parties' cases as to the legality of the disciplinary process which RST had commenced on 8 April 2021. In subsequent correspondence, it was anticipated this step would produce a binding outcome.

(b) Then the parties would attend a suitably qualified mediator with a view to resolving all outstanding issues in light of the lawyer's opinion.

(c) Ms H would return to full-time employment on a graduated basis.

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9 At [35].

(d) Ms H would continue the process of securing current medical information from her clinicians through her general practitioner, and would provide this data for the purposes of informing the mediation.

[38] In the second of the two letters relied on, dated 2 July 2021, Mr Henderson outlined recent events in some detail, and then, under the heading of "Arbitration/mediation", referred to what he described as a limited arbitration on the legality of the 8 April 2021 disciplinary process. He said that RST had ignored this proposal, although it had appeared to leave open the option of mediation. It was his view that without an authoritative resolution of the central legal question by objective arbitration, bare mediation was unlikely to have any reasonable prospects of success and would waste resources.

[39] For the purposes of reg 68, Mr Henderson submitted that this was an "offer to settle" under reg 68(1), which would have had the effect of containing, by avoidance, all the legal costs now being sought. He also submitted it had been made a reasonable time before the hearing.

[40] He went on to refer to other correspondence which was exchanged at about this time, submitting in effect that RST's conduct could be criticised for rejecting the offer that had been made, giving rise to the question as to which party had caused the significant litigation costs. He argued that by "ignoring" Ms H's reg 68(1) offer, RST's conduct had caused unnecessary costs to be incurred.

[41] Once it was apparent that the offer had been declined, Mr Henderson said Ms H was left with three unsatisfactory options: to resign; to submit to what she was advised was a questionable disciplinary process; or to return to the Court to enforce what she believed to be her contractual and statutory rights.

[42] There are several issues which arise from the proposal as advanced for Ms H.

[43] The first is whether it is reasonable to conclude that RST should have submitted to a binding alternative dispute resolution (ADR) process, when it plainly possessed more extensive legal rights under the Act. That is, had the Authority or Court heard

and decided the issue as to the legality of the disciplinary process as a preliminary point, both parties would have possessed the right to appeal that conclusion. I do not consider that a matter of conduct for costs purposes arose because RST was not persuaded to abandon potential statutory rights and agree to a binding arbitration.

[44] Secondly, costs would in any event have arisen from the arbitration process, including in respect of the costs of the arbitrator. No estimate has been provided as to the extent of these costs. All that can be concluded at this stage is that it is likely the legal costs involved in dealing with the legality of the disciplinary process which had been instituted by RST would have been similar to the costs incurred on that point in the Court with, as I say, the additional requirement that the parties would have been required to meet the costs of a private arbitrator. These would have included costs of preparation, of sitting, and of deliberating in order to produce an award. The total cost of this process would likely have been significant.

[45] The second aspect of the proposal involved the possibility of mediation, albeit on the basis of an arbitral award. There is no guarantee that the matter would have been capable of resolution in those circumstances. Costs would likely have been incurred even in attending mediation. Although Mr Henderson was not necessarily suggesting that the mediation aspect of the intended process was an offer to settle, I am unable to conclude that there would necessarily have been a significant costs savings, since there would have been no guarantee of resolution at mediation.

[46] In any event, as I shall elaborate shortly, RST indicated it was willing to undertake mediation on all matters.

[47] A further problem is that soon after the correspondence relied on by Ms H had been sent, an incident occurred which led to a direction by RST that she commence a period of paid sick leave with immediate effect. In the proceeding which came before the Court, it was alleged these events led to a further cause of action as to whether Ms H had been unjustifiably suspended.[10]

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10 *FGH v RST*, above n 1, at [304].

[48] In summary, then, I am not persuaded that these events, when considered in context, are such as to lead to a conclusion that RST should be disqualified in whole or in part from now claiming costs.

Issue three: RST ignored the offers made, leaving no option but for Ms H to bring legal proceedings

[49] Mr Henderson said that the offer to settle the case via the mechanisms he proposed was ignored by RST. However, as Ms Richards submitted, an analysis of the correspondence between the parties at the time does not establish this proposition. I outline the history briefly.

[50] Letters were sent by Mr Henderson on 14 June 2021 raising the possibility of limited arbitration followed by mediation, and again on 17 June 2021 proposing mediation. Ms Richards responded on 18 June 2021, acknowledging the request that the parties attend urgent mediation, and stating that RST fully supported this occurring, and that it should take place no later than 9 July 2021, and preferably much earlier.

[51] On 2 July 2021, Mr Henderson wrote to Ms Richards, stating that Ms H would not attend mediation to resolve the matters without first attending the proposed limited arbitration.

[52] On 6 August 2021, Ms Richards replied, reiterating that RST was not opposed to attending mediation at an appropriate time, but noting that it did not consider arbitration to be an appropriate process to deal with an employment relationship problem.

[53] Context is also relevant. As already mentioned, in my substantive judgment I reviewed the various other developments which occurred at the time of these exchanges.[11]

[54] The lawyers on both sides were engaged in robust exchanges, but I do not consider that these steps could be regarded as demonstrating, in either instance,

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[11] At [309]–[317].

anything other than good faith attempts to resolve a difficult employment relationship problem.

[55] Plainly, RST did not ignore the offer made.

Issue four: Access to justice

[56] Mr Henderson relied on s 27 of the New Zealand Bill of Rights Act 1990 (NZBORA) which he says affirms the fundamental right to "access to justice", to support a submission that in exercising this right, costs in this case should lie where they fall.

[57] Mr Henderson submitted that a hopeless and irresponsibly conducted case may legitimately expose a plaintiff to the unqualified application of the Guideline Scale. He said that in such circumstances, a plaintiff arguably might have a claim for professional negligence against counsel who committed a waste of the Court's and the other party's time and resources.

[58] By contrast, a case involving an employee with an underlying chronic mental health condition and demonstrable limited means, and if that case was responsibly conducted and argued, might well lead to a conclusion that such a party should not be liable for costs if the claim was unsuccessful.

[59] In a related submission, he argued that the obvious imbalance of power between an employer and an employee, and the impact of litigation loss on a vulnerable party, ought to be taken into account in the Court's wide discretion. Mr Henderson submitted that upholding an employer's claim for costs could have a "chilling effect" on practitioners who advise employees, to the point of discouraging financially weak employees from enforcing their rights in the Court.

[60] He submitted this was an access to justice issue, noting the early judgment of a former Chief Judge in *New Zealand Airline Pilots' Assoc IUOW v Registrar of Unions*.[12] The Court observed that an award of costs should be "… neither illusory

[12] *New Zealand Airline Pilots' Assoc IUOW v Registrar of Unions* (1989) ERNZ Sel Cas 304, [1989] 2 NZILR 550 (LC).

nor oppressive, and in the latter regard ability to pay without undue hardship is a relevant consideration."[13]

[61] There are indeed cases where, relying upon its broad costs discretion, the Court has concluded costs should lie where they fall. This has often been the case in what are described as test cases.[14] Proceedings in this category tend to involve a practice or procedure which could potentially impact on a wide range of employers and employees, and/or other cases.

[62] There can also be other circumstances where such an approach is warranted, such as in recent cases involving dismissals as a result of COVID-19 vaccination issues. In certain circumstances, the Court held it was in the public interest for a public sector organisation to bear its own costs.[15] All such examples are, however, case specific.

[63] While the usual starting point is that costs should follow the event, the Court has a discretion which can be exercised with flexibility so as to reflect any particular circumstances which it may be appropriate to consider – to the point where the Court may direct that costs should lie where they fall.[16]

[64] Central to Mr Henderson's access to justice submission was his reliance on s 27 of NZBORA. The components of the section are that a person has the right to observance of the principles of natural justice, the right to apply for judicial review, and the right to bring and defend proceedings involving the Crown in the same way as civil proceedings between individuals. It was not clarified which component of s 27 was being relied on.

[65] I deal with each. I do not consider there is, in this case, an application for costs which raises a natural justice issue that the Act itself is unable to deal with. There is

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13 At 3.

14 See, for example, *Terry Young Ltd v NZ Engineering, Printing and Manufacturing Union Inc* [2007] ERNZ 533 (EmpC); *Maritime Union of New Zealand Inc v TLNZ Ltd* [2008] ERNZ 91 (EmpC); *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111; and *Blue Water Hotel Ltd v VBS* [2019] NZEmpC 24.

15 *GF v OO* [2022] NZEmpC 1 at [20]; and *VMR v Aviation Security Service Division of Civil Aviation Authority* [2023] NZEmpC 95 at [22].

16 *Vulcan Steel Ltd v Manufacturing and Construction Workers Union* [2022] NZEmpC 144 at [14].

no issue as to judicial review. Nor is there an issue as to Ms H's right to bring civil proceedings against the Crown and have those proceedings heard according to law in the same way as civil proceedings between individuals in issue. That is precisely what has happened.

[66] At the present stage, the pros and cons of a costs award are able to be determined under conventional costs principles. Ms H's personal circumstances (financial and non-financial) are, of course, relevant under the Court's wide discretion as to costs. These particular factors are best considered under the authorities which have previously considered the issue of hardship, to which I now turn.

Issue five: Hardship issues

[67] In *Tomo v Checkmate Precision Cutting Tools Ltd*, Judge Inglis discussed the authorities as to hardship in considerable depth.[17] This was for the purposes of determining whether, following a discontinuance, an employing party should be awarded costs when an employee claimed that undue financial hardship would arise if costs were to be awarded.

[68] The Court reviewed cases where, in this Court, the interests of a successful litigant had largely been displaced because undue financial hardship had been established – to the point of reducing quantum to nil.[18]

[69] The Court noted that there are a range of policy factors that need to be considered when hardship is raised, including the possibility that an impecunious litigant could embark on lengthy and doomed proceedings, free from the spectre of a significant, or any, costs liability. A successful party may also have been financially stretched by having to participate in the subject proceeding. On the Court's reasoning, this was not necessarily in the interests of justice.

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[17] *Tomo v Checkmate Precision Cutting Tools Ltd*, above n 6, at [12] onwards; and see the further discussion of those factors in *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 812 at [38]–[39]; and in *Vince Roberts Electrical Ltd v Carroll* [2015] NZEmpC 161 at [12].

[18] See *Prime Range Meats Ltd v McNaught* [2014] NZEmpC 179; *T & R Distributors Ltd v Grimes* EMC Christchurch CC9A/06, 23 November 2006; and *Koia v Attorney-General (No 2)* [2004] 2 ERNZ 274 (EmpC).

[70] Reference was made to the relevance of the comparative bargaining strength of the parties to an employment relationship to the assessment of costs. The Court referred to a High Court judgment, *McGrath v Bank of New Zealand*, which involved an employment relationship problem, with Grieg J observing:[19]

> While it is clear that there has been a change in the wording of the rule [HCR 46], I think that is more apparent than real. There always has been, and still remains, a judicial discretion which has been a very wide one and which allowed in appropriate cases a refusal of costs to a successful party. The principle under the old rule was what was more fair as between the parties … That, I think, is equally applicable under the new rule and ought to be the primary consideration in this case.
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> The second principle is that the considerations which are to be taken into account in deciding what is more fair must be those which have a connection with the case …
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> These considerations include the way in which the case was presented in the pleadings and the course of the case itself; what were the issues between the parties and whether the hearing was lengthened or shortened by the conduct of the case on either side. *I think that, on the other hand, the financial position of the plaintiff and the relative position of the plaintiff and the defendant are not considerations which are connected with the case. An employee in a case against his employer will always be in a subordinate position and is likely to be less affluent than the employer. That would tend to mean that in every case there would be a preference towards the employee in the award of costs and that is not, in my opinion, either just or right*.

[71] Judge Inglis ultimately concluded:[20]

> [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.
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> [22] 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. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The

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[19] *McGrath v Bank of New Zealand* (1988) 1 PRNZ 257 (HC) at 258–259 (emphasis added).

[20] *Tomo v Checkmate Precision Cutting Tools Ltd*, above n 6, at [21].

> interests of both parties, and broader public policy considerations, must also be taken into account. …

[72] I have set out the reasoning contained in *Tomo* in detail because it explains clearly the general considerations which may fall for consideration in a case involving hardship. In short, hardship may be a relevant consideration justifying the making of a reduced order for costs or relieving an unsuccessful party from a costs liability in total. But the interests of justice require a careful evaluation of the nature of the case, the circumstances of both parties, and the rights of both parties.

[73] The starting point for consideration of Ms H's position relates to her financial circumstances. On the figures produced to the Court, which represented the position as at July of this year, Ms H was insolvent if she was to pay all her debts. Although insolvent, neither her lawyers (in respect of the costs incurred with regard to this litigation) nor RST (with respect to the award of costs directed for payment by the Court of Appeal) have enforced their debts. She has not to this point been adjudicated bankrupt.

[74] Indeed, there is appellate authority to the effect that an unsuccessful party, having been adjudicated bankrupt, is not protected from an award of costs: *Skelton v Howcroft*.[21] Ms H's financial impecuniosity is not necessarily a reason for waiving RST's entitlement to costs, particularly as that impecuniosity is in large measure due to the bringing of a proceeding which did not succeed.

[75] However, submissions made on her behalf raise broader problems. She has pointed to her significant mental health issues. She has emphasised the fact that she is now the mother of a young child requiring significant support. Finally, she says she faces the prospect of a difficult disciplinary procedure at the conclusion of her parental leave period in the near future. At that stage, it is conceivable she will face further legal costs. For the avoidance of doubt, reference to this point is not to be taken as indicating what the merits of the intended disciplinary action are, one way or the other.

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21 *Skelton v Howcroft* [2018] NZCA 140 at [22].

[76] Turning to the position of RST, no financial information has been provided to the Court. Nor would I have expected this would be necessary in the case of a government sector organisation for the purposes of a case such as this. Ms Richards said that the actual costs in defending the claim by Ms H were more than four times the amount being sought in scale costs of nearly $50,000. However, I proceed on the basis that I must consider whether hardship would arise for Ms H if she was required to contribute to the sum identified earlier of approximately $32,000.[22] RST did succeed on two key points – the legality of the disciplinary proceeding it wished to advance and whether the steps taken in the latter part of 2021/early 2022 were justified.

[77] Standing back, I have concluded that recognition of hardship is appropriate, and should result in a reduction of the costs amount to $8,000, being 25 per cent of $32,000. Although this amount represents a modest contribution to RST's legal costs, I have concluded this sum is fair and reasonable in the circumstances.

[78] I was invited to consider the possibility of directing Ms H to pay costs by instalments. Now that I have fixed the sum involved, that may be an option for the parties to consider in the light of Ms H's difficult circumstances.

Result

[79] Ms H is to pay RST the sum of $8,000 as a contribution to its costs in this proceeding.

B A Corkill
Judge

Judgment signed at 4.30 pm on 4 October 2023

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22 See above at [36].