

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 91
EMPC 233/2022**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN KIRSTY HILFORD
 Plaintiff

AND BOARD OF TRUSTEES OF WHANGAREI
 BOYS' HIGH SCHOOL
 Defendant

Hearing: On the papers

Appearances: A Halse, advocate for plaintiff
 RM Harrison, counsel for defendant

Judgment: 19 June 2023

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In my 8 March 2023 judgment,¹ I considered Mrs Hilford's challenge to an order of the Employment Relations Authority that she destroy three particular documents in her possession,² and to a subsequent compliance order enforcing that direction with regard to the documents that remained to be destroyed.

¹ *Hilford v Board of Trustees of Whangarei Boys' High School* [2023] NZEmpC 36.

² *Hilford v Whangarei Boys' High School Board of Trustees* ERA Auckland 3156381, 23 June 2022 (Member Dumbleton).

[2] The Board of Trustees of Whangarei Boys' High School (WBHS) opposed the challenge. Believing that there had been non-compliance with the Authority's order to destroy the documents, it issued a counterclaim seeking a sanction.

[3] At the hearing, Mrs Hilford confirmed that the documents had in fact been destroyed. WBHS accordingly discontinued its application for a sanction.

[4] After reviewing these events in detail, I allowed the challenge and established an approach for dealing with the documents at issue in both the Authority and the Court. I dismissed WBHS's application for a sanction, and reserved costs. The parties were invited to discuss costs themselves, and if agreement could not be reached, memoranda could be filed.

[5] Mr Halse, advocate for Mrs Hilford, filed an application for costs. In essence, he stated that costs should follow the event, and should be calculated in accordance with the Court's Guideline Scale as to costs.³ He sought an award of \$26,051, together with disbursements associated with the hearing of \$528, and a Court filing fee of \$204.44.

[6] Mr Harrison, counsel for WBHS, submitted that costs should lie where they fall due to the history of the matter. Alternatively, it was submitted the correct starting point under the Guideline Scale was \$19,359. He discussed various factors, which he said would warrant a reduction in the range of 50 to 75 per cent.

Analysis

Cost principles

[7] The principles for assessing costs are well known. The Court has a broad discretion in awarding costs.⁴ That discretion must be exercised on a principled basis and in the interests of justice. The Court's Guideline Scale is normally utilised. However, the Practice Directions, which establish the Guideline Scale, make it clear

³ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

⁴ Employment Relations Act 2000, sch 3 cl 19.

it is not intended to replace the Court's ultimate discretion under the statute as to whether to make an award of costs and, if so, against whom and how much. It is a factor in the exercise of the Court's discretion.

[8] I also mention reg 68 of the Employment Court Regulations 2000 (the Regulations), which makes it clear that in exercising the Court's costs discretion, it may have regard to "any conduct of the parties tending to increase or contain costs".

The parties' positions in more detail

[9] In summary, Mr Halse submitted that the usual approach should apply, namely that costs should follow the event. Mrs Hilford had succeeded, and she should be reimbursed accordingly.

[10] Mr Harrison, however, submitted that a range of conduct matters should be considered to support a conclusion that costs should lie where they fall and/or be deferred. In summary, he submitted that:

- (a) Mrs Hilford had access to and retained confidential information during and after the ending of her employment without WBHS's knowledge or agreement;
- (b) she had failed to comply with either the original order requiring destruction of confidential documents, or a compliance order made by the Authority of its own volition soon after;
- (c) no application for stay was made when she brought a challenge to the Authority's orders; and
- (d) Mrs Hilford failed to advise in a timely manner that she had, in the weeks following the making of the orders, destroyed the documents in question.

[11] The focus of the present application must be on matters relevant to the pleadings (claim and counterclaim) which came before the Court. It is not the purpose

of a costs award to punish a party. Accordingly, I place to one side the issue of the merits of the possession of the confidential documents by Mrs Hilford. Also, it is not for the Court at this stage to consider whether this factor is relevant to other aspects of her claim.

[12] Mr Harrison raised issues as to how Mrs Hilford and/or Mr Halse interacted with the Authority in its investigation meeting. Again, these are issues that may fall for consideration at a later stage, but they are not relevant to the present application for costs.

[13] A factor which is relevant, however, is the delay in the Court being advised that Mrs Hilford had in fact destroyed the documents prior to the hearing of her challenge.

[14] At the time WBHS issued its counterclaim for a sanction to enforce the Authority's compliance order, it was unaware of this development. Consequently, I accept the submission that the costs sought by Mrs Hilford for dealing with WBHS's application for a sanction should be disallowed, and that some allowance should be made to WBHS for having incurred the costs of that particular step.

[15] A related problem is that no application for stay was made once Mrs Hilford brought her challenge. The challenge was brought soon after the Authority made its compliance order. If this step had been taken, it would have allowed the Court to consider the merits of the position at an early point and, in particular, whether the status quo should be maintained until the substantive challenge could be heard. There would have been clarity as to whether the documents had in fact been destroyed and/or whether they would be held on a redacted or other appropriate basis, pending the hearing of the challenge by the Court.

Should costs lie where they fall?

[16] These factors are relevant to a consideration of costs, but they do not go as far as establishing that costs should lie where they fall. In my view, the better approach is to regard them as considerations that arise under reg 68 of the Regulations, to be taken into account following the determination of the appropriate starting point under

the Guideline Scale. I return to these points later when considering the appropriate reduction to the costs award.

The scale assessment

[17] Focusing on the Guideline Scale assessment advanced for Mrs Hilford, there are two aspects which are incorrectly claimed. They are:

- (a) An allowance for filing a statement of defence and for preparation in respect of the defendant's counterclaim for a sanction – these items are not, in the circumstances, appropriately claimed for the reasons I have given.

- (b) The amount claimed for both preparation and appearances at telephone directions conferences is excessive. It is appropriate to award costs for the first telephone directions conference held on 23 August 2022. The second and third telephone directions conferences, held on 23 November and 13 December 2022, however, related to difficulties which arose over the preparation of briefs of evidence for the hearing of the challenge, and regarding the bundle of documents. Ultimately, WBHS prepared the common bundle. Mr Harrison accepted that were a Guideline Scale approach to be adopted, preparation for the first directions conference should be allowed for, and attendance at two directions conferences should be allowed for, amounting to a total of 0.8 days. I accept this submission.

[18] The balance of the items sought are not opposed for starting point purposes. The starting point figure is accordingly \$19,359.

Final assessment and result

[19] Returning to the considerations I alluded to earlier, there should be some reduction for the failure to file an interlocutory application for stay when the challenge was filed; and for not advising the Court of steps that had in fact been taken with regard to the destruction of documents in a timely manner, which may well have

clarified the plaintiff's position, and avoided preparation in respect of issues that subsequently became irrelevant. I do not consider, however, that a reduction of 50 per cent to 75 per cent is justified. A 30 per cent reduction is appropriate. The amount payable by WBHS is, accordingly, \$13,551.30.

[20] With regard to disbursements, I allow travel and the amount sought for a Court filing fee. I do not allow the \$50 sought for meals. The total allowed for disbursements is therefore \$682.44.

[21] Mr Harrison suggested that any costs award be deferred. I disagree. The challenge dealt with a standalone problem. Any liability for the costs concerning that problem will not, in my view, be affected by the outcome of substantive issues between the parties.

[22] Accordingly, WBHS is to pay Mrs Hilford \$14,233.74 within 14 days.

[23] Given the mixed outcome, I consider this is not a case suitable for an award of costs on costs. In other words, the costs related to bringing this costs application will lie where they fall.

BA Corkill
Judge

Judgment signed at 4 pm on 19 June 2023