IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2023] NZEmpC 95
EMPC 386/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	VMR First Plaintiff
AND	KRR Second Plaintiff
AND	WEN Third Plaintiff
AND	XDD Fourth Plaintiff
AND	AVIATION SECURITY SERVICE DIVISION OF CIVIL AVIATION AUTHORITY Defendant

EMPC 473/2021

IN THE MATTER OF	an application for special leave to remove a matter to the Employment Court
AND IN THE MATTER OF	an application for costs
BETWEEN	VMR First Applicant
AND	KRR Second Applicant
AND	WEN Third Applicant

AND	XDD Fourth Applicant
AND	AVIATION SECURITY SERVICE DIVISION OF CIVIL AVIATION AUTHORITY Respondent

Hearing:	On the papers
Appearances:	S Grey, counsel, and D Gilbert, advocate for plaintiffs/applicants P Caisley and S Worthy, counsel for defendant/respondent
Judgment:	21 June 2023

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment deals with costs considerations arising from two judgments.

[2] The first is an application for costs brought by the Aviation Security Service (AvSec), a division of the Civil Aviation Authority. This organisation is the former employer of the plaintiffs/applicants, who were Aviation Security Officers (AVOs). The application follows my judgment dismissing the AVOs' application for interim reinstatement.[1]

[3] The second is an application for costs after I issued a judgment ordering removal of the AVOs' relationship problems to the Court.[2]

[4] Initially, the AVOs said costs should lie where they fall in respect of both matters, but a fallback position was developed where they sought costs on the removal matter but said that these should be equivalent to any liability imposed on them in the reinstatement matter. The two liabilities would then be set off against each other.

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1 *VMR v Civil Aviation Authority* [2022] NZEmpC 5, [2022] ERNZ 22.

2 *VMR v Aviation Security Service Division, Civil Aviation Authority* [2022] NZEmpC 127, [2022] ERNZ 512.

[5] After a formal application was filed by the AVOs in respect of the removal matter, AvSec submitted that the amount it was seeking for the purposes of the reinstatement challenge exceeded the amount the AVOs were seeking for the purposes of the removal application. It was asserted that after allowing for a setoff, there would be a residual liability on the part of the AVOs.

Background

[6] The background may be briefly stated. The AVOs' employment was terminated by AvSec because they had not been vaccinated against COVID-19.

[7] They brought dismissal grievances in the Employment Relations Authority, pleading that their terminations on this ground were unjustified so that they should be reinstated and awarded other remedies.

[8] AvSec contended that vaccination against COVID-19 was a mandatory requirement under the law for this class of worker and that it was not possible to either modify the AVOs' job descriptions to avoid the effect of the applicable legal requirements, or to redeploy them.

[9] The plaintiffs, after filing their employment relationship problem in the Authority, sought interim reinstatement to their former positions, an application that was declined by the Authority.[3]

[10] The challenge to that determination was resolved by this Court, as indicated earlier, against the AVOs.

[11] Whilst the reinstatement challenge was being dealt with, the AVOs filed an application for special leave to remove the employment relationship problem, since the Authority had declined to remove it in the first instance.

[12] After my judgment in the reinstatement challenge was issued, the parties attended mediation. They were unable to resolve matters. The application for special

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3 *VMR v Civil Aviation Authority* [2021] NZERA 426 (Member Doyle).

leave then came on for hearing. It was granted on the basis that there were issues of law, or issues of fact and law, which were of sufficient complexity in the circumstances to meet the statutory test for removal,[4] and that there was no reason for exercising the discretion not to grant special leave.[5]

[13] On both applications, I reserved costs, indicating that the parties should attempt to resolve these. Because that did not prove possible, the present applications followed.

[14] I consider the costs implications of both matters are linked, so it is appropriate to resolve the two costs applications in tandem.

[15] For completeness, I note that the interlocutory phase of the removed matter continues. The AVOs' substantive claims have yet to be set down for hearing.

The costs applications in more detail

[16] The essence of AvSec's position is that scale costs for defence of the interim reinstatement challenge total $20,195.50. It says that there should be an uplift of this amount to $25,000 because the AVOs' conduct unnecessarily increased its costs. It also submits that costs for the AVOs' unsuccessful application for interim reinstatement in the Authority should be fixed. Under the Authority's standard tariff, the starting point for this claim would be $2,250, but an uplift to $4,500 would be appropriate, in light of conduct which it is asserted unnecessarily increased costs in the Authority. The total amount therefore sought by AvSec is $29,500.

[17] As noted earlier, the AVOs' position is that costs should lie where they fall on both matters. If, however, costs are to be fixed in each matter, they say there is no conduct warranting an uplift with regard to the reinstatement proceeding, that their ability to pay is a significant matter to be taken into account, and that costs in the Authority should not be resolved by the Court at this stage. On its application for costs on the removal matter, it says scale costs for bringing the removal application are

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4 *VMR v Aviation Security Service Division, Civil Aviation Authority*, above n 2, at [65].
5 At [75].

$11,472. It says a setoff should apply, I infer on the basis that the same amount should be fixed for each application because the AVOs say neither party should pay any sum to the other if there is a setoff of the two liabilities.

[18] AvSec now also invites the Court to consider a setoff, but it says the net position is a liability where the AVOs should pay AvSec $18,028.

Analysis

Costs principles

[19] The applicable principles are not in issue. The Court's power to award these is discretionary, as set out in cl 19 of sch 3 to the Employment Relations Act 2000. Regulation 68 of the Employment Court Regulations 2000 provides that in exercising the Court's discretion under the Act, the Court may have regard to any conduct of the parties which tended to increase or contain costs, including any offer made to settle all or some of the matters in issue.

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

[21] The Court's guideline scale also applies when exercising the discretion.[7] I provisionally assigned these proceedings Category 2B for costs purposes under the scale. Both parties proceeded with reference to this category, at least as a starting point.

Should costs lie where they fall?

[22] Ms Grey, counsel for the AVOs, submitted that it was in the interests of justice to conclude that all costs lie where they fall in each proceeding. This was because:

(a) the circumstances were novel and involved important legal and human rights issues, including the relationship between subordinate legislation

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6 *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196 at [5].

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

and a collective employment agreement, as well as the duty of good faith owed by employers to employees;

(b) the circumstances had serious economic and social implications for each of the AVOs as they faced sudden termination of their employment after years of loyal service;

(c) the absence of any fault on the AVOs' part in what was analogous to frustration of contract due to the terms of subordinate legislation giving rise to a "technical redundancy type situation";

(d) AvSec is a public sector organisation; it was accordingly, in the circumstances, in the public interest for it to bear its own costs, a point which was relevant in *GF v OO*;[8]

(e) each AVO faced difficult ongoing financial circumstances for a range of reasons;

(f) also relevant was the AVOs' willingness to attend mediation on more than one occasion in an attempt to resolve the issues; and

(g) the limited resources the AVOs held had been affected by the multiple applications made in this jurisdiction, and for the purposes of an important judicial review application in the High Court.

[23] Whilst these considerations are indeed entitled to weight in varying degrees, there are also countervailing considerations raised by AvSec which must also be considered. In summary, Mr Caisley, counsel for AvSec, submitted these were:

(a) The AVOs had unreasonably rejected a Calderbank offer to settle the interim reinstatement proceedings. AvSec had proposed that the AVOs withdraw their claims for interim reinstatement with no issue as to costs in the Court, that they could still pursue their substantive claims which

[8] *GF v OO* [2022] NZEmpC 1 at [20].

at that time were before the Authority, and that AvSec would not make an application for costs in the Authority following dismissal of the applications for interim reinstatement.

(b) A lengthy affidavit from a medical practitioner (Dr Febery) was largely irrelevant and led to an escalation of costs.

[24] On the first point, there is some force in the hindsight assessment that the AVOs may well have been better off had they accepted the Calderbank offer, and then sought a removal of their proceeding to this Court. However, as subsequent events have shown, the issues in the case are somewhat complex. It was perhaps understandable that the AVOs brought their interim application based on what was likely seen as an attempt to preserve the status quo whilst the substantive issues were advanced to deal with the substantive issues. Although it may have been anticipated that the Authority's investigation meeting to deal with the substantive issues could be convened promptly, given the complexity of the matter, this may well not have been possible in reality. Even now, the parties are still dealing with comprehensive interlocutory issues. Given all these factors, the advancing of the case in this Court has not been straightforward. Pressing on with the reinstatement challenge should not, in the circumstances, be viewed as having been unreasonable at the time.

[25] On the second point, Dr Febery's affidavit was originally placed before the Authority for the purposes of the application for interim reinstatement. It is also the case that the Court was required to consider an opposed application for admission of the affidavit.[9] In doing so, I observed that it may transpire that some or all of the material would not prove to be relevant or entitled to weight. I said that if that was the case, then an issue of costs may arise in due course. Given that context, there are several relevant considerations. The material in Dr Febery's evidence, when it was filed in this Court, was not unknown to AvSec, since it had been filed previously. AvSec did not incur the cost of filing evidence in reply in this Court. I agree that the affidavit was not of assistance for interim purposes. On the other hand, the AVOs no

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9 *VMR v Aviation Security Service (AvSec) Division of Civil Aviation Authority* [2021] NZEmpC 216.

doubt incurred irrecoverable costs when dealing with the admissibility issue. I conclude that this consideration is neutral.

[26] Standing back, there is some logic in concluding that costs should lie where they fall in each instance.

Analysis of the two scale assessments

[27] However, I think it is also appropriate to cross-check this conclusion by considering the two applications for costs on a separate basis.

[28] Before doing so, it is appropriate to make the preliminary point that the scale analysis has resulted in a higher starting point for the defence of the reinstatement challenge than for bringing the successful application for removal. That is because the interim reinstatement scale analysis includes an amount for preparation of evidence, whereas the application for removal assessment does not. The parties agreed for the purposes of the removal application that the evidence which was already before the Court could be utilised, subject to some additional material being filed by consent. There is accordingly a mismatch in the two starting point figures.

[29] I start with the scale assessment advanced by AvSec.

[30] The first matter on which I comment is that a claim is made for the preparation of a list of issues, agreed facts, authorities and common bundle, being one day. In fact this step was not taken. A chronology of events was filed, but it was not a complex document. I disallow the claimed item. That reduces the amount claimed to 7.45 days, and a figure of $17,805.

[31] A claim is also made for the preparation of briefs and affidavits. As I have already noted, however, this material was able to be used in the subsequent reinstatement application. Thus, AvSec faces no application for costs of preparation of evidence in the removal application. In these circumstances, it is preferable to disallow this item also, reducing the total to $13,025.

[32] I have already commented on the grounds which AvSec said would justify an increase. For the reasons I have already given, I am not persuaded there should be an uplift.

[33] Next, I consider the AVOs' point that their financial circumstances should be taken into account. At the request of the Court, detailed affidavits have been filed.

[34] I am satisfied, on the basis of that material, that each AVO continues to face significant financial challenges due to loss of their AvSec income which they have not been able to replace; and in one case where the AVO was able to obtain reduced alternative income, but his partner also lost their job so there is now significant pressure in meeting mortgage commitments. All face the prospect of further costs in respect of the fixture in this Court.

[35] I agree with the dicta of the Court in *Shaw v Bay of Plenty District Health Board* that "limited means" is not by itself a reason to decline to make a costs award or to reduce that award.[10]

[36] However, an aspect of the present case which also needs to be taken into account is that the challenges which the AVOs have faced, and which have led to them incurring considerable expenditure, is not due to fault on their part, as I explained in my first judgment.[11]

[37] A further factor relates to AvSec's position. It holds onerous responsibilities for border protection. There is no evidence to suggest that but for the unusual pandemic-related regulatory provisions, the AVOs would have lost their jobs, some of which had been held for a lengthy period. In these circumstances, I consider it is reasonable that it should absorb some – although not all – of the costs it incurred in resisting the reinstatement challenge. I accept Mr Caisley's submission that the scenario considered by the Court in *GF v OO* differs; however, I think the circumstances here nonetheless warrant a similar approach.

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10 *Shaw v Bay of Plenty District Health Board* [2022] NZEmpC 112 at [25].
11 *VMR v Civil Aviation Authority*, above n 1, at [6].

[38] In the round, I deduct $2,000, having regard to ability to pay considerations. This results in a net figure of $11,025.

[39] Turning to the scale assessment for the removal application, the assessment advanced for the AVOs totals $11,472. I am not persuaded that this figure should be reduced.

[40] As the two amounts are approximately equivalent, a setoff is appropriate so that costs may lie where they fall.

[41] On either approach, the same result is reached.

Costs in the Authority

[42] As noted earlier, AvSec also invites the Court to assess an amount for the costs incurred in successfully resisting the application for interim reinstatement in the Authority.

[43] Mr Caisley submitted that it is well established that the Court can determine Authority costs on a challenge, referring to *Maheta v Skybus (NZ) Ltd (formerly Airbus Express Ltd)*.[12] The dicta of the Court of Appeal in that judgment related to a case where the entire relationship problem had been placed before the Court by means of a challenge. The Court of Appeal said that in those circumstances, the Court could resolve the issue of costs in the Authority even if the Authority itself had not done so.

[44] I accept that the issue of costs in the Authority has come before the Court, but not by reason of the challenge to the Authority's reinstatement determination. It has arrived in the Court by reason of the removal.

[45] Because the Court is at this stage dealing with its own judgment as to reinstatement, I consider it is appropriate, at the same time, to deal with costs relating to the Authority's determination on the same subject.

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[12] *Maheta v Skybus NZ Ltd (formerly Airbus Express Ltd)* [2022] NZCA 516 at [12]–[13].

[46] Mr Caisley said that the investigation meeting took approximately half a day, which resulted, under the Authority's tariff, in a starting point of $2,250 in light of the Authority's tariff.

[47] He sought an uplift to $4,500 on the basis that the Authority proceedings related to four plaintiffs and were therefore of increased complexity; he also referred to a compendious affidavit from one of the AVOs and to the scope of Dr Febery's affidavit, on which I commented earlier.

[48] Having regard to the view I have already expressed as to the responsibility which AvSec should bear as a public organisation, I consider it is appropriate that tariff costs only should be ordered.

[49] The next question is whether ability to pay factors ought to reduce the liability. Earlier, when considering this factor, I discounted the amount of costs to be paid,[13] but I did not conclude that the AVOs should, with regard to their reinstatement challenge, be completely protected from costs.

[50] Having regard to the relatively small amount involved, and the fact that there are four AVOs to share it, I do not think it is appropriate to reduce the tariff sum.

[51] I declare that each AVO is to be separately liable for a one-quarter share of the amount involved. Thus, each AVO is to pay AvSec the sum of $562.50. However, given the likely prospect of further costs in respect of this litigation, payment is to be deferred until after the hearing of the substantive claims.

Result

[52] Costs are to lie where they fall in respect of each of the applications that have been made for costs in this Court.

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[13] See above [38].

[53] With regard to costs in the Authority, each AVO is separately liable to AvSec for $562.50, but in the circumstances, this liability should be deferred until after the hearing of the substantive claims.

[54] This is not an appropriate case for costs on costs. In other words, the costs related to bringing the costs applications will lie where they fall.

B A Corkill
Judge

Judgment signed at 12.30 pm on 21 June 2023