

[3] Counsel for LDJ indicated that scale costs on a category 2 band B basis would amount to \$8,126. However, he acknowledged that LDJ received legal aid from 15 March 2024, which limits what they can recover from that date. Ultimately, LDJ seeks \$4,541 plus GST for work carried out on a pro bono basis prior to that date, \$2,439.04 for the grant of legal aid after that date, and disbursements of \$204.44.

[4] LDJ also seeks \$2,250 in costs in relation to the Authority's determination which declined to remove the matter to the Court; that sum being 50 per cent of the Authority's daily tariff. Disbursements of \$224.88 are also sought in relation to the filing fees for the statement of problem and application for removal filed in the Authority. Finally, costs of \$250.50 plus GST are sought on the application for costs.

[5] In response, counsel for the respondent acknowledged that costs are payable in relation to the legally aided portion of the case. However, counsel submitted that although it is within the Court's jurisdiction to award costs where a litigant is represented on a pro bono basis, the Court cannot award more costs than have actually been incurred. It is observed that no evidence has been provided outlining what costs were incurred while LDJ was represented on a pro bono basis.

[6] In relation to costs in the Authority, the respondent opposes LDJ's application for costs and seeks costs of \$2,250 on the basis that it was the successful party. It submitted that the successful application in the Court was not in the nature of an appeal and that it did not overturn the Authority's decision. It also opposes the claim for disbursements in the Authority on the basis that it was the successful party and that, in relation to the filing fee for the statement of problem, it is premature to award anything.

[7] The respondent submitted that costs on costs are not normally awarded and that there is no reason to depart from the Court's typical approach in this case. More generally, the respondent submitted that GST should not be awarded on any costs awards.

[8] Counsel for LDJ filed a memorandum in reply. He acknowledged that he cannot provide evidence of costs incurred while assisting LDJ on a pro bono basis but submitted that costs are, in any event, payable and that the Court's costs guideline

scale reflects a fair assessment of costs for each step. In relation to costs in the Authority, he submits that the successful application for special leave effectively reversed the costs position on the underlying application for removal in the Authority.

Costs principles

[9] The Court has a broad discretion as to costs.³ The discretion is augmented by reg 68(1) of the Employment Court Regulations 2000, which enables the Court to have regard to the conduct of the parties tending to increase or contain costs.

[10] When the Court sets costs for the Authority, it stands in the shoes of the Authority and applies the principles which apply in the Authority rather than those which apply in the Court.⁴ Any award is guided by the Authority's daily tariff, which is \$4,500 for the first day of any investigation and \$3,500 for subsequent days.⁵

[11] Rule 14.2(1)(f) of the High Court Rules 2016 states that one of the general principles applying to the determination of costs is that "an award of costs should not exceed the costs incurred by the party claiming costs". The purpose of the rule is to prevent parties from profiting from an award of costs.⁶ As a result, a party that receives legal services free of charge will not be entitled to claim costs, having not incurred any.

[12] However, where a party is represented by counsel who reserves the right to issue an invoice, that party will be entitled to costs so long as the costs have actually been incurred and so long as those costs are ultimately paid, even if only after the costs award is made.⁷ For costs to be incurred, it is not necessary for them to have been the subject of invoices.⁸ Where the exact costs arrangement between counsel and client

³ Employment Relations Act 2000, sch 3 cl 19.

⁴ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [19].

⁵ Employment Relations Authority "Practice Direction of the Employment Relations Authority" (February 2024) <www.era.govt.nz> at 5.

⁶ David Bullock and Tim Mullins *The Law of Costs in New Zealand* (LexisNexis, Wellington, 2022) at [1.16].

⁷ At [2.29]. See *Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 96, [2020] ERNZ 262 for a survey of the relevant authorities.

⁸ *Caistean An Ime Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2024] NZEmpC 83 at [18] and [24]–[25]; and *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [85]–[88] and [93].

is unclear, any concerns can be normally resolved by a solicitor's undertaking, by an affidavit, or simply by ordering costs on the condition that they be used to pay the fees of counsel.⁹

[13] The issue of whether GST is recoverable as part of costs and disbursements was resolved by the Court of Appeal in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC*.¹⁰ All awards of scale costs are GST neutral; GST is simply omitted from the calculations.¹¹ However, although scale costs are GST neutral, the Court has a discretion to order increased costs by uplifting scale costs to acknowledge GST which has been paid but which will not be recoverable by the successful party.¹²

[14] Where indemnity costs are ordered, GST will be recoverable where the successful party is not able to recover the GST component of any award. Usually, this will depend on whether the successful party is GST registered.¹³ The position for disbursements is the same as for indemnity costs; GST is usually recoverable where the successful party is not GST registered.¹⁴ Counsel for LDJ has confirmed that LDJ is not GST registered.

Analysis

Costs in the Authority

[15] The parties agree that the appropriate award of costs in relation to the Authority's determination is a sum of \$2,250. However, they disagree over which party should be entitled to that sum. The respondent was successful in the Authority, and it submitted that the Authority's determination was not overturned by the Court's

⁹ See *NR v MR* [2014] NZCA 623, (2014) 22 PRNZ 636 at [41]; and *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [360].

¹⁰ *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 23 PRNZ 260.

¹¹ At [7].

¹² At [11]–[12]; *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120, [2017] ERNZ 726 at [12]; *Xtreme Dining Ltd, (t/a Think Steel) v Dewar* [2017] NZEmpC 10, [2017] ERNZ 26 at [42]–[45]; and *Johnson v Chief of the New Zealand Defence Force* [2020] NZEmpC 59.

¹³ *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC*, above n 10, at [13].

¹⁴ At [17].

decision. Counsel for LDJ submitted, on the other hand, that the Court's decision effectively reversed the costs position on the Authority's determination.¹⁵

[16] Where an application is made to the Court for removal, the Court considers the application by applying the same criteria as are considered by the Authority, although without having the Authority's overall broad discretion. An order for removal from the Court under s 178(3) effectively overturns the Authority's determination declining removal. As such, where the Court orders removal, it is appropriate that the successful party should receive costs in the Authority as well as in the Court.

[17] Therefore, I find that LDJ is entitled to costs of \$2,250 for the Authority's determination. I do not understand there to be any GST issue in relation to that sum.

[18] Turning to consider the issue of disbursements, the filing fee of \$153.33 for the application to remove the matter to the Court is a reasonable disbursement. I accept that it is payable. That sum is inclusive of GST as LDJ is not GST registered.

[19] I accept, as submitted by counsel for the respondent, that the filing fee for the statement of problem in the Authority relates to the substance of the parties' dispute. However, it was necessary for LDJ to file the statement of problem in the Authority before any removal application could be filed. Accordingly, I find that it was a cost that was specific to the conduct of the removal application and reasonably necessary.¹⁶ Therefore, LDJ is also entitled to recover that filing fee of \$71.55 as a disbursement. Again, that sum is inclusive of GST as LDJ is not GST registered.

Costs in the Court

[20] Two groups of costs are sought in relation to the application before the Court. Costs are sought in the period prior to 15 March 2024 when counsel for LDJ represented them on a pro bono basis. Costs are also sought in relation to legal aid costs arising after that date.

¹⁵ Citing *Johnston v The Fletcher Construction Co Ltd* [2018] NZEmpC 18 at [2] and [16]–[18].

¹⁶ See High Court Rules 2016, r 14.12.

[21] The respondent acknowledged that costs can be awarded where a litigant is represented on a pro bono basis. However, it submitted that no costs are available because no evidence has been provided of what costs were actually incurred by LDJ. In response, counsel for LDJ submitted that the Court's guideline scale for costs provides a fair assessment of the work undertaken regardless of whether time records are provided.

[22] Counsel for LDJ is an officer of the Court with ethical responsibilities to his clients and also to the Court.¹⁷ He has a duty not to charge clients more than a fee that is fair and reasonable for the services provided, and he has a duty not to mislead the Court.¹⁸ As a result, the Court is in a position to take the application for costs on face value to be an assurance both that counsel is in a position to invoice LDJ for costs and that the costs claimed could be fairly and reasonably charged.¹⁹ In any case, the respondent's concerns about LDJ profiting from an award of costs can be resolved by making the award conditional on it being used to pay the fees of counsel.

[23] Turning to the sums claimed for the period prior to 15 March 2024, LDJ seeks \$4,541 (1.9 x \$2,390) plus GST for items 5 and 12 in the Court's guideline scale. Although the respondent submitted that costs should not be awarded in the absence of evidence of actual costs, it did not object to the calculation of scale costs for these items or reject the proposition that such items were fairly claimable on a category 2 band B basis. Therefore, I find that the sum of \$4,541 is payable by the respondent as a reasonable contribution to LDJ's legal costs. As this is an award of scale costs, that sum is exclusive of GST; however, I consider that it ought to be uplifted to include GST as LDJ is not GST registered.

[24] The next item of costs claimed relates to the period when LDJ had obtained legal aid after 15 March 2024. Legal aid is a loan rather than a gift; it is normally repayable to the Legal Services Commissioner.²⁰ Therefore, as the respondent correctly acknowledged, costs are payable for that period. However, scale costs

¹⁷ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 2.1.

¹⁸ Rules 9 and 13.1.

¹⁹ See *Ling v Super Cuisine Group Ltd* [2023] NZEmpC 167 at [12]; and *Xtreme Dining Ltd, (t/a Think Steel) v Dewar*, above n 12, at [26].

²⁰ Legal Services Act 2011, ss 18(2) and 21; and *Bullock and Mullins*, above n 6, at [2.39].

exceed LDJ's actual costs of \$2,439.04 for this period, so any award is limited by those actual costs.²¹ As the amount that LDJ will need to repay is GST inclusive, it is appropriate to allow the GST portion of that sum.

[25] Finally, LDJ seeks a disbursement of \$204.44 for the filing fee in relation to LDJ's application to the Court for special leave. I accept that to be a reasonable disbursement and allow it. That sum is inclusive of GST as LDJ is not GST registered.

Costs on costs

[26] LDJ seeks costs on costs of \$250.50, which is \$167 plus GST. Counsel for LDJ indicates that he intends to invoice the Legal Services Commissioner for that sum. The respondent opposes that application on the basis that the Court does not normally order costs on costs.

[27] The Court has a discretion to award costs on costs.²² In light of the complexity of the issues that have arisen in this application and noting that LDJ has been entirely successful, I consider that an award of costs on costs ought to be made.²³ I accept that the sum claimed, inclusive of GST, is reasonable and order accordingly.

Conclusion

[28] The respondent is accordingly ordered to pay LDJ the following sums:

- (a) \$2,250.00 for costs in the Authority;
- (b) \$5,222.15 for costs in the Court from before LDJ was legally aided, on the condition that the costs award is used to pay the fees of Mr Donovan;

²¹ *Curtis v Commonwealth of Australia* [2019] NZCA 126 at [21]–[22]; and *Taunoa v Attorney General [compensation]* (2004) 8 HRNZ 53 (HC) at [44]–[45].

²² *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [46]–[47]; and *Nisha v LSG Sky Chefs New Zealand Ltd (No 2)* [2018] NZEmpC 33, [2018] ERNZ 108 at [11]–[18].

²³ See *Bullock v Mullins*, above n 6, at [4.22]–[4.24] for a discussion of the circumstances where costs on costs have generally be ordered.

- (c) \$2,439.04 for costs in the Court while LDJ was legally aided;
- (d) \$250.50 for costs on costs; and
- (e) \$429.32 in disbursements.

[29] The amounts ordered against the respondent must be paid to LDJ within 14 days of the date of this judgment.

Kathryn Beck
Judge

Judgment signed at 9.30 am on 30 August 2024