IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 27
EMPC 245/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	KEVIN BREEN Plaintiff
AND	PRIME RESOURCES COMPANY LIMITED Defendant

EMPC 249/2022

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AND IN THE MATTER	of an application for costs
BETWEEN	PRIME RESOURCES COMPANY LIMITED Plaintiff
AND	KEVIN BREEN Defendant

Hearing:	On the papers
Appearances:	S Houliston, counsel for Kevin Breen R White and S Langton, counsel for Prime Resources Company Limited
Judgment:	23 February 2024

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] This judgment deals with an application for costs following the Court's judgment of 15 November 2023.[1] While the parties were encouraged to agree costs they have been unable to do so.

[2] The company seeks a contribution to its costs incurred in both the Court and the Authority. Mr Breen says that he should be entitled to costs or, alternatively, that costs should lie where they have fallen. In order to understand the respective position of each party it is necessary to briefly outline the history of this litigation and this Court's judgment.

Background

[3] Mr Breen was employed by the company for a relatively short period of time. His employment coincided with the COVID-19 pandemic and the first lockdown in Auckland. It was agreed that he would continue to work from home. He contended that over the next two months he received two under-payments of wages. He sought to resolve matters with his employer but that did not prove possible. He then pursued a disadvantage grievance in the Employment Relations Authority. The Authority found that he had been paid late for one of the months and awarded him $2,000 by way of compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[4] Mr Breen then filed a challenge to the Authority's compensation award, contending that the Authority had erred in fact and law in arriving at the quantum ordered in his favour. The challenge was pursued by way of non-de novo hearing. The company filed a de novo cross-challenge, contending that the Authority had erred in finding that Mr Breen had been underpaid. Timetabling directions were made for the exchange of briefs of evidence and a bundle of documents, and both parties prepared for the hearing on the basis that the matters at issue were those identified in the pleadings.

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[1] *Breen v Prime Resources Company Ltd* [2023] NZEmpC 199.

[5] The hearing occupied half a day. During the course of closing submissions then counsel for the company raised a legal argument that the Court was barred from determining the challenge because the issue between the parties was a dispute; accordingly the dispute resolution procedures provided for in the Act must be followed, rather than the personal grievance procedures. The company filed an amended statement of claim, by agreement, and Mr Breen filed a statement of defence to the amended statement of claim. Further submissions were then advanced by both parties.

[6] I held that the Court could not determine Mr Breen's personal grievance and set the Authority's determination, awarding Mr Breen $2,000, aside. I indicated that the late raising of the jurisdictional argument would likely be relevant to costs. I also indicated that but for the jurisdictional bar I would likely have found in favour of Mr Breen's personal grievance.[2] It was against this backdrop that the parties were encouraged to agree costs; as I have said that did not prove possible.

Analysis

[7] The Court has a broad discretion as to costs.[3] While the discretion is broad it must be exercised on a principled basis,[4] consistently with equity and good conscience.[5] The Court generally has regard to a Guideline Scale for costs[6] but the factual context of each case will be considered in arriving at a fair and just contribution in the particular circumstances. And, while it is not uncommon for parties to submit that the approach to costs developed in the High Court under the High Court Rules 2016 should apply via reg 6 of the Employment Court Regulations 2000, there is a need for caution. As recently explained in *Pyne v Invacare New Zealand Ltd*:[7]

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2 At [30].
3 Employment Relations Act 2000, sch 3 cl 19; and Employment Court Regulations 2000, reg 68.
4 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [47].
5 See *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [45]; and Employment Relations Act 2000, s 189.
6 "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.
7 *Pyne v Invacare New Zealand Ltd* [2024] NZEmpC 26.

> [5] While it is correct that that High Court Rules incorporate provisions relating to costs, it does not follow that those provisions apply in this Court.
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> [6] The wording of reg 6(2)(a)(ii) is clear: where any case arises in which there is no form of *procedure* under the Employment Relations Act 2000 or the Regulations, the Court *must* dispose of the case as nearly as may be practicable in accordance with the provisions of the High Court Rules affecting any similar case. If there is no procedural lacuna reg 6(2) is not engaged. As Judge Shaw pointed out in *Lloyd v Museum of New Zealand Te Papa Tongarewa*, reg 6(2) is "designed to facilitate the passage of cases through the Court in cases where the legislation is silent as to procedure" and does not confer jurisdiction. I respectfully agree with those observations.
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> [7] It is probably unsurprising that reg 6(2) is confined to procedure rather than extending to substantive matters, reflecting that this is a specialist Court operating in a specialist area of the law, under legislation that sets out a number of objectives which are of particular relevance to the exercise of the Court's powers but which may not be engaged in a court of general jurisdiction. While this Court may from time to time draw assistance from principles and practices developed in the High Court, including as to costs quantification, the core assessment will be directed at what is relevant to the exercise of the discretion in this jurisdiction, consistently with the underlying purposes and objectives of the empowering legislation.
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> [8] The short point is that costs in this Court are clearly discretionary and there is no procedural lacuna in the Act or Regulations which would otherwise engage the High Court Rules. Further, the provisions in the High Court Rules relating to costs which counsel referred to are not procedural, and so would not be engaged in any event.

[8] Mr Breen submits that while he was the unsuccessful party, the company's success hinged on the late raising of a jurisdictional argument. In these circumstances costs ought to be awarded to him or, alternatively, costs should lie where they have fallen. The company submits that it made offers to settle in advance of the hearing which Mr Breen unreasonably declined. In these circumstances costs ought to be awarded to it. Both submissions centre on a concern about wasted costs.

[9] As the Court of Appeal has emphasised, in the field of employment law parties should have in mind the importance of conducting litigation with a proper focus on the issues and on the containing of costs.[8] Any time-wasting, unreasonable refusal of offers to settle and other conduct that increases the costs of the proceedings,

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8 *Victoria University of Wellington v Alton-Lee*, above n 4, at [65].

deliberately or otherwise, may appropriately be taken into account when assessing where costs should lie.[9] Proportionality is also a factor in this jurisdiction.[10]

[10] As the company points out, costs generally follow the event and Mr Breen's challenge did not succeed.[11] That is not determinative.[12] As the authors of *The Law of Costs in New Zealand* observe:[13]

> It is not the case that costs will be reduced simply because a successful party lost on some part of its case—a reduction is only appropriate where that issue 'significantly' increased the costs of the losing party. The court must make an assessment of how much preparation and hearing time was devoted to issues on which the successful party failed, although that will usually be a matter of judgment and impression rather than precise arithmetical calculation. A matter that is minor, or that only involved additional limited legal submissions but not evidence, is unlikely to 'significantly' increase the costs of the losing party.
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> However, where the successful party wins on a minor point and loses on matters taking up most of the evidence or hearing time, a reduction in costs may be quite material.

[11] I make the following points in the present case. The jurisdictional argument was raised at a late stage, and after significant resources had been applied to the matters identified from the outset as being in issue. The late raising led to a fresh statement of claim, fresh statement of defence and further legal submissions. If it had been raised earlier the argument could (and likely would) have been dealt with as a preliminary issue.

[12] I accept the submission that Mr Breen's costs were significantly increased by the fact that the argument on which the company succeeded was raised at the 11th

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9 *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323 (CA) at 329; and Employment Court Regulations 2000, reg 68(1).

10 See *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [11].

11 *Victoria University of Wellington v Alton-Lee*, above n 4, at [48].

12 See, for example, *MacDonald v Health Technology Ltd* [1992] 2 ERNZ 735 (EmpC) at 755; *Solid Roofing Ltd v Newman (No 2)* [2018] NZEmpC 135 at [20]; *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 12 at [38]; and *TNT Worldwide Express (New Zealand) Ltd v Cunningham* [1992] 2 ERNZ 1010 (CA) at 1013. See also cases where the Court has granted the successful party an indulgence and ordered that costs should lie where they have fallen, for example, *Zhang v Telco Asset Management* Ltd [2019] NZEmpC 22 at [75]; *Advance International Cleaning Systems (NZ) Ltd v Hamilton* [2016] NZEmpC 34 at [45]; *Jones v Christchurch European Ltd* [2016] NZEmpC 4 at [9]; *Marra Construction (2004) Ltd v Pretorius* [2015] NZEmpC 222 at [22]; and *Juahm Industries Company Ltd v Isnanto* [2015] NZEmpC 152 at [18].

13 David Bullock and Tim Mullins *The Law of Costs in New Zealand* (LexisNexis, Wellington, 2022) at 92 (footnotes omitted). See too *Weaver v Auckland Council* [2017] NZCA 330 at [26]: confirming the High Court's reduction of costs by one-half.

hour. And while there was no formal finding that Mr Breen would otherwise have succeeded, the judgment makes it clear that his claim appeared to have substantive merit. Although the company succeeded in its challenge I do not consider it appropriate to order costs in its favour on this basis.[14]

[13] The company made three offers to settle Mr Breen's claim before the hearing. All three offers were made on a without prejudice save as to costs basis. The company places particular reliance on the first offer, which was made well in advance of the hearing, contending that costs should be awarded to it from the date of expiry of that offer. The offer was for $8,000, inclusive of the $2,000 awarded by the Authority; the second and third offers were for $9,000 and $10,000 respectively (again both inclusive of the Authority's compensatory award).

[14] It is well established that the Court may take into account prior offers to settle proceedings when determining costs.[15] The defendant submits that its prior offers should result in costs being awarded in its favour, in light of the required "steely" approach to Calderbank offers referred to by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell*.[16]

[15] As recently observed in *Pyne v Invacare New Zealand Ltd*,[17] while the "steely" approach observation is frequently referred to as a basis for submitting that the contribution to a successful party's costs should be substantially reduced, often to nil, the Court of Appeal's judgment should not be interpreted as requiring broad-brush 'steeliness' in the sense of rigidity. Rather the Court of Appeal made it clear that regard must be had to all of the circumstances. All of this is underpinned by s 189 of the Act, which confers jurisdiction on the Court to determine all matters (so including the exercise of discretionary powers to apportion costs as between parties) as in equity and good conscience it thinks fit; s 3 of the Act, which sets out a number of statutory objectives which the Court has regard to in exercising its jurisdiction, including (as

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14 See too *Zhang v Telco Asset Management Ltd* [2020] NZEmpC 9 at [31], noting the Court's reluctance to compensate a party for time spent on issues which it would not have succeeded on.
15 Employment Court Regulations 2000, reg 68(1).
16 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].
17 *Pyne v Invacare New Zealand Ltd*, above n 7.

the Supreme Court recently emphasised in *FMV v TZB*) to address the inherent imbalance of bargaining power in employment relationships.[18]

[16] As Mr Houliston, counsel for Mr Breen, points out the offers were made at an early stage and on an entirely different basis (being directed at the substantive issues on the non-de novo challenge which concerned the quantum of remedies awarded in the Authority) from that which the company ultimately relied upon and succeeded on (the jurisdictional argument). None of the offers mentioned the jurisdictional argument, nor was that argument apparent in the pleadings at the time the offers were made. The reasonableness of Mr Breen's decision to reject the offers must be assessed against that backdrop.[19]

[17] The failure to adequately address reputational concerns and/or vindication has been referred to in a number of judgments declining to rely upon a Calderbank offer to reverse costs.[20] While it is true that the company's offer to settle exceeded the amount that Mr Breen obtained (by $8,000, since he ended up with $0), it is also true that Mr Breen's challenge failed for reasons which had nothing to do with the substantive merits of his personal grievance. Rather, as the judgment notes, the merits appeared to be in his favour. Mr Breen's challenge engaged non-pecuniary losses he was seeking to address, including an acknowledgment of wrongdoing by the company via a compensatory award under s 123(1)(c)(i) of the Act.[21] The settlement offers did not include such an acknowledgement, rather they were stated to be on the basis of that the company accepted no liability.

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18 At [15]. Citing *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 at [1], [46] and [52]; and Employment Relations Act 2000, ss 3 and 189.

19 See *Wilding v Te Mania Livestock Ltd* [2018] NZHC 1506 at [192]: "The rejection of an offer may be unreasonable if there are obvious problems confronting the offeree in establishing liability, but sometimes the nature of the case makes it difficult to assess the strength of the litigation positions and it may not be unreasonable for a party to proceed to trial in such circumstances".

20 *The Commissioner of Salford School v Campbell* [2015] NZEmpC 186 at [57]; *Lewis v JPMorgan Chase Bank, N.A.* [2016] NZEmpC 33 at [85]; *Lancom Technology Ltd* [2018] NZEmpC 30 at [59]–[60]; *Zhang v Telco Asset Management Ltd*, above n 14, at [21]–[23]; and *Byrne v New Zealand Transport Agency* [2020] NZEmpC 34 at [29] and [37].

21 See, for example, *Henderson v Walker* [2019] NZHC 3020 at [17] where a similar point was made in relation to torts concerning dignity and which usually attract lower damages but represent a legitimate personal importance to the plaintiff.

[18] In the particular circumstances, and in light of the way in which the offers were couched, I am not prepared to conclude that it was unreasonable for Mr Breen to reject them. I put the settlement offers to one side.

Conclusion

[19] As I noted in the substantive judgment dismissing Mr Breen's challenge, he would have been entitled to feel frustrated by the result. Costs awards are not designed to be punitive, or a means of compensating disappointed litigants. But the reality is that the parties were put to a significant amount of unnecessary expense and wasted effort for reasons which sit at the company's feet rather than Mr Breen's. Standing back and considering all relevant matters I conclude that it is fair and just that costs lie where they have fallen, and that such a result is consistent with the equities of the case and good conscience.

[20] The applications for costs are accordingly dismissed. Costs on the parties' challenges in the Court and in respect of the Authority proceedings lie where they have fallen.

Christina Inglis
Chief Judge

Judgment signed at 2.15 pm on 23 February 2024