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

**I TE KŌTI TAKE MAHI O AOTEAROA**
**ŌTAUTAHI**

**[2024] NZEmpC 83**
**EMPC 356/2022**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Act |
| AND IN THE MATTER OF | an application for costs |
| BETWEEN | CAISTEAL AN IME LIMITED<br>Plaintiff |
| AND | A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT<br>Defendant |

Hearing: On the papers

Appearances: D Angus, agent for plaintiff
A Miller and G La Hood, counsel for defendant

Judgment: 20 May 2024

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**COSTS JUDGMENT OF JUDGE K G SMITH**

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[1] On 23 November 2020, Caisteal An Ime Ltd and a Labour Inspector entered into an enforceable undertaking pursuant to s 223B of the Employment Relations Act 2000 (the Act). In that undertaking Caisteal acknowledged two breaches of the Act, five breaches of the Holidays Act 2003 and one breach of the Wages Protection Act 1983.

[2] One consequence of Caisteal having entered into the enforceable undertaking was that it had to take remedial action. A disagreement emerged between the Inspector and Caisteal about whether the company had established that the required remedial

action was taken. The Inspector decided to make further inquiries. To do that she issued a notice to Caisteal under s 229 of the Act requiring it to forward to her copies of certain wage and time records, holiday and leave records, and employment agreements.

[3] The Inspector's notice was not complied with so she sought and obtained a compliance order and penalty from the Employment Relations Authority.[1]

[4] Caisteal unsuccessfully challenged the Authority's determination seeking to set it aside, but the Authority's determination was varied slightly to adjust the time for compliance with the Inspector's notice.[2] Caisteal unsuccessfully sought leave to appeal to the Court of Appeal.[3]

[5] Having been successful in resisting Caisteal's challenge the Inspector was held to be entitled to costs. She has now applied for them. Mr Miller's memorandum itemised the costs sought in accordance with Category 2, Band B, of the Court's Guideline Scale at the applicable daily rate of $2,390.[4]

[6] The claim was for $14,579 as set out in this table:

| Step | Description | Days | Total |
|---|---|---|---|
| 2 | Commencement of defence to challenge by defendant | 1.5 | $3,585 |
| 11 | Preparation for first directions conference | 0.4 | $956 |
| 13 | Appearance at first directions conference | 0.2 | $478 |
| 35 | Defendant's preparation of briefs | 1 | $2,390 |
| 38 | Preparation for hearing | 2 | $4,780 |
| 39 | Appearance at hearing for principal representative | 1 | $2,390 |
| | **TOTAL** | | **$14,579** |

1 *A Labour Inspector v Caisteal An Ime Ltd* [2022] NZERA 485 (Member Cheyne).
2 *Caisteal An Ime Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2023] NZEmpC 126.
3 *Caisteal An Ime Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2024] NZCA 96; and *Caisteal An Ime Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2023] NZEmpC 141. A stay granted pending the Court of Appeal's decision lapsed when it was released.
4 "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

[7] The Inspector did not include in her claim any allowance for an application seeking to strike out the challenge and only sought one day for step 35 (preparation of briefs) rather than the two allowed for in the scale. That adjustment was made because only one brief of evidence was prepared.

[8] Mr Miller filed a memorandum in response to a minute from the Court seeking confirmation that the claimed costs did not exceed actual costs and drawing the parties' attention to *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council*.[5] He explained that MBIE's in-house counsel use a legal practice management system to record time spent on a particular matter. Using that system, he was able to say that slightly more than 151 hours were worked in relation to the steps in the challenge. By applying a nominal rate of $100 per hour to that time the amount claimed did not exceed actual costs.[6]

[9] Caisteal does not accept that the Inspector should be awarded costs and prefers instead that they lie where they fall.

## Power to award costs

[10] The Court has a broad discretion as to costs conferred by sch 3 cl 19 to the Act. The discretion is augmented by reg 68(1) of the Employment Court Regulations 2000, enabling the Court to have regard to the conduct of the parties tending to increase or contain costs.

[11] To assist the Court in exercising the discretion a Guideline Scale is used with the objective being to achieve predictability, consistency and expediency in determining costs. The scale does not displace the Court's discretion.

## The plaintiff's submissions

[12] Mr Angus began his submissions by referring to the scale which, he considered, concentrated on the method of calculating a claim for costs rather than on

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5 *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council* [2019] NZHC 449, [2019] NZAR 587.

6 See High Court Rules 2016, r 14.2(1)(f); and *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [62], n 59.

establishing an entitlement to them. That methodology, it was submitted, was about "actual incurred costs for representation". Developing these submissions his observation was that the costs scale could be described as a reasonable contribution model.

[13] In response to the Inspector's claim, Mr Angus submitted that, because she was represented by in-house counsel who were also employed by the Ministry of Business, Innovation and Employment (MBIE) there were no commercial cost implications arising from their involvement and no real costs were incurred.

[14] While the focus of these submissions was building a case that no actual costs were incurred, and therefore the reasonable contribution model was inapplicable, Mr Angus also attempted to show that there was no real difference between the Inspector being represented by in-house counsel and Caisteal being represented by him. He likened the Inspector's and company's positions to being self-represented litigants.

[15] Mr Angus was familiar with the Supreme Court's judgment in *McGuire v Secretary for Justice* and referred to it.[7] He mentioned, in particular, the Court's criticisms of the rule that precludes a lay litigant from claiming costs (as distinct from disbursements) and the exceptions that apply where lawyers act in person or through an employed lawyer. His analysis of *McGuire* was that the Supreme Court referred to those exceptions as being indefensible and unfair.

[16] Mr Angus preferred the approach of the Court of Appeal in *Joint Action Funding Ltd v Eichelbaum* which relied on costs being claimed to defray actual costs incurred known as an invoicing approach.[8] He went so far as to rely on an example of that approach in *Commissioner of Inland Revenue v New Orleans Hotel (2011) Ltd* where costs were declined in the High Court by following *Joint Action Funding* and the Court of Appeal's judgment in *McGuire*.[9]

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7 *McGuire*, above n 6.
8 *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70.
9 *Commissioner of Inland Revenue v New Orleans Hotel (2011) Ltd* [2018] NZHC 971.

[17] Stemming from Mr Angus' analysis that no costs were actually incurred by the Inspector, he submitted that awarding anything to her would be revenue generating and, additionally, would infringe the rule that costs awards should not exceed actual costs.

[18] The use of a nominal hourly rate was criticised as creating a hypothetical figure because nothing was invoiced. That submission was supplemented with a calculation based on the salary range for in-house counsel employed by MBIE. The salary calculation was intended to show that the effective hourly rate for in-house counsel would be less than $100 per hour, so that to award the amount claimed would exceed actual costs and amount to punishing Caisteal for bringing the challenge. In other words, in the absence of an invoice the time and effort dedicated by in-house counsel to this challenge was a sunk cost arising from their employment by MBIE.

[19] In inviting the Court to reject the costs claim Mr Angus also relied on the Environment Court's decision *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council* where costs calculated on a nominal basis were declined.[10]

## Analysis

[20] Mr Angus' submissions are inconsistent with the Supreme Court's judgment in *McGuire*. The submissions invited this Court to apply *New Orleans Hotel* or perhaps to revisit *Joint Action Funding*. Of course, such an outcome is not possible. The Supreme Court's *McGuire* decision concluded that *Joint Action Funding* was wrongly decided from which it follows that *New Orleans Hotel* must be put aside in this analysis.[11]

[21] Contrary to Mr Angus' submissions, the Supreme Court held that the primary rule, the lawyer in-person exception and the employed lawyer exception are to be

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10 *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council* [2021] NZEnvC 65.

11 *McGuire,* above n 6, at [88].

applied.[12] That means Mr Angus' submissions seeking to deprive the Inspector of costs because she was represented by in-house counsel cannot succeed.

[22] In *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council*, the High Court dealt with an application similar to this one, in the sense that costs were sought for in-house counsel. In that case, unlike this one, the defendant accepted the nominal hourly rate which was $100 per hour.[13] Issue was taken, however, with the number of hours claimed. The High Court referred to cases before *Joint Action Funding* that shed light on the quandary faced by parties as to how to calculate costs for in-house counsel and was satisfied that costs could be awarded.[14]

[23] The High Court was content to allocate costs on the basis of the charge out rate for Royal Forest and Bird's lawyer's and accepted the reasonableness of $100 per hour along with counsel's estimate of the total hours worked.[15] The Court was satisfied that it was appropriate to accept assurances from in-house counsel that costs exceed scale costs without evidence to support the conclusion.[16]

[24] A similar approach is warranted in this case. I consider that is acceptable for the Inspector to adopt the same nominal hourly rate used in *Royal Forest and Bird* and that it is reasonable. The decision in that case is now about five years old. The adoption of the same rate now, despite inflation in the years since, suggests the Inspector is taking a conservative approach.

[25] I do not accept Mr Angus' submission that the nominal rate for in-house counsel represents an element of impermissible revenue generation. His approach concentrated on his assessment of how to translate the salary range for in-house counsel employed by MBIE into an hourly rate. That approach is too narrow because it does not acknowledge that an hourly rate is likely to involve more components than

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12 At [88].
13 *Royal Forest and Bird Protection Society of New Zealand,* above n 5, at [33].
14 At [36]–[38], citing *Bright v Auckland Council* [2016] NZHC 2117; and *Norrie as Liquidator of Pakiri Investments Ltd (in liq) v Sutich* [2015] NZHC 2913.
15 *Royal Forest and Bird Protection Society of New Zealand*, above n 5, at [38] and [39].
16 At [38] and relying on *Norrie*, above n 14.

converting an employee's salary into that unit of time. It will, for example, probably include a contribution to overheads.

[26] For completeness, Mr Angus' reliance on the Environment Court's costs judgment in *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council* does not assist.[17] The Court explained in that case that under s 285 of the Resource Management Act 1991 it has a discretion about awarding costs.[18] The Court went on to say that it does not as a matter of general practice allow costs to a successful party unless there are special circumstances making it fairer to depart from that rule.[19] The Environment Court has published a practice note in which it indicated that where there was an appeal against a proposed policy statement, plan, or plan change costs would not normally be awarded to any party.[20] The public policy reason for that approach is not material to litigation like the present claim.

[27] For completeness, there was no dispute that the Inspector had taken each of the steps referred to from the scale. The company's dispute lay elsewhere.

[28] I am satisfied that 2B is an appropriate category and band for costs and that each of the steps claimed was justified.

## Outcome

[29] Caisteal An Ime Ltd is ordered to pay costs to the Inspector of $14,579.

K G Smith
Judge

Judgment signed at 2.15 pm on 20 May 2024

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17 *Royal Forest and Bird Protection Society of New Zealand*, above n 10.
18 At [7].
19 At [8].
20 At [10].