Employment Court of New Zealand

Booth v Big Kahuna Holdings Limited [2015] NZEmpC 4 (8 January 2015)

Last Updated: 21 January 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 4

ARC 1/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	BRENDON RICHARD BOOTH Plaintiff
AND	BIG KAHUNA HOLDINGS LIMITED Defendant

ARC 84/13

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN BRENDON RICHARD BOOTH Plaintiff

AND BIG KAHUNA HOLDINGS LIMITED Defendant

Hearing:	On the papers filed on 9 September and 24 September 2014
Appearances:	P Swarbrick and T Oldfield, counsel for plaintiff J Golightly, counsel for defendant
Judgment:	8 January 2015

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] In my substantive judgment dated 24 July 2014 I upheld the plaintiff's

challenge to a determination of the Employment Relations Authority (the Authority)

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and set aside both its substantive and subsequent costs determinations.1 The parties were invited to reach agreement as to costs but have been unable to do so. Memoranda have been filed.

Background

[2] Mr Booth was dismissed for serious misconduct. He pursued a personal grievance against the defendant company. The Authority

investigated his grievance and dismissed it. Mr Booth filed a de novo challenge to the Authority's determination. The Authority then issued a costs determination, ordering costs of

$29,400 in the defendant's favour. As the Authority acknowledged, this quantum significantly exceeded the usual daily rate which (it appears) would otherwise have applied, and which would have amounted to $5,250. The uplift applied by the Authority was based on a Calderbank offer made by the defendant company to the plaintiff, which he declined prior to the investigation meeting.

[3] The plaintiff filed a separate challenge to the Authority's costs determination. By later agreement, the costs challenge was put to one side pending the outcome of the substantive challenge.

[4] In my judgment I concluded that Mr Booth had been unjustifiably dismissed and ordered lost wages and compensation in his favour.2 I set aside the Authority's earlier costs determination.3

[5] The plaintiff seeks costs consequent on his successful challenge in this Court, including in relation to interlocutory activity in the lead-up to hearing, the challenge to the Authority's costs determination, and costs said to have been incurred following judgment. Costs in the Authority are also sought.

[6] The assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs in this Court.

[7] As to costs in the Authority, a full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* observed that a number of guiding principles apply.4 Of particular relevance to the present application is the observation that awards in the Authority will be modest, that costs are frequently assessed against a notional daily rate, and that conduct which increases costs unnecessarily can be taken into account in

inflating or reducing an award. The notional daily rate is currently set at $3,500.

[8] This Court also has a discretion as to costs. The starting point is cl 19(1) of sch 3 to the Employment Relations Act 2000 (the Act). It provides that:

19 Power to award costs

(1) The court in any proceedings may order any party to pay to any other party such costs and expenses ... as the court thinks reasonable.

[9] While the discretion conferred by cl 19 is broad it is to be exercised judicially and in accordance with principle. The principles applying to costs in this Court are well established. The usual approach is to assess the costs actually incurred by the successful party and whether they were reasonable. The Court then determines the level at which it is reasonable for the unsuccessful party to contribute

towards those costs.5

[10] There appears to be some confusion as to whether an appropriate starting point is two-thirds or 66 percent of actual and reasonable costs. It is a small point, and one that leads to only a relatively minor variation in result, but is probably worth clarifying. Counsel for the plaintiff submits that the appropriate starting point is two-thirds, although 66 percent is applied to some (although not all) of the

calculations provided. In *Binnie v Pacific Health Ltd* the Court of Appeal said that:6

The first step is to decide whether the costs actually incurred by the plaintiff were reasonably incurred. Adjustment must be made if they were not. The second step is to decide, after an appraisal of all relevant factors, at what level it is reasonable for the defendant to contribute to the plaintiff's costs. Potentially that level can be anywhere from 100 percent to 0 percent. A starting point at 66 percent is generally regarded as helpful in ordinary cases. Mr Taylor reflected common practice when he referred to this as the two-

thirds rule. If such a starting point is adopted, careful attention must be given to factors said to justify an increase or a decrease.

[11] When read in context, it appears that a 66 percent approach applies in assessing a starting point (where appropriate), consistent with the sliding contribution rate from 0 to 100 percent in reaching a final figure. I proceed on this basis.

Costs in the Authority

[12] The Authority's investigation meeting occupied one and a half days. Applying the notional daily rate would lead to a figure of $5,250. Counsel for the plaintiff submit that if submissions had been presented orally, rather than in writing following the investigation meeting, a further half day would have been consumed and that accordingly the minimum award of costs should be based on a two day meeting, amounting to $7,000 (although a much greater contribution is sought).

[13] Such an approach appears to be out of step with the way in which the Authority generally applies the notional daily rate, regarding it as having a built-in component for standard preparation time and submissions.7 This tends to be supported by the way in which the Authority member would have approached matters in the present case but for the Calderbank offer.

[14] The plaintiff submits that a contribution to costs well in excess of the notional daily rate should be awarded in recognition of the actual costs incurred by him in the Authority. These, it is said, exceeded $30,000 by an unspecified margin. It is submitted that it would be appropriate to order a contribution of $14,000 to the plaintiff 's costs recognising the actual costs incurred at a higher level than the

notional daily rate.

[15] Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice

that can automatically be visited on the unsuccessful party. The point is particularly

7 See *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15, [2014] ERNZ 1 at [21]; and

Wilton v Carter Holt Harvey Ltd [2013] NZERA Auckland 468 at [5].

apposite in the Authority, which is statutorily designed to be an investigative, non- technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues, particularly (although not exclusively) for employees. This has particular relevance to the weight that might otherwise be given to Calderbank offers in the Authority, and whether the 'steely' approach that is said to apply in this Court should have equal application in that forum.

[16] The Authority gave full weight to a Calderbank offer made by the defendant company to the plaintiff prior to the investigation meeting, ordering him to pay costs of $29,400. Because of the outcome of the substantive challenge the Calderbank offer, and the weight to be given to it, is no longer in issue. I pause to note, however, that the Court of Appeal's observations as to the desirability of a 'steely approach' to Calderbank offers in *Bluestar Print Group (NZ) Ltd v Mitchell* were directed at

Employment Court proceedings.8 It is not immediately apparent that they were

intended to have broader application.

[17] An indicator of what the Authority itself regards as the sort of legal cost that might reasonably be warranted in terms of a 'garden variety' case can perhaps be gauged from its notional daily rate of $3,500. Parties who choose to incur costs in excess of this rate are entitled to do so but cannot confidently expect to recoup any additional sums. I do not regard the actual costs incurred by the plaintiff, in excess of $30,000 for a one and a half day investigation meeting, as a realistic indicator for the purposes of assessing whether increased costs are appropriate in this case.

[18] It is said that the plaintiff faced increased costs because of the way in which the defendant ran its case. Particular reference is made to evidence adduced by the defendant that the plaintiff says was irrelevant and directed at efforts to bring the plaintiff into disrepute.

[19] Counsel for the defendant, Ms Golightly, makes the point that the evidence which the plaintiff criticises as being irrelevant was called in response to claims by him in relation to Ms A's return to the workplace following his dismissal. While I accept that a party's conduct may increase the level of costs that might otherwise be awarded in the Authority I am not satisfied that a sufficient basis for doing so has been established in this case.

[20] I consider that this is an appropriate case for application of the notional daily rate. I accordingly award the plaintiff $5,250 by way of contribution to costs in the Authority.

[21] The plaintiff also claims disbursements totalling $594.10. The defendant does not appear to dispute the claimed disbursements relating to office expenses ($198); binding the bundle of documents ($50) and filing fee ($71.56). It does dispute the claimed disbursements relating to the service of a witness summons ($261.04) and witness expenses ($13.50). Insufficient information has been provided by the plaintiff in support of the claim for witness disbursements and they are disallowed.

Costs in the Court

[22] There are three broad components to the costs claim pursued by the plaintiff. These relate to costs incurred on the substantive challenge, the plaintiff 's costs challenge, and post hearing costs (including the costs incurred in pursuing costs).

[23] The substantive challenge occupied four days of hearing. Two interlocutory matters were dealt with pre-trial, being:

- Application for a stay, advanced by the plaintiff.

Application for security for costs, advanced by the defendant. 9

[24] I deal with the costs associated with these two applications at this juncture.

Interlocutory applications

[25] Actual costs of $3,897.35 (GST inclusive) were incurred on the plaintiff's successful application for a stay of the Authority's costs award. A contribution of 80 percent is sought, on the basis that an interim stay was required because of threats to bankrupt the plaintiff notwithstanding the Authority's indications that enforcement would be inappropriate until any challenge had been resolved.

[26] It is well established that a challenge does not operate as a stay. A litigant who has been successful in the Authority is entitled to pursue satisfaction of any orders made in its favour in the absence of a stay. The plaintiff did not seek a stay until a late stage, and after the defendant sought to assert its rights. In the event, a stay was granted on condition that the plaintiff pay a specified sum into Court. As it transpired, the defendant had proposed that the application be dealt with on the basis that the costs ordered by the Authority be

paid into Court. Because there was no agreement to such a course the application had to be dealt with by way of formal order, although the sum ordered was of a substantially reduced amount.

[27] The plaintiff seeks a contribution to his actual costs of $5,448.70 (GST inclusive) on the defendant's unsuccessful application for security for costs. An uplift to 80 percent of actual and reasonable costs is sought on the basis that the application had no merit.

[28] I accept that the plaintiff incurred actual costs of $5,448.70 in successfully opposing the application for security for costs and $3,897.35 on successfully applying for a stay of the Authority's costs award. However, I do not accept that those costs were reasonable having regard to the attendances required. Both applications were dealt with together, and on the papers. A brief notice of opposition comprising four paragraphs was filed in respect of the application for security. A short affidavit setting out the plaintiff 's financial position was filed in support of his application for a stay of proceedings. Brief written submissions were also filed, traversing both applications. The issues were not complex and the law is settled. I do not consider that costs of more than $4,000 would be reasonable, 66 percent of which is $2,640. I do not accept that an uplift is appropriate in the circumstances.

Contrary to the plaintiff's submission, I did not conclude that the defendant's

application for security was wholly without merit.10

[29] Accordingly, I order the defendant to pay the plaintiff the sum of $2,640 by way of contribution to his legal costs in relation to its unsuccessful application for security for costs and the plaintiff's successful application for a stay.

Costs on challenges

[30] Other than the costs associated with the interlocutory applications, which I have dealt with, the plaintiff seeks a contribution to his costs from the date of the Authority's substantive determination to the end of January 2014 (actual costs amounting to $7,128.85). This figure includes costs relating to the plaintiff 's costs challenge and disclosure issues. I pause to note that disclosure was not formally pursued by the plaintiff, the defendant having objected to it on the grounds of privilege. Ms Golightly submits that such costs ought to be excluded from the costs calculus in the circumstances. I agree. The plaintiff also seeks a contribution to actual costs of $1,639.90 incurred between 31 March 2014 and 3 April 2014 and indemnity costs on his substantive challenge from the date on which a Calderbank offer was made (namely, 3 April 2014). The actual costs said to have been incurred from 3 April 2014 amount to $40,216.65.

[31] Ms Golightly points out that the plaintiff has not provided timesheets and details of the applicable charge out rates. Counsel for the plaintiff submits that there is no obligation to do so, citing *Binnie*, where the Court of Appeal observed that it was not mandatory for counsel to provide details of time involved and charge out

rates:11

Obviously this kind of information may help, and its absence may invite a degree of caution, but in the end the Court, when considering whether actual costs are reasonable, has to make a judgment, bearing in mind the proper interest of the losing party in the question.

[32] I accept, based on the material before the Court, that the plaintiff incurred actual legal costs as claimed. Counsel for the plaintiff submit that these costs were reasonably incurred, and refer to a recent judgment of Judge Perkins where he concluded that costs of $40,000 for a two day hearing with no interlocutory activity

were reasonable,12 and his order (of two-thirds of those costs) was not disturbed on

appeal.13

[33] Ms Golightly submits that the plaintiff's costs were unreasonable, and that they were unnecessarily inflated by the plaintiff's decision to instruct Auckland counsel. She makes the point that there are a number of suitably qualified employment practitioners in Whangarei who could have been instructed and submits that the plaintiff's decision to instruct out of town counsel resulted in higher costs, by a margin of around $175 per hour.

[34] The fact that one counsel may charge more per hour than another does not automatically mean that the overall costs incurred will be excessive. And in the present case I accept that the plaintiff was entitled to treat the claim seriously having regard to the nature of the interests at stake.

[35] The defendant opposes any allowance being made for costs relating to the plaintiff 's costs challenge and rather submits that costs ought to be awarded in its favour. In this regard Ms Golightly submits that the challenge put the defendant to unnecessary expense as it was not pursued. Accordingly, the defendant ought to be regarded as the successful party and costs should be awarded to it, and deducted from any award otherwise made in the plaintiff 's favour.

[36] I do not accept the logic of the defendant's argument. The plaintiff had an adverse costs award made against him in the Authority which he challenged. That costs award was set aside as a consequence of his successful substantive challenge. It was on this basis that the costs challenge did not progress, and in accordance with the parties' agreement to "park" the challenge pending the outcome of the

substantive challenge. However, by this stage the plaintiff had reasonably incurred costs on the costs challenge.

[37] Standing back and considering each of the steps reasonably required to progress the plaintiff 's claim, but excluding the interlocutory steps dealt with above and making an adjustment downwards for costs in relation to disclosure issues, I do not consider that the total costs incurred by the plaintiff were unreasonable. A cross- check against the sort of quantum that would apply under the

High Court Rules leads to a similar figure.

[38] The plaintiff made an offer to settle on 3 April 2014, on the basis of a payment by the defendant of $5,000 compensation under s 123(1)(c)(i) of the Act and a contribution to costs in the Authority (of $5,250) and the Court (of $14,750).

[39] As counsel for the plaintiff observe, the Court of Appeal has made it clear that a robust approach is to be adopted to Calderbank offers in this Court.14 That is consistent with the public interest in encouraging the acceptance of reasonable settlement offers and avoiding unnecessary litigation. However, it is equally clear that indemnity costs are not to be automatically awarded against a party which has unreasonably failed to accept a Calderbank offer. Ultimately it is a matter for the Court's discretion having regard to the particular circumstances of the case.

[40] It is submitted on behalf of the plaintiff that it was unreasonable for the defendant to have refused the offer to settle, particularly given the ultimate outcome (which was significantly more beneficial to the plaintiff). Counsel for the plaintiff refer to the former Chief Judge's observations in *Ogilvy & Mather (New Zealand)*

Ltd v Darroch that:15

> ...[T]here is merit in the suggestion that a plaintiff wishing to play lotto

should not expect to do so with the defendant's money.

[41] I do not consider that this is an apt description having regard to the circumstances of this case, and in light of the fact the defendant had the benefit of an

Authority determination which was squarely in its favour. The defendant does not

14 *Bluestar*, above n 8, at [18].

take issue with the plaintiff's submission that it was unreasonable of it to decline the offer, accepting that an uplift is warranted. It is essentially the quantum of the uplift which is in issue.

[42] Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.16 I do not accept that this is a suitable case for indemnity costs to be awarded, and I decline to do so.

[43] I consider an uplift to 80 percent of costs from the date on which the offer of settlement was rejected is appropriate. In relation to costs incurred prior to 3 April

2014, I consider that 66 percent of actual and reasonable costs is appropriate. This leads to a total figure of $37,500.

Post-hearing costs and availability of costs on costs

[44] Post hearing costs, for July and August 2014, of $3,595.48 are sought, together with $1,500 for costs associated with seeking costs. As Ms Golightly observes, correspondence from the plaintiff 's counsel of 14 August 2014 refers to post-hearing work in progress of $2,309.50. Those costs could not sensibly relate to anything other than reading and reporting on the judgment, given that the parties' correspondence relating to costs came later. I am not satisfied as to the nature of the attendances associated with these costs, or why they are said to have been reasonably incurred and thereby recoverable from the defendant. Accordingly I make no order in relation to them.

[45] It is submitted that an application for costs was necessary because of the defendant's unreasonable approach to discussions. Ms Golightly submits that no costs should be awarded, including having regard to the refusal to provide details of the costs claimed.

[46] It is relatively rare for parties to seek costs on costs in this Court. That is not to say that such costs are not available. The Court has a broad discretion as to costs

and I see no reason in principle why a party which is put to the time and expense of

16 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [28], citing

Prebble v Huata [2005] NZSC 18, [2005] 2 NZLR 467 at [6].

pursuing costs ought not to be able to claim a reasonable contribution towards them. That is consistent with the basic principle that costs should follow the event. Concerns that have been identified in some High Court judgments in relation to the ability to make such orders tend to be focussed on the schedule of attendances set out in the High Court Rules, and the fact that no express reference is made to an application for costs on costs.17 That concern has not been universally accepted,18

and has no application in this Court where no such schedule has been adopted.19

[47] I accept in principle that a successful party to litigation may claim a contribution to its costs in seeking costs.20

[48] A failure to provide sufficient information to enable an opposing party to make an informed decision as to their potential costs liability will likely undermine a subsequent submission that they ought to be entitled to a contribution to their costs in pursuing an application. Ms Golightly submits that the plaintiff refused to provide details of the costs claimed, and that this impeded the

defendant's ability to reach an agreement. I accept this submission. It is evident that significantly more detail and supporting material has been provided to the Court by way of memoranda than was provided to counsel at the time. In the circumstances I consider it appropriate for costs to lie where they fall on the plaintiff's application for costs.

GST on costs

[49] The plaintiff seeks costs inclusive of GST. This is on the basis that GST is not recoverable by the plaintiff as an individual not registered for GST purposes.

[50] As the (then) Chief Judge pointed out in *Davidson v Christchurch City*

Council:[21]

17 See for example *West v Cowley* [2013] NZHC 2356 at [28].

18. See *Beach Road Preservation Society Inc v Whangarei District Council* [2001] NZHC 811; (2001) 16 PRNZ 13 (HC) at [15].

19 See for example *Snowdon v Radio New Zealand Ltd* [2014] NZEmpC 180 at [67] where an

award of costs on a costs application was made.

20 See for example *Parsot v Greig Developments Ltd* [2008] NZHC 1168; (2008) 18 PRNZ 995 (HC) at [21]; and *Sax v*

Dempsey Wood Civil Ltd [2013] NZHC 1126 at [47].

21 *Davidson v Christchurch City Council* [1995] NZEmpC 95; [1995] 1 ERNZ 523 (EmpC) at 528-529.

It is unrealistic, when contemplating the costs incurred, to deduct from them the GST component of those costs where the parties, the clients being charged the costs, are unlikely to be registered for GST purposes and are therefore going to be unable to recover the GST. So the true cost incurred by them is the full amount of the fee including GST.

[51] This does not appear to be the invariable practice in this Court.22 This may reflect the general approach in the High Court of GST neutrality.23 However, there is no costs schedule in this Court and costs are generally determined as a percentage

of costs actually and reasonably incurred. I see no reason in principle why the Employment Court ought not to take into account the ability of a successful party to recover GST in determining actual and reasonable costs.24 To approach the issue otherwise would lead to inequities. The plaintiff was obliged to incur GST on his legal costs. This effectively added 15 percent to his total costs which he is otherwise unable to recover. By way of contrast, the defendant company can offset the GST component of its own legal costs by claiming them as a business expense.

[52] I accept the plaintiff's submission that the awards of costs in his favour ought

to be GST inclusive.

Disbursements

[53] The plaintiff claims disbursements. The defendant disputes the claim for mileage for out of town counsel as being unnecessary. While I have concluded that the legal costs incurred on the plaintiff's substantive claim were not unreasonable, I accept the defendant's submission that local counsel could have been instructed. Accordingly the claim for mileage is disallowed, on the basis that it was not a necessary expenditure.25

[54] I disallow the claim for disbursements relating to a filing fee for a notice requiring disclosure. Disclosure was objected to and, in the event, was not formally progressed. In these circumstances, and in the absence of any additional

22 See *Entwisle v Dunedin City Council* [2002] NZEmpC 142; [2002] 2 ERNZ 23 (EmpC) at [64].

23 See *Burrows v Rental Space Ltd* [2001] NZHC 770; (2001) 15 PRNZ 298 (HC).

24 See *Virtual Warehouse Ltd v Hormann* EMC Auckland AC3B/06, 12 June 2006 at [23].

25 See *Baker v St John Central Regional Trust Board* [2013] NZEmpC 109 at [43].

information, I am not persuaded that the plaintiff 's claim for these expenses ought to

be allowed.

[55] Issues relating to GST on disbursements also arise. A claimed disbursement which is GST inclusive can scarcely be deemed "reasonable" if the claimant party can then recover GST on it.26 Conversely any disbursement ordered in Mr Booth's favour ought to be GST inclusive, for the reasons I have already traversed.

[56] The defendant is ordered to pay the plaintiff the following sums (plus GST, if not otherwise included) by way of disbursements:

- $1,502.64 (hearing fees)
- $204.44 (filing fee in ARC 84/13)
- $204.44 (filing fee in ARC 1/14)

$125.00 (office expenses/photocopying)

Total = $2,036.52

Conclusion

[57] The defendant is ordered to pay the plaintiff the following sums (plus GST, if not otherwise included) by way of contribution to his legal costs in relation to the proceedings in ARC 1/14 and ARC 84/13:

$37,500.00 (costs on the substantive and costs challenge, excluding

interlocutories)

$2,640.00 (security for costs/stay applications)

$5,250.00 (costs in the Authority)

26 *Dunedin Catering Supplies v Mr Chips Ltd* [2013] NZHC 1815, (2013) 26 NZTC 21-063 (HC)

at [59].

Total = $45,390

[58] I make no order for costs in relation to the plaintiff 's costs application.

[59] The defendant is ordered to pay the plaintiff disbursements as set out above at

[21] and [56].

Christina Inglis

Judge

Judgment signed at 4pm on 8 January 2015
