Employment Court of New Zealand

Hu v Passion Fresh Limited [2024] NZEmpC 154 (16 August 2024)

Last Updated: 24 August 2024

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2024] NZEmpC 154
EMPC 80/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	YANFANG HU Plaintiff
AND	PASSION FRESH LIMITED First Defendant
AND	WHVER HUB LIMITED Second Defendant

Hearing:	On the papers
Appearances:	M Moncur, advocate for plaintiff M McGoldrick and K Zafar, counsel for first defendant No appearance for second defendant
Judgment:	16 August 2024

COSTS JUDGMENT OF JUDGE K G SMITH

[1] Yanfang Hu was employed by Whver Hub Ltd which company provides labour hire services. She was assigned by Whver to work at Passion Fresh Ltd and the circumstances in which her assignment ended gave rise to proceedings in the Employment Relations Authority.1

1 *Hu v Passion Fresh Ltd* [2023] NZERA 54 (Member Fuiava).

[2] The Authority issued a determination on a preliminary issue to the problem it was investigating. It declined to join Passion Fresh to the proceeding as a controlling third party. Ms Hu unsuccessfully challenged the determination.2 The costs arising from that challenge were reserved and the parties were provided with an opportunity to reach agreement about them. Agreement has not been reached and Passion Fresh, as the successful party, has applied for costs.

[3] The amount sought by Passion Fresh in costs is $19,269.38. That amount has been arrived at by assessing each step taken in the proceeding under Category 2B from the Guideline Scale and adding an uplift.3 Without an uplift the amount of the claim would be $15,415.50. The basis for claiming an uplift was Ms Hu's rejection of a settlement offer made without prejudice except as to costs. The amount claimed is less than the actual costs incurred by Passion Fresh.

[4] Mr McGoldrick provided a cross-check to support the submission that the costs claimed are reasonable. The amount assessed under the guideline was submitted to be reasonable because it was slightly under two-thirds of actual and reasonable costs at about 62 per cent of them. His cross-check against the amount claimed if the uplift applied was said to show that such an award would represent about 75 per cent of Passion Fresh's actual costs.4

[5] The settlement offer was conveyed by letter dated 28 September 2023. The amount offered was $4,000. The offer was that Ms Hu could elect to be paid that amount under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and/or as a contribution to her costs of representation. The offer further proposed that, if she elected to be paid to defray the costs of representation, GST would be added lifting the amount payable to $4,600. It was accompanied by a calculation of costs that might be awarded under the Guideline Scale at that point in time. The amount calculated

2 *Hu v Passion Fresh Ltd* [2024] NZEmpC 74.

3. "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18. The classification of this proceeding as 2B was made provisionally at a directions conference in August 2023.
4. Relying for example on *Xtreme Dining Ltd (T/A Think Steel) v Dewar* [2017] NZEmpC 10, [2017] ERNZ 26; *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305; *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172; and *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438.

was $14,818. The offer was open for acceptance until 20 October 2023. It was not accepted.

[6] Ms Moncur made brief submissions opposing the costs application. They were supported by an affidavit from Ms Hu about her financial circumstances. The submissions fell into two broad parts but did not take issue with costs being calculated on a 2B basis, the assessment of the steps required to complete this proceeding, or whether the claimed uplift was of an amount that might be considered to be fair and reasonable.

[7] Ms Moncur first submitted that Ms Hu was suffering from financial hardship and that there would be significant personal and professional impacts on her if she was faced with paying the significant sum claimed. To respond to those difficulties, the Court was invited to take what was referred to as a "tailored" approach to any costs order. The submission did not explain what that approach would mean, but it at least entailed a significant reduction in the amount that might be awarded.

[8] Ms Moncur's second submission was allied to the first one, she urged the Court to consider fairness and access to justice principles. Her submission was that the amount sought is excessive, but she did not point to any part of the claim to support this criticism. There was, nevertheless, an invitation to consider the possibility that any sum awarded be made payable by instalments.

[9] Ms Hu's affidavit disclosed, in a broad and general way, her recent financial situation. She deposed to difficulties after her employment ended, problems during the COVID-19 pandemic, and subsequently struggling to find a job matching her abilities and experience. She described her relatively recent employment, from February 2023 until mid-July 2024, when she resigned to undertake some study. She did not disclose her income, assets or liabilities.

[10] Ms Hu was aware of the settlement offer. In her affidavit she described her decision to not accept it, because she believed she was treated unfairly. Her refusal was based on taking a principled stance, not just for herself but for others she considered to be in a similar situation.

Analysis

[11] The starting point is cl 19(1) of sch 3 to the Act. The Court may make an order that any party to a proceeding pay any other party to it such costs and expenses as are considered to be reasonable. That power is supplemented by reg 68 of the Employment Court Regulations 2000 which provides that, in fixing costs, the Court may have regard to any conduct of the parties tending to increase or contain costs.

[12] A costs award is discretionary. The discretion must be exercised on a principled basis and in accordance with the interests of justice. The primary principle is that costs follow the event so that the successful party is ordinarily entitled to a reasonable contribution from the unsuccessful party.5

[13] The Court's discretion is assisted by the Guideline Scale. That scale supports, so far as is possible, the policy objective that determining costs should be predictable, expeditious and consistent. It is not, however, a replacement for the discretion.

[14] As has already been mentioned, Ms Moncur did not take issue with 2B being applied to each of the steps claimed by Passion Fresh. Instead, she sought to rely on Ms Hu's straitened financial circumstances to either keep costs down to an unspecified lower-level or to enable payment over time.

[15] In the absence of more information explaining Ms Hu's financial circumstances, it is not possible to take that submission very far. However, even if that information had been provided it is unlikely costs would be declined or reduced. To take such a step would deprive the successful defendant of an opportunity to at least attempt to defray some of the cost it incurred.6

[16] I accept it is appropriate for the costs claim to be advanced on a 2B basis. Each of the steps claimed was appropriate. That brings the assessment to $15,415.50.

[17] The next issue is whether there ought to be an uplift. Mr McGoldrick submitted that an uplift is justified because, had the settlement offer been accepted,

5 *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [48].

6 See *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2; [2015] ERNZ 196.

the subsequent expense incurred by both parties would have been avoided.7 This submission drew heavily on *Bluestar Print Group (NZ) Ltd v Mitchell*.8 The Court of Appeal in that case cautioned that a "steely" approach is required in dealing with the cost consequences of settlement offers made without prejudice save as to costs.9

[18] Bluestar does not provide particular guidance to assist in assessing the impact of such offers. However, some factors that may be relevant include the amount of the claim, the size of the offer relative to actual costs, the reasonable expectations of the party that refused the offer, whether there is perhaps some uncertainty in the area of law, whether the parties were in a position to assess the merits when the offer was received, the timing of the offer and the conduct of the offeror.10

[19] I accept that the existence of a settlement offer can justify an uplift. The amount sought in this case is 25 per cent of scale costs which amount has not been explained beyond referring to the "steely" approach in *Bluestar* and the offer itself. While Passion Fresh provided a cross-check against its actual costs, the rate of recovery sought is likely to be higher than Mr McGoldrick calculated. That is because one invoice provided as part of the cross-check included professional services on a matter clearly described as not being about Ms Hu's claim and cannot therefore form part of any costs assessment. Another invoice was for attendances that occurred after judgment and dealt with reviewing the decision and in taking steps to apply for costs. Such an invoice is not, in my view, appropriate for inclusion in the cross-check approach adopted by Mr McGoldrick.11

[20] Once the problems identified with the supporting invoices are taken into account the amount of the claimed uplift is likely to represent a higher proportion of Passion Fresh's actual costs than Mr McGoldrick submitted it would be.

7 Employment Court Regulations 2000, reg 68; see also High Court Rules 2016, r 14.6(3)(b)(v).

8 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

9 At [20].

10. See the discussion in *Samson v Mourant* [2016] NZHC 1119 at [44]; *Weaver v HML Nominees Ltd* [2016] NZHC 473 at [30]; and *Robertson v Idea Services Ltd* [2023] NZEmpC 210.
11. The invoices provide for GST, but I have assumed that the defendant company is registered for GST and can make a claim.

[21] While Ms Hu rejected the settlement offer, and did so knowing the risk she was taking, I am not persuaded that it would be just to impose an uplift of the amount claimed. None of the evaluative factors referred to in para [18] could support such an uplift. Adequate recognition of the settlement offer is provided by an uplift of 10 per cent from scale costs. That brings the total amount to $16,957.05.

Outcome

[22] Ms Hu is ordered to pay to Passion Fresh the amount of $16,957.05 as costs of this proceeding.

K G Smith Judge

Judgment signed at 3.30 pm on 16 August 2024