



Employment Court of New Zealand

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UXK v Talent Propeller Limited [2021] NZEmpC 223 (13 December 2021)

Last Updated: 18 December 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 223](#)

EMPC 229/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	UXK Plaintiff
AND	TALENT PROPELLER LIMITED First Defendant
AND	THE EMPLOYMENT RELATIONS AUTHORITY Second Defendant

Hearing: (on the papers)

Appearances: A Fechney, advocate for UXK
R Upton, counsel for Talent Propeller Ltd
P Gunn, counsel for the Employment Relations Authority

Judgment: 13 December 2021

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves a costs application which followed a judgment that dealt with two proceedings brought by UXK.¹

[2] It is necessary to describe each. I begin with the more significant proceeding, which was a challenge brought to certain directions made by the Employment

¹ *UXK v Talent Propeller Ltd* [2021] NZEmpC 167.

UXK v TALENT PROPELLER LIMITED [2021] NZEmpC 223 [13 December 2021]

Relations Authority as to production by UXK of an unredacted copy of a District Court judgment so that its relevance could be assessed.

[3] In the multiple minutes which were issued by the Authority, directions were made which fell into two categories. The first category was a direction that an unredacted copy of the District Court judgment be filed and served by UXK. The second category was that the Authority, would of its own motion, produce the document as filed in another proceeding.²

[4] I concluded that the Authority had issued determinations which were susceptible to challenge.³

[5] In respect of the first category of directions, I concluded it was appropriate for UXK to be directed to produce an unredacted copy of the document, subject to certain protections.⁴ In effect, the challenge was allowed in part.

[6] In respect of the second category of directions, I found that issues of natural justice had arisen when the Authority determined that it would produce the document on its own motion. I concluded that directions falling into that category should be set aside. The challenge succeeded completely in respect of the second category.⁵

[7] Another proceeding was brought in reliance of the Court's judicial review jurisdiction. To some extent, it was overtaken by the findings made with regard to the challenge, but in any event, it was dismissed because the criteria of [s 184\(1A\)](#) of the [Employment Relations Act 2000](#) (the Act) were not met.⁶ That proceeding was accordingly dismissed.⁷

[8] I concluded my judgment by reserving costs.⁸

2 At [111].

3 At [114] and [125].

4 At [144] and [165].

5 At [158] and [166].

6 At [163].

7 At [164].

8 At [171].

Submissions

[9] Ms Fechny then filed a claim for costs on behalf of the plaintiff. She said UXK had been legally aided and that costs for both proceedings of \$6,068.19, including GST, had been invoiced to the Legal Services Commissioner. She said this amount was significantly less than provided for under the Court's Guideline Scale as to Costs.

[10] She submitted it was in the public interest for UXK's costs to be reimbursed in full, particularly where the proceedings had been brought to address natural justice issues.

[11] Mr Upton, counsel for Talent Propeller Ltd (TPL), submitted, first, that costs should not be awarded at all because the challenge was unnecessary. He submitted that the totality of the various minutes, and the communications of counsel with the Authority, showed that UXK did not:

- (a) accept an undertaking to protect the document, as offered;
- (b) disclose the document on a representative/counsel basis, as had been offered and the Authority directed; and
- (c) recognise the security which would be given by a private hearing.

[12] Mr Upton went on to submit that in the alternative, if an award of costs was to be made, then it should not be imposed against TPL, which had tried to provide safeguards. The problems were not of TPL's making. An order, if any, should be made against the Authority.

[13] Mr Gunn, counsel for the Authority, submitted on the basis of orthodox authorities, that no award of costs should be made against it. This is because it had abided the outcome of the judicial review proceeding and took no active part in the hearing in accordance with established practice and expectations with regard to judicial bodies.⁹

[14] Although costs would normally follow the event, and UXK had succeeded in part, the Authority had not "failed" in a relevant sense.

[15] Moreover, costs would only be awarded against a judicial officer or institution in the rarest of circumstances which call for strong disapproval.¹⁰ This was not such a case.

The legal framework

[16] The starting point for the assessment of costs is cl 19 of sch 3 of the Act. It confers a broad discretion.

[17] That discretion must be exercised judicially and in accordance with that and other well established principles.¹¹ The

Court's Guideline Scale as to Costs may be a factor in the exercise of the discretion, but it is not dispositive.

[18] This case requires a consideration of the circumstances where a party is legally aided. In *Curtis v Commonwealth of Australia*, the Court of Appeal considered whether a successful party funded by legal aid could recover scale costs or some lesser amount.¹² In that particular context, the Court of Appeal said:

[22] The quantum [of costs] should be according to the Court of Appeal scale. Costs should be scale costs or the amount paid by the [Legal Services] Commissioner for the appeal, whichever is the lesser figure. Thus costs should not exceed scale, or (if they are less), the amount paid for legal services.

[19] No submissions were made to the Court regarding these circumstances, but I recently considered the point in *McKinlay v Wellington Cosmetic Clinic Ltd* and

9. *New Zealand Engineering Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration* [1976] 2 NZLR 283 (CA) at 284-285.

10 *Coroners Court v Newton* [2006] NZAR 312 (CA) at [44].

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

12 *Curtis v Commonwealth of Australia* [2019] NZCA 126.

concluded it was appropriate to follow the principle identified by the Court of Appeal.¹³

[20] I proceed on the basis of these principles.

Analysis

[21] Ms Fechny submitted that scale costs, if assessed, exceeded the legal aid costs. No other party contested this submission. I agree with it, since a scale assessment would have required a calculation on the basis of two separate proceedings which would have produced a figure well in excess of the invoiced sum.

[22] Having regard to the dicta in *Curtis*, the starting point for assessing a contribution to costs is accordingly \$6,068.19. That sum includes GST which, for the reasons I gave in *McKinlay*, may be considered.¹⁴

[23] Normally, costs follow the event. However, the position in the present case is not straightforward.

[24] With regard to UXK, the challenge succeeded partially in respect of the first category of directions.

[25] Mr Upton, in effect, said that outcome was more apparent than real, because the Court essentially endorsed the Authority's approach as to the terms on which the unredacted District Court judgment should be produced.

[26] I disagree. The Court's consideration involved close scrutiny of the protections that should apply. Two in particular went beyond what the Authority had directed. The first related to the actual terms of an undertaking, a matter the Authority had not considered; the second related to the proposition that another Authority Member should deal with the application as to relevance, as raised by the Court.

13 *McKinlay v Wellington Cosmetic Clinic Ltd* [2021] NZEmpC 211.

14 At [17].

[27] The challenge in respect of the first category was justified and achieved a positive outcome. It largely succeeded.

[28] With regard to the second category of directions – not mentioned by Mr Upton in his costs submissions – UXK's challenge succeeded in full. The second category of directions were set aside.

[29] Mr Upton also submitted that the problems as to the form of the Authority's directions should not result in a costs liability as far as TPL is concerned.

[30] However, the Court must approach the assessment of costs on the basis of the way in which the challenge was run for TPL. It was opposed.

[31] Moreover, the Authority was not a party to the challenge; it was a party only in the judicial review proceeding.

[32] What the Court has to consider is whether TPL should carry a costs liability for its role in the challenge.

[33] I am satisfied that UXK achieved substantive success and that, in respect of that proceeding, costs should follow the event. As the opposing party, TPL should carry a costs liability.

[34] I turn to the judicial review proceeding. There was an overlap between the challenge and the judicial review proceeding: they both related to the same underlying problems. But the judicial review proceeding was overtaken by the way in which the challenge was ultimately presented. All the substantive issues relating to the production of the disputed document were in effect fully canvassed in the challenge.

[35] UXK failed at the first hurdle with regard to the judicial review proceeding. Allowance should be made for that fact in the overall assessment of costs.

[36] Although Mr Gunn made helpful submissions as to the position of a judicial body when cited as a party, that does not arise in respect of the judicial review

proceeding, since the proceeding was dismissed. No adverse finding was made about the Authority in that matter. I place its position to one side.

Result

[37] I return to the starting point figure. UXK should not be reimbursed in respect of the costs she incurred in bringing the unsuccessful judicial review proceeding.

[38] Unfortunately, no information has been provided to apportion the costs incurred with regard to the challenge on the one hand and the judicial review proceeding on the other.

[39] Standing back, a fair apportionment is \$3,500 to reflect costs reasonably incurred in the challenge. TPL should pay this sum to UXK.

[40] No claim is brought by TPL, as the successful party, in the judicial review proceeding. She was legally aided, so no order could be made against her unless a claim of exceptional circumstances were to be established under [s 45\(2\)](#) of the [Legal Services Act 2011](#). Such an application was not advanced by TPL.

[41] Accordingly, no order for, or about, costs is made in that proceeding.

B A Corkill Judge

Judgment signed at 10.05 am on 13 December 2021