IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 52
ARC 24/12

IN THE MATTER OF	an application for costs
BETWEEN	TANGIANAU HERE Plaintiff
AND	MCALPINE HUSSMAN LIMITED Defendant

Hearing: By memoranda filed by the defendant on 18 January 2013 and by the plaintiff on 25 March 2013

Counsel: Gregory Bennett, advocate for plaintiff
Rob Towner, counsel for the defendant

Judgment: 19 April 2013

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The plaintiff brought a challenge in this Court against the determination of the Employment Relations Authority[1] dismissing his personal grievance. He had been dismissed for threatening his supervisor, Mr McAuley. His dismissal followed an earlier warning for swearing at Mr McAuley. His challenge was unsuccessful.[2] Costs were reserved. The parties were invited to seek agreement as to costs. That has not been possible. Accordingly, the matter has come back before the Court for determination.

[2] The defendant seeks a contribution towards its costs in the sum of $57,000, having incurred total costs well in excess of that amount.

[1] [2012] NZERA Auckland 61.
[2] [2012] NZEmpC 204.

[3] While timetabling directions were made for the filing of submissions in relation to costs, no submissions were filed on behalf of the plaintiff within time. Following a further communication from the Registrar, a brief memorandum was filed on 25 March 2013 advising that the plaintiff did not intend to oppose costs; is unable to meet any costs award; that the plaintiff will be declaring himself bankrupt; and that he does not oppose the Court making such orders for costs in the absence of written submissions. No material was filed in support of the plaintiff's claimed financial position.

[4] I am obliged to determine costs on the basis of the information before the Court and in accordance with established principle.

[5] Clause 19(1), Sch 3, of the Employment Relations Act 2000 (the Act) confers a discretion as to costs. It provides that:

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

[6] The discretion to award costs is to be exercised in accordance with principle. The primary principle is that costs follow the event.[3] The usual approach in this jurisdiction in ordinary cases is 66 percent of actual and reasonable costs. From that starting point, factors that justify either an increase or decrease are assessed.[4]

[7] I pause to note that in *Snowdon v Radio New Zealand Ltd*[5] the Court of Appeal indicated that it will consider whether this "traditional means" of fixing costs should be maintained, in light of changes to the costs policy reflected in the High Court Rules and s 6 of the Interpretation Act 1999.[6] While leave to appeal was granted by the Court on this issue (on 25 November 2009), the appeal has yet to be heard and is unlikely to be for some time. In the meantime I proceed on the usual basis, following the earlier judgment of the Court of Appeal in *Health Waikato Ltd v Elmsly.*[7] There the Court said that:

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[3] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
[4] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
[5] [2009] NZCA 557.
[6] At [21], [22], and [25].
[7] [2004] 1 ERNZ 172 (CA) at [51].

> While it would be open to the Employment Court, if it chose, to adopt the High Court approach to costs, it has not done so and it is, indeed, perfectly entitled to follow its existing practice, in terms of which costs actually and reasonably incurred are the relevant starting point.

[8] Counsel for the defendant, Mr Towner, has filed a memorandum setting out the actual costs incurred by the defendant in relation to the challenge (being $86,972.37, inclusive of GST and Bell Gully's standard service fee of 2.5 per cent in relation to all disbursements and costs incurred). The fee component of these costs was $73,725. Copies of the invoices to which these costs relate are before the Court, and they set out (by way of covering letters) the nature of the work undertaken. I am satisfied that the defendant incurred the legal costs cited.

[9] The hearing occupied two days. The challenge was not complex and did not raise any difficult legal issues. I accept Mr Towner's submission that it was reasonable for the plaintiff's claim to be treated seriously, including because the plaintiff was seeking reinstatement which was strongly opposed by it in the particular circumstances of the case. In the event the plaintiff's claim for reinstatement was withdrawn on the second day of the hearing. At this time, the plaintiff also conceded that his behaviour constituted serious misconduct. That meant that, while the case could have been conducted on a substantially reduced scale, much of the cost associated with preparing for and defending the claim on the basis on which it had initially been pursued had already been incurred.

[10] I also accept that the hearing, which had initially been set down for one day, took longer than anticipated because the day prior to the fixture the plaintiff's advocate served witnesses summons' on three of the employees of the defendant for whom briefs of evidence had not been filed. This led to a split hearing. The additional witnesses did not assist the Court in resolving the plaintiff's claim, and their involvement lengthened the hearing unnecessarily. And, as Mr Towner submitted, part-heard cases inevitably result in increased costs for the parties.

[11] The defendant was charged for 159 hours of work although there was an additional 78 hours worked on the file (at a time value of approximately $35,000 in respect of which the defendant was not charged). The costs associated with second counsel were not claimed. The 159 hours worked equates to a charge out rate of

around $460 per hour. While the defendant is entitled to instruct counsel of its choice, including senior counsel such as Mr Towner, I do not consider that the challenge required the level of skill and experience that he was able to bring to bear.

[12] As a perusal of costs judgments of this Court reflects, the task of assessing the reasonableness or otherwise of costs is not without difficulty. The High Court Rules may provide helpful guidance as to whether costs actually incurred were reasonable in a particular case.[8] The daily recovery rates specified in the Rules are intended broadly to approximate two-thirds of the rates that New Zealand practitioners in the relevant category currently charge to clients.[9] Applying the analogous time allocations in the Rules to the steps taken in these proceedings (with appropriate allowances, including for time that would have already been spent in terms of preparation for the Authority's investigation) leads to a figure of around $20,000. Allowing for the daily rate discount that has already been applied to that figure, results in a starting point of approximately $30,000. In my assessment such a figure reflects an appropriate level of reasonable costs in this jurisdiction, having regard to the particular features of this litigation and what was required in terms of responding to the challenge.

[13] Counsel for the defendant submits that if the Court finds that the actual costs incurred were unreasonable for the purposes of determining an appropriate costs contribution in the circumstances of this case, the contribution to costs that might otherwise be ordered ought to be adjusted upwards to reflect the way in which the case was conducted by the plaintiff. I have already had regard to the way in which the challenge was conducted and its impact on costs reasonably incurred. I am not persuaded that an uplift is warranted in the circumstances.

[14] Mr Towner further submitted that an uplift was appropriate because of the plaintiff's failure to take up a settlement offer made at an early stage, and in circumstances where it ought to have been apparent that the challenge was weak. The offer referred to was effectively a "walk away" offer, with the plaintiff withdrawing his challenge without any issue as to costs.

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[8] See, for example, *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Zeal 320 Ltd* [2009] ERNZ 458 at [27].
[9] *McGechan on Procedure* (looseleaf ed, Brookers) at [HR14.4.01].

[15] The effect of a "walk away" offer was considered by the Court of Appeal in *Hira Bhana & Co Ltd v PGG Wrightson Ltd*.[10] The Court rejected a contention that a "walk away" Calderbank offer was consistent with the overall purpose of a Calderbank offer, that being to limit a party's exposure to the potentially high cost of litigation. It held that:[11]

> ...where the nature of the offer made is simply a "walk away" proposition, made early in the proceedings, it cannot be the case that the mere fact that the party which rejected the offer subsequently loses means that party is required to pay indemnity costs or increased costs. If that were so, it would mean that the costs regime set out in rr 46-48G would be effectively bypassed in almost all cases where the defendant succeeds, because defendants would routinely make "walk away" offers of the kind made in this case, and then claim indemnity costs if they subsequently succeed at trial.

[16] The underlying policy was more recently considered by the High Court in *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council.*[12] There Kós J said that:[13]

> ... the reason the Courts take a conservative approach to imposing increased costs in the context of walk-away offers is that they effectively value the opponent's claim, the opponent's prospects of success, and their own litigation risk all at nil. As the plaintiffs put it in their submissions, it ranked the plaintiffs' chances of success "at zero percent". It will be a rare case where it is unreasonable for a plaintiff to take a more optimistic view of their own prospects than "zero percent".

[17] I am not persuaded that it was unreasonable of the plaintiff not to accept the defendant's offer in the circumstances of this case. I do not consider that an uplift is appropriate.

[18] It appears from the brief memorandum filed on 25 March 2013 that Mr Here may be in a difficult financial position. There is an established approach in this jurisdiction of taking into account a party's ability to pay if payment would place an

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[10] [2007] NZCA 342.
[11] At [50].
[12] CIV-2008-454-31, 22 December 2011. The costs judgment of the Court was recently, and unsuccessfully, appealed in *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2013] NZCA 79.
[13] At [17].

undue hardship on that party.[14] I consider that it is important not to over-reach the hardship approach, for the reasons I recently set out in *O'Hagan v Waitomo Adventures Limited*.[15] I do not repeat that discussion here. And while it has long been established that the Employment Court may discount costs if payment would cause undue financial hardship, it has been repeatedly emphasised that any such claim must be supported by acceptable evidence. The information required includes details of the party's assets and liabilities and income and expenditure.[16] No such information is before the Court. In these circumstances, and having regard to the matters referred to above, I consider that an appropriate contribution to the defendant's costs is $20,000.

[19] The plaintiff is accordingly ordered to pay to the defendant the sum of $20,000.

Christina Inglis
Judge

Judgment signed at 2.30 pm on 19 April 2013

[14] See, for example, *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 at [29]; *Walker v Procare Health Ltd* [2012] NZEmpC 186 at [32].
[15] [2013] NZEmpC 58 at [33]-[38].
[16] *Merchant* at [29].