

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2016] NZEmpC 150
EMPC 326/2014**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN WHANAU TAHI LTD
Plaintiff

AND KIRAN DASARI
Defendant

Hearing: By submissions filed on 25 October and 9 November 2016

Appearances: M Ryan, counsel for plaintiff
A Swan, counsel for defendant

Judgment: 17 November 2016

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] In a judgment dated 20 September 2016, having rejected the plaintiff's challenge, I reserved the issue of costs.¹

[2] Submissions have now been received from counsel for the parties on the issue of costs. While submissions were meant to have been filed simultaneously, counsel for the plaintiff suffered a bereavement which meant there was some delay in receiving submissions from him. In the circumstances Mr Swan was entitled to file a further submission in reply.

¹ *Whanau Tahī Ltd v Dasari* [2016] NZEmpC 120.

[3] Mr Dasari seeks full reimbursement of costs incurred by him in this matter, both before the Employment Relations Authority and the Court. The basis for the claim to indemnity costs is that the plaintiff conducted its case unreasonably and inappropriately and extended the time required for the Court hearing. It is alleged that it used its considerable resources against Mr Dasari to drag out an unmeritorious case.

[4] Mr Ryan has submitted for the plaintiff that the usual principles as to awards of costs in this Court should apply. He has submitted that two thirds of actual reasonable costs in this matter should be awarded. He has also carried out a calculation under the Court's Guideline Scale of Costs, even though such scale does not apply in this case as the plaintiff's statement of claim was filed before 1 January 2016. His calculation arrives at a similar result to that if the two thirds rule applies. He has also submitted that costs in the Authority should not be awarded. This is on the basis that the defendant, Mr Dasari, did not apply for costs in the Authority and in any event he had been unrepresented there.

[5] It is clear that Mr Ryan is not correct concerning the costs in the Authority. Mr Swan did represent Mr Dasari before the Authority and an application for costs was made although no costs determination was ever issued.

[6] The substantive judgment of this Court has the effect of setting aside the determination of the Authority. In reaching a conclusion on costs it is appropriate for the Court to consider not only costs in respect of the challenge but also costs which should be awarded in respect of the proceedings before the Authority.

[7] The principles applying to an application for costs in this Court have now been well established in three Court of Appeal decisions.² Costs would normally follow the event. Usually the award of costs to a successful party would be two thirds of actual reasonable costs. The Court has a wide discretion in making an award of costs and can order increased costs and full indemnity costs where the circumstances justify that.

² *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 173 (CA)

[8] Mr Ryan has made the further submission on behalf of the plaintiff that the quantum of costs now sought by Mr Dasari is not reasonable. No real basis is put forward for that submission. Mr Swan has attached time records to his submissions. Mr Ryan has given no indication of fees charged to his client, which might appropriately have been indicated if he wished to pursue the submission he has made.

[9] Two hearing days were initially required for the hearing of the plaintiff's challenge. A two day hearing was allocated. Evidence was not completed within the two days and a further hearing day was to be allocated to complete the evidence and hear counsel submissions. As a result of counsel unavailability, substantial delays occurred in the Court being able to allocate the further day required. Eventually counsel agreed that the third day would not be required for evidence and written submissions would be filed and considered by the Court. In those submissions the plaintiff raised reasonably complex legal arguments based on amended pleadings which had been filed and these needed appropriate consideration and reply by Mr Swan.

[10] In the circumstances I do not consider the costs incurred by Mr Dasari as unreasonable. However, while the plaintiff did act in a way which prolonged the hearing and made it unduly complicated, this is not an appropriate case for the award of indemnity costs. The usual principles should apply.

[11] Two thirds of actual costs claimed in this matter amount to \$14,373.33. Mr Ryan's calculation under the Guideline Scale of Costs, which does not apply in this case but is a useful guide, results in a figure of approximately \$15,000. That seems to me to be further evidence that the costs sought by Mr Dasari are reasonable. The sum of \$15000 is an appropriate award of costs to make in favour of Mr Dasari in respect of the unsuccessful challenge by the plaintiff.

[12] Insofar as the costs in the Authority are concerned, Mr Dasari seeks reimbursement of full costs incurred there of \$10,500. The investigation meeting before the Authority was conducted over one day. At the time the daily costs tariff applying in the Authority was \$3,500. Accordingly, there will be a further award that

the plaintiff reimburses Mr Dasari in the sum of \$3,500 in respect of the Authority proceedings.

Conclusion

[13] The plaintiff, Whanau Tahi Ltd, is ordered to reimburse Mr Dasari the sum of \$18,500 as a contribution towards the costs incurred by him in this matter.

M E Perkins
Judge

Judgment signed at 10.15 am on 17 November 2016