**IN THE EMPLOYMENT COURT**
**WELLINGTON**

**[2017] NZEmpC 110**
**EMPC 220/2016**

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| IN THE MATTER OF | proceedings removed from the Employment Relations Authority |
| AND IN THE MATTER | of an application for costs |
| BETWEEN | KAREN BELOW<br>First Plaintiff |
| AND | DAVID BELOW<br>Second Plaintiff |
| AND | THE SALVATION ARMY NEW ZEALAND TRUST<br>Defendant |

Hearing: (on the papers dated 28 July, 17 and 24 August 2017)

Appearances: P McBride and F Lear, counsel for the plaintiffs
A Scott-Howman, counsel for the defendant

Judgment: 8 September 2017

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**COSTS JUDGMENT OF JUDGE B A CORKILL**

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## Introduction

[1] The issue for resolution is whether an order for costs should be made as sought by The Salvation Army New Zealand Trust (the Trust) against Mr and Mrs Below, in light of the conclusions reached by the Court in its substantive judgment of 10 July 2017.[1]

[1] *Below v The Salvation Army New Zealand Trust* [2017] NZEmpC 87.

[2] The question which was resolved on that occasion was whether Mr and Mrs Below were employees when they were cadets at the Booth College of Mission (the College), a facility which is administered and run by The Salvation Army through the Trust.

[3] That issue had been removed from the Employment Relations Authority (the Authority) for resolution by the Court.[2] This was because the Authority considered that an issue relating to the status of religious trainees was an important question of law, which arose within the context of the relationship problem before it other than incidentally.[3]

[4] After assessing all relevant factors, I found that a range of factors led to the conclusion that Mr and Mrs Below were not employees. These included the quasi military nature of The Salvation Army, and the facts that cadetship is a response to a call, that the intention of the parties was to prepare Mr and Mrs Below for officership, that certain work tasks would be and were undertaken for training purposes, and having regard to the financial arrangements which were entered into which supported them when training. The reality was that they were students who attended a residential course of learning in preparation for officership.[4]

[5] I concluded that since Mr and Mrs Below were not employees of the defendant, there was no jurisdiction under the Employment Relations Act 2000 (the Act) which would enable the Court to consider the circumstances which led to the termination of their cadetship.[5]

[6] I stated that costs, if sought, should follow the event; I established an appropriate timetable which has resulted in the Trust seeking costs; the application is opposed by Mr and Mrs Below.

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2 *Below v The Salvation Army New Zealand Trust* [2016] NZERA Wellington 111.
3 At [16].
4 *Below v The Salvation Army New Zealand Trust*, above n 1, at [132].
5 At [133].

## The parties' position as to costs

[7] For the Trust, Mr Scott-Howman noted that prior to the hearing, the matter had been assigned Category 2, Band B of the Court's Costs-Guideline Scale (the scale). On this basis, Mr Scott-Howman said that an appropriate award of costs would be $20,850.50.[6]

[8] Mr Scott-Howman, anticipating an argument that this was a test case where costs should lie where they fall, submitted that Mr and Mrs Below's circumstances were confined to a limited class. He said that the Court's decision was unlikely to have a wide effect. The claim was not a representative action where others in identical circumstances would be spared the need for litigation by virtue of this proceeding. Simply because the proceeding was removed on the basis there was an important point of law did not elevate it to test case status.

[9] The essence of the submissions filed for Mr and Mrs Below were, first, that the outcome would be of wide application; indeed, the matter had been removed to this Court on the basis of an assertion on behalf of The Salvation Army that it had that quality. Costs ought not to be awarded, for that reason.

[10] Second, and alternatively, any award of costs ought to be modest for several reasons; these included the fact that Mr and Mrs Below have limited means, that regard should be had to the costs that would have been awarded in the Authority if the proceeding had not been removed, and that in any event, a scale assessment as placed before the Court for the Trust does not produce a figure which is fair and reasonable for costs purposes.

## Applicable principles

[11] Clause 19 of sch 3 to the Act governs the award of costs in this Court. Furthermore, reg 68 of the Employment Court Regulations 2000 provides that in the exercise of its discretion, the Court may have regard to any conduct of the parties tending to increase or contain costs.

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[6] In reliance on Items 9, 11/14, 12/15, 13, 16, 43, 45, 46 and 47.

[12] The principles are well established and uncontroversial, as described in the Court of Appeal judgments of *Victoria University of Wellington v Alton-Lee*,[7] *Binnie v Pacific Health Ltd*[8] and *Health Waikato Ltd v Elmsly*.[9]

[13] Under the scale, the assessment of reasonable costs may be made by applying the daily recovery rate to the time considered appropriate for each step reasonably taken in advancing the proceeding. But the scale is not intended to replace the Court's ultimate discretion under the statute as to the making of an award of costs, and if so, against whom and how much. It is a factor in the exercise of that discretion. In this case, it is an important factor since the application for costs is made solely in reliance on the provisions of the scale.

[14] In *New Zealand Labourers IUOW v Fletcher Challenge Ltd*, a test case was described as being one which will apply to other similar circumstances involving those or other parties; or which concern the practice or procedure of the Court; or where there is some generalised ruling involving or affecting many parties.[10]

[15] Such an approach has been adopted in many subsequent cases. In a test case, costs generally lie where they fall.[11]

[16] Finally, in this brief review of applicable legal principles, it is well established that it may be appropriate in suitable cases to consider a party's ability to pay.[12]

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7 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48]

8 *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

9 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [17].

10 *New Zealand Labourers IUOW v Fletcher Challenge Ltd* (1990) ERNZ Sel Cas 644, [1990] 1 NZILR 557.

11 A well known example includes the judgment of the full Court in *Service and Food Workers Union v Vice-Chancellor of the University of Otago (No 2)* [2003] 2 ERNZ 707 (EmpC); and the more recent judgment of *New Zealand Nurses Organisation v Waikato District Health Board* [2016] NZEmpC 50 – a proceeding which is currently scheduled for re-hearing, but not with regard to this point.

12 *Te Awamutu Residential Trust v Nicholson* AC7C/05 at [22]; *Burns v Media Design School* AC40/09 at [14]; *Metallic Sweeping (1998) Ltd v Ford* [2010] NZEmpC 129 at [52] – [55]; *Patel v OCS Ltd* [2014] NZEmpC 131 at [16]; *Snowdon v Radio New Zealand Ltd* [2014] NZEmpC 180 at [69].

## Discussion

[17] Although there were legal issues in this case of moderate complexity, and these were of significant importance to the parties, the proceeding does not qualify for characterisation as a test case. There is no evidence that it was one which was intended to have consequences for similar circumstances involving the present parties, or that it includes a general ruling which will affect many other parties. In the end, it involved a reasonably straightforward application of s 6 of the Act. This is not a case, then, where costs should lie where they fall for that reason.

[18] Next, I deal with the question of whether costs should be assessed at a level that would have been made had the issue been dealt with in the Authority. It was submitted that High Court Rule 14.13 should be considered, at least by analogy. It provides that costs paid to a successful plaintiff should not exceed the costs and disbursements which that party would have recovered in the District Court, if the proceeding had been brought there, unless the Court otherwise directs. I am unassisted by that particular rule, since it relates to a jurisdictional divide between the District Court which may hear claims up to $350,000, and the High Court which may hear claims of greater value.[13] Distinctions of this kind do not arise in this jurisdiction.

[19] However, I do acknowledge the force of the submission that the application for removal of the claim which had been brought by Mr and Mrs Below in the Authority was made at the request of the Trust. Although this was consented to by Mr and Mrs Below, there should be some recognition of the fact that they were potentially exposed to more significant costs than may have otherwise have been the case in the Authority where an investigation meeting may well have been more confined. However, costs should be assessed according to the principles which apply to costs in this Court and not on the basis of the Authority's daily tariff-based approach of $3,500 per day.

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[13] District Court Act 2016, s 74.

[20] It is next necessary to consider the quantum of the costs claimed by the Trust. It was submitted that the time allocations result in a figure which is unduly generous, and which does not reflect a reasonable award of costs having regard to three factors.

[21] The first is what was described as a high degree of cooperation between the parties that reduced preparation and appearance time, including the submission of a memorandum of agreed facts, and a number of joint memoranda. It is correct that there was appropriate cooperation as to procedural matters, as I would expect of the competent counsel who appeared in this case. The provision of agreed facts, whilst helpful as far as those went, did not avoid the necessity of receiving evidence, which included thorough cross-examination. The result is that I am not satisfied that there should be an adjustment of the scale figure for this reason.

[22] Next, it was submitted that half a day was devoted to a site visit which was requested by the Trust, and which it had limited use in determining the relationship between the parties. As I stated in the substantive judgment, the visit facilitated a proper understanding of the description of the environment within which the Residential Training Programme of cadetship operated at all relevant times.[14] However, the visit was not critical, and this is a factor which does need to be taken into account.

[23] Finally, it is submitted that there was an overly generous allocation of time for directions conferences and case management meetings. Claims were made under Items 11/14, 12/15, 13 and 16 of the scale, totalling $2,787.50. I agree that this is excessive. I disallow Items 11/14 and 16, reducing the claimed sum of $20,850.50 to $19,131.10. This is a starting point figure, which may be discounted in light of particular factors, including some to which I have already referred.

[24] However, the most significant factor for present purposes is the submission which was made as to Mr and Mrs Below's ability to pay. I accept the submission that this factor was canvassed in the evidence, to the effect that they lost all sources of financial support and their accommodation once the cadetship with the Trust was terminated. This was followed by two years without income, where they had to find

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[14] *Below v The Salvation Army New Zealand Trust*, above n 1, at [7].

new accommodation and employment for themselves, while supporting a family of six.

[25] Standing back, I exercise my discretion to determine that Mr and Mrs Below should pay the Trust the sum of $7,500 as a contribution to its costs.

B A Corkill
Judge

Judgment signed at 2.30 pm on 8 September 2017