IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 159
EMPC 48/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	CATHERINE STORMONT Plaintiff
AND	PEDDLE THORP AITKEN LIMITED Defendant

Hearing:	By memoranda of submissions filed on 1 and 8 August 2017 and further submissions filed on 30 and 31 October 2017
Representation:	CW Stewart and C Pallant-Drake, counsel for plaintiff A Sharp, counsel for defendant
Judgment:	14 December 2017

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] In my substantive judgment dated 6 June 2017,[1] I upheld Ms Stormont's challenge to a determination of the Employment Relations Authority, finding that she had been unjustifiably dismissed from her employment with the defendant, Peddle Thorp Ltd (Peddle Thorp), and that she was entitled to an unpaid bonus.[2] Ms Stormont was awarded $61,400 by way of unpaid bonus; $11,717.35 by way of special damages; a sum equivalent to six months' lost remuneration; $25,000 by way of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act); and 75 per cent of the penalty awards made against the defendant for breaches

1 *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71.
2 *Stormont v Peddle Thorp Aitken Ltd* [2016] NZERA Auckland 28.

of good faith. A corollary of the judgment was that the costs determination in the Authority (ordering just over $32,000 against Ms Stormont in that forum) was set aside.[3]

[2] The parties were invited to seek to agree outstanding issues as to costs. That has not proved possible and each has filed submissions in support of their respective positions.

[3] The plaintiff seeks full indemnity costs and disbursements in both the Authority and the Court. In the alternative, an uplift is sought having regard to the allegedly aggravating features of the case. An award of indemnity costs would result in:

- costs of $72,964.07 in the Authority;
- costs of $157,371.04 in the Court.

[4] The defendant submits that the plaintiff has failed to establish a basis for indemnity or uplifted costs in either forum; that the usually applicable daily rate should be applied in respect of costs in the Authority; and that costs in the Court should be calculated according to the Guideline scale.[4]

[5] I deal with costs on the plaintiff's successful challenge to the Court first.

Costs in the Court

[6] The starting point for costs is cl 19 of sch 3 to the Act. It confers a broad discretion as to costs. A scale has been adopted to guide the setting of costs in the Court. As the guidelines make clear, the scale is intended to support (as far as possible) the policy objective that the determination of costs be predictable, expeditious and consistent. It is not intended to replace the Court's ultimate discretion as to costs. Generally costs will be assessed by applying the appropriate

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3 *Stormont v Peddle Thorp Aitken Ltd* [2016] NZERA Auckland 79.

4 Employment Court Practice Directions "Costs – Guideline scale" <www.employmentcourt.govt.nz/legislation-and-rules>.

daily recovery rate to the time considered reasonable for the steps reasonably required in relation to the proceeding. Principles applying to increased and indemnity costs apply in appropriate cases.[5]

Indemnity costs?

[7] The actual costs incurred by the plaintiff on her challenge total $157,371.04 (incl GST). This figure incorporates a significant discount for legal attendances, including for attendances of junior counsel at the hearing.

[8] There is no doubt that the Court may award indemnity costs in appropriate cases. The sort of circumstances in which such costs may be considered appropriate are well established, including particular misconduct that causes loss of time to the Court and to other parties; commencing or continuing proceedings for some ulterior motive; doing so in wilful disregard of known facts or clearly established law; and/or prolonging a case by advancing groundless contentions.[6] Indemnity costs generally require exceptionally bad behaviour.[7]

[9] While it is true that a number of criticisms were levelled at the way in which the defendant dealt with issues relating to the plaintiff's bonus and the circumstances leading up to her departure from the company, it is the way in which the litigation itself was progressed which is relevant to a determination of costs, most particularly the extent to which the defendant's actions increased the costs incurred by the plaintiff. I do not consider that this is the sort of case in which an award of indemnity costs is appropriate. Nor do I consider that indemnity costs are appropriate in setting costs in the Authority, a point I return to below.

Costs calculated under the guideline scale

[10] The proceeding was provisionally assigned category 2 under the costs guideline scale. I am satisfied it remains the appropriate categorisation. The reality

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5 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400. See also Employment Court Regulations 2000, reg 68(1) which provides that, in deciding costs, the Court may have regard to any conduct of the parties tending to increase or contain costs.

6 At [29].

7 At [28].

is that the proceeding raised a number of issues, but sat in the middle of the range in terms of legal and factual complexity.

[11] Ms Stewart, counsel for the plaintiff, has assessed costs under the guideline scale as amounting to $96,336. This figure has been arrived at applying band C to each of the required attendances. Applying band B across all attendances would result in a figure of $67,346. Mr Sharp, counsel for the defendant, submits that band B ought to be applied. I agree, having regard to what was reasonably required in terms of time to deal with each step in the proceeding. That leads to a figure (subject to any appropriate adjustment) of $67,346 on the plaintiff's successful challenge.

Increased costs?

[12] The plaintiff makes seven key points in support of a claim for increased costs:

- The defendant dragged its heels in the conduct of the litigation, unnecessarily increasing costs.

- Costs should be increased to incorporate the costs associated with attendance at a second mediation.

- The defendant unreasonably declined a settlement offer made before the Authority's investigation, which should result in an increase in costs in the Court.

- The plaintiff's billed costs do not reflect the true costs of the litigation as a significant amount was written off, supporting an increase in costs.

- The defendant's approach to various interlocutory matters (disclosure; a request for further particulars; and the requirement to file a reply to the positive defences contained within the amended statement of defence) unnecessarily increased costs.

- The defendant indicated that a key witness (Mr Goldie) would be called to give evidence but did not ultimately do so. This unnecessarily increased the plaintiff's hearing preparation costs.

- An award of costs should reflect the plaintiff's GST status.

Heel-dragging conduct of litigation

[13] The plaintiff claims that the defendant dragged its heels and that this resulted in unnecessarily increased costs. No specifics are provided in support of this aspect of the claim and I am not satisfied, on the basis of the material before the Court, that increased costs on this ground are appropriate.

Mediation costs

[14] The second point relied on by the plaintiff for increased costs relates to attendance at a second mediation. An uplift of $2,877.76 is sought, reflecting the full costs associated with preparing for and attending mediation.

[15] Reliance is placed on two judgments of the Court in which an uplift of costs has been made to reflect mediation costs.[8] While the Court was prepared to make an allowance for such costs in *Jinkinson v Oceana Gold (NZ) Ltd* and *Burrowes v Commissioner of Police*, there is conflicting authority on the point.[9] In the present case the parties had already attended mediation once and attendance at further mediation was at the direction of the Court, although both parties agreed with the direction being made. In circumstances where there has been an agreement to attend mediation, in an effort to seek to reach a mutually acceptable resolution (and where, as here, the defendant met the costs of that mediation), I see less basis for awarding mediation costs and decline to do so in this case.

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8 *Jinkinson v Oceana Gold (NZ) Ltd* [2011] NZEmpC 2 at [16]; *Burrowes v Commissioner of Police* [2015] NZEmpC 150 at [45]. See, too, *RHB Chartered Accountants Ltd v Rawcliffe* [2012] NZEmpC 31, [2012] ERNZ 51.

9 Compare, for example, *Naturex Ltd v Rogers* [2011] NZEmpC 9, (2011) 8 NZELR 251; *Quan Enterprises Ltd v Fair* [2012] NZEmpC 62 at [8]-[10].

Settlement offer

[16] The defendant advanced a settlement proposal on 25 November 2014, followed by a second offer on 12 December 2014, offering a figure of $40,000 in exchange for the plaintiff's resignation. On 16 December 2014 the plaintiff counter-offered by way of two parallel letters - one in relation to the grievance and the other in respect of the bonus. The counter-offer in respect of the former claim was that, in exchange for the plaintiff's resignation, the company would pay her the sum of $30,000 under s 123(1)(c)(i); $10,000 by way of contribution towards the plaintiff's legal costs; and all outstanding holiday pay. In relation to the bonus issue, the company would pay the plaintiff the sum of $48,000 (gross) and a contribution of $5,000 (plus GST) towards her legal costs. It was open to the defendant to accept either, or both, offers. The defendant declined the plaintiff's counter-offers. The plaintiff relies on this refusal as justifying an increase in costs.

[17] The parties subsequently attended mediation. Mediation was not successful so the plaintiff proceeded with her claim in the Authority, which she comprehensively lost. The parties attended a second mediation following a direction from the Court, but with the agreement of the parties. The defendant met the costs of the mediation which appear to have amounted to $3,000. The defendant advanced a further settlement offer following the second mediation. This time the defendant's offer was for $50,000 compensation under s 123(1)(c)(i), a waiver of the costs and disbursements awarded in the defendant's favour by the Authority (which totalled $32,078.17).[10]

[18] If the defendant had accepted the plaintiff's counter-offer of 16 December 2014 it would plainly have been better off. As Ms Stewart points out, it would have paid $95,250 (incl GST) with an ability to claim $2,250 GST back from Inland Revenue. In contrast, under the Court's judgment the defendant was ordered to pay the plaintiff the total sum of $179,621.35, plus interest on the bonus payment.

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[10] *Stormont v Peddle Thorp Aitken Ltd* [2016] NZERA Auckland 79 (costs determination) at [11]-[13].

[19] The Court of Appeal's judgment in *Bluestar Print Group* is generally regarded as the leading authority on the impact of settlement offers in this jurisdiction. There the Court observed that:[11]

> It has been repeatedly emphasised that *the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered*. *Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff* in the absence of compelling countervailing factors. The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.
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> (emphasis added)

[20] While these obiter observations may be taken to suggest that the focus is on the reasonableness of the rejected offer itself, rather than the unreasonableness of the rejection of it, such an interpretation would be at odds with the formulation contained within the High Court Rules 2016,[12] and the approach adopted in other cases, including by the Court of Appeal in *Holdfast NZ Ltd*. There it was said that:[13]

> … any party seeking increased costs on the basis of the other's failure 'without reasonable justification' to accept a settlement proposal will *need to establish clearly that the failure was unreasonable*.
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> (emphasis added)

[21] It seems to me to logically follow that the reasonableness or otherwise of the decision to decline a settlement offer is to be assessed at the time the offer was rejected.[14] The fact that the plaintiff ultimately achieved more than the defendant was prepared to offer is not the sole focus of the inquiry.[15]

[22] Further, while a "steely approach" has been endorsed by the Court of Appeal, and recently by a full Court of this Court,[16] it does not in my view follow that the

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11 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].

12 See High Court Rules 2016, r 14.6(3)(b)(v).

13 *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [29].

14 See, for example, *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [28]. Compare *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 147 at [28]-[43].

15 See, for example, *Bayly v Hicks* [2016] NZHC 504 at [5], citing *New Zealand Sports Merchandising Ltd v DSL Logistics Ltd* HC Auckland CIV-2009-404-5548, 19 August 2010 at [36] in support.

16 In *Xtreme Dining Ltd*, above n 14, at [27].

Court's broad discretionary powers to award costs are *subject* to the so-called steely approach. Rather, it is one of a number of factors to have regard to in the exercise of the Court's discretion. The point applies with particular force to costs in the Authority, for the reasons explained in *Stevens v Hapag-Lloyd (NZ) Ltd*.[17]

[23] I accept the submission advanced by the plaintiff that a settlement offer made prior to an Authority investigation but not renewed may nevertheless be relevant for costs purposes.[18]

[24] In the substantive judgment I found that the defendant had fallen well short of its obligations to the plaintiff, including in terms of the way in which it dealt with the bonus issue. However, it appears that both parties made genuine efforts to resolve their differences from a relatively early stage of the litigation process but were unable to do so. In the Authority the defendant succeeded in resisting each aspect of the plaintiff's claim. The defendant made a further attempt to settle the claim after the Authority's substantive and costs determinations were issued. While the basis on which the defendant approached the plaintiff's settlement offers of 16 December no doubt reflected its views of the relative strength of its position, the reality was that at the time it seriously underestimated the strength of each of the plaintiff's claims. This led it to unreasonably decline the reasonable settlement offers that had earlier been made by the plaintiff.

[25] Standing back and viewing matters in context, I am satisfied that an uplift is appropriate. Scale costs are set on a nominal assessment of what reasonable costs would be, discounted by a third. In the circumstances I consider that a just contribution to the plaintiff's actual costs is scale costs (calculated on a 2B basis), multiplied by 1.5 times. I make orders accordingly.

[26] I return to the plaintiff's submission for uplifted costs in the Authority below.

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17 *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [88]-[99].

18 See the discussion in *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137 at [18]-[21]; see too *Rodkiss*, above n 14, at [29]-[33]. Compare *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 92, [2012] ERNZ 395 at [9]-[28]; and *O'Connor v Auckland University Students' Assoc Inc* [2014] NZEmpC 185.

Unbilled time

[27] The plaintiff submits that an uplift is appropriate having regard to the costs, including unbilled time, incurred in pursuing her claim and to ensure that any costs award is reasonable in amount. In this regard reference is made to the Court of Appeal's judgment in *Victoria University of Wellington v Alton-Lee* where the Court referred to five relevant factors, including the significant unbilled which had been written off ($52,000 in total).[19] In the present case it is said that the plaintiff's counsel discounted their invoices by more than $65,000. Had this discount not applied, the plaintiff's total legal costs would have amounted to $337,502.95. It is said that the total figure reflects the complexity of the matter and why indemnity or increased costs ought to be applied.

[28] Without intending any disrespect to either counsel, I do not think that this case can be described as overly complex. It is true that the events at issue traversed a relatively lengthy period of time and a number of issues were raised as the case developed, some of which were of peripheral importance only. But at its heart the claim was about the proper interpretation of a clause in an employment agreement relating to the entitlement to a bonus payment and whether the plaintiff had been unjustifiably dismissed for redundancy.

[29] I do not consider that it is in the broader public interest to encourage complexity of pleadings or of approach when dealing with relatively straightforward employment claims. Proportionality is key. Both parties were 'lawyered up' and were demonstrably keen to thoroughly pursue their respective positions, as they were entitled to do. I do not consider that the quantum of costs incurred by the plaintiff, or the extent to which some of her costs were written off, justifies an uplift in the particular circumstances, and I decline to do so.

Interlocutory matters

[30] The plaintiff submits that an uplift is appropriate having regard to the allegedly obstructive approach the defendant took to requesting further particulars and disclosure of relevant documents.

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[19] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [62].

[31] It is clear that the plaintiff was put to the cost of responding to requests for further particulars and various documentation, some of which was ultimately able to be dealt with on an agreed basis. I do not accept that the way in which the issue of further particulars was pursued by the defendant justifies an uplift, and I decline to do so. The reality is that both parties adopted what could neutrally be described as a thorough approach to the litigation.

[32] On the last day of the hearing the defendant raised a number of technical matters in respect of affirmative defences raised in its pleadings. As Ms Stewart points out, had these matters been raised at an earlier stage the plaintiff could have responded to them without incurring the expense involved in filing extensive documentation responding to the issue. While that may be so, the defendant was entitled to raise the point and have it dealt with. In the event the Court found that the plaintiff was required to file a reply to the affirmative defences if she denied them, which she had failed to do. Leave was granted to file a reply out of time.[20] Having regard to the particular circumstances, I consider that it is appropriate that costs lie where they fall on this aspect of the proceedings.

Witness issues

[33] Mr Goldie was a key player in the way in which the plaintiff's bonus issue was dealt with and the circumstances leading to her departure from the company. Mr Goldie gave evidence in the Authority and a brief of evidence was filed for him in advance of the hearing in this Court. Not surprisingly the plaintiff understood that Mr Goldie would be giving evidence in support of Peddle Thorp's defence of the claim against it, and it is clear that a considerable amount of work was put into responding to the contents of his brief of evidence and preparation for this aspect of the hearing. It was not until mid-way through the eight-day hearing that counsel for the defendant advised that Mr Goldie would not be called after all.

[34] Parties are free to call, or not call, witnesses of their choosing and such choices are made for a variety of reasons. I accept that while it was open to the defendant not to call Mr Goldie, the way in which the issue was dealt with

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[20] *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 12.

necessarily resulted in wasted costs for the plaintiff. It is appropriate to reflect this in an uplift. I consider an uplift of around $3,500 is appropriate.

GST on costs

[35] The plaintiff seeks an uplift to reflect her GST status, namely her inability to claim the GST component of her legal costs back from Inland Revenue. The defendant accepts (in supplementary written submissions) that the Court may take the plaintiff's GST status into account in setting costs.

[36] Issues relating to GST on costs have been traversed by the Court of Appeal (in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC*)[21] and in judgments of this Court.[22]

[37] The position in respect of GST can be summarised as follows. The GST registration status of a successful party is a material factor in determining whether or not an uplift is appropriate, whether from scale or otherwise. The plaintiff is not able to recover GST. It is appropriate to take this into account and uplift costs to reflect that.

Costs on costs

[38] The plaintiff seeks a contribution to the costs she has incurred in seeking costs. Substantial costs of $7,459.84 are said to have been incurred in preparing the costs submissions. As will be evident, a number of the points pursued by the plaintiff in support of her costs claim have not been accepted. A modest contribution of $1,000 is appropriate in the particular circumstances.

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21 *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282 at [10], (2016) 23 PRNZ 260.

22 See *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120 at [5]-[12]; *Xtreme Dining*, above n 14, at [42]-[45]. (Note that *Jesson* appears to refer erroneously to *Xtreme Dining*, rather than *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135).

Costs in the Authority

[39] On a challenge to a costs determination such as this, the Court is required to stand in the shoes of the Authority and to assess the evidence relating to the costs award in order to judge an appropriate award of costs in light of all relevant considerations.[23]

[40] The Authority's current approach is to apply the general principle that costs should follow the event, and a daily tariff of $4,500 for the first day and $3,500 for each subsequent day. At the relevant time for the purposes of these proceedings, the applicable daily rate was $3,500. Applying this daily rate would lead to an award of $10,500.[24]

[41] I see no reason to depart from the usual applicable daily rate in the present case, and accordingly adopt it as a starting point.

Settlement offer

[42] I have already referred to the circumstances surrounding the defendant's rejection of each of the two offers made by the plaintiff on 16 December 2014. I consider that an uplift is appropriate.

Other factors

[43] Ms Stewart further submits that an uplift is warranted because of the defendant's conduct in the Authority, including on the basis that it pursued hopeless lines of argument. While the plaintiff would have been put to the cost of responding to each of the matters raised by the defendant, I am not satisfied that an uplift is warranted on the basis of the material before the Court.

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23 *PBO Ltd (formerly Rush Security) v Da Cruz* [2005] ERNZ 808 (EmpC) at [19].

24 Given that the investigation meeting occupied three days. The Authority adopted the generally applied daily rate as a starting point and then uplifted to reflect the decline of the defendant's settlement offer, and disbursements.

GST

[44] It appears that the Authority does not tend to take into account a party's ability, or otherwise, to recover 15 per cent of its costs in applying the daily rate. I accept, essentially for the reasons set out above, that there should be an uplift in costs to reflect the plaintiff's GST status in determining a just contribution to costs in the Authority. I see no reason in principle to adopt a different approach in each forum, including having regard to the underlying objectives of the legislation. It is appropriate to take the plaintiff's GST status into account and to uplift costs in the Authority to reflect that.

Disbursements

[45] The plaintiff is entitled to her claimed disbursements (including GST). I am satisfied, having considered the material filed in support of the claim, that the claimed disbursements were reasonable in amount and were necessarily related to the proceedings.

Concluding remarks

[46] I have not overlooked the submission that regard should be had to the underlying objectives of the Act in setting costs, and the desirability that Ms Stormont not be left out of pocket, having successfully pursued her claim. Those points can usefully be considered alongside the following observations of Judge Ford in *Rodkiss*:[25]

> [99] In the opening paragraph of this judgment I record that Mr Rodkiss had incurred legal expenses totalling $230,313.61. He recovered $51,258.85 under this Court's substantive judgment of 24 March 2015 and under this costs judgment he has recovered an additional $149,500. On those figures he will still be left significantly out of pocket. I say at once that such an outcome is unsatisfactory and of considerable concern. Mr Rodkiss, with justification, must be left wondering whether it has all been worthwhile.
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> [100] It may be timely to respectfully remind counsel practising in this jurisdiction of the following passage from the judgment of the Court of Appeal in *Alton-Lee* delivered nearly one and a half decades ago:[26]

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25 *Rodkiss*, above n 14.
26 *Alton-Lee*, above n 19, at [65].

> The parties, and those who practise in this field (where this case cannot be regarded as wholly exceptional) might well reflect on the consequences of conducting litigation without proper focus on the issues and without tight control on the escalation of costs.

[46] I respectfully agree with these observations.

Result

(a) The defendant is ordered to pay the plaintiff $120,197 by way of contribution to her costs in the Court.

(b) The defendant is ordered to pay the plaintiff $18,000 by way of contribution to costs in the Authority.

(c) The defendant is ordered to pay the plaintiff her claimed disbursements totalling $40,641.92.

(d) The money held in the trust account of Swarbrick Beck Mackinnon is to be disbursed in accordance with my interlocutory judgment of 30 June 2016.[27]

Christina Inglis
Judge

Judgment signed at 3.45 pm on 14 December 2017

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[27] *Stormont v Peddle Thorp Aitken Ltd* [2016] NZEmpC 84 at [1](II)(b)(i).