

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2017] NZEmpC 34
EMPC 55/2015**

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

AND IN THE MATTER of an application for costs

BETWEEN BARBARA TWENTYMAN
 Plaintiff

AND THE WAREHOUSE LIMITED
 Defendant

Hearing: By memoranda of submissions filed on 31 January 2017

Appearances: P Swarbrick and M McGoldrick, counsel for defendant

Judgment: 29 March 2017

COSTS JUDGMENT AND FURTHER ORDER OF JUDGE K G SMITH

Introduction

[1] In this proceeding Ms Twentyman unsuccessfully challenged the determination of the Employment Relations Authority (the Authority).¹ Costs were reserved. The Warehouse Ltd (TWL) has now applied for costs and sought a revocation of the stay of execution of the Authority's remedies granted in the interlocutory judgment of Chief Judge Colgan on 8 October 2015.²

[2] Ms Twentyman's submissions in reply to TWL's application for costs were due no later than 21 February 2017. Despite a reminder from a court registry officer, Ms Twentyman has not filed submissions or provided any explanation for not doing so. Nor has she responded to TWL's further application.

¹ *Twentyman v The Warehouse Ltd* [2016] NZEmpC 172.

² *Twentyman v The Warehouse Ltd* [2015] NZEmpC 178 at [35].

The application

[3] TWL is seeking costs of \$42,702, calculated as two-thirds of its actual costs, and disbursements of \$5,539.68. It does not seek costs for attendances to prepare the application for costs or a contribution to the GST that has been paid.

Framework

[4] The power to award costs is contained in cl 19 of sch 3 to the Employment Relations Act 2000 (the Act). A broad discretion is conferred on the Court as follows:

19 Power to award costs

- (1) The court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable.
- (2) The court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[5] That broad discretion must be exercised judicially and in accordance with principle. This proceeding pre-dates the adoption of the Court guideline costs scale and is therefore to be determined according to the principles in three well-known cases: *Victoria University of Wellington v Alton-Lee*;³ *Binnie v Pacific Health Ltd*;⁴ and *Health Waikato Ltd v Elmsly*.⁵ In *Alton-Lee* the Court of Appeal accepted the primary principle that costs follow the event. As to quantification, that Court held the principle is one of a reasonable contribution to costs actually and reasonably incurred. In *Binnie* the Court of Appeal adopted a two-stage process when considering costs. The first stage is to consider whether the costs actually incurred by the party entitled to an order were reasonably incurred. If those costs were not reasonably incurred adjustments to them might be necessary. The second stage is to decide what level is reasonable for the unsuccessful party to contribute to those costs. That two-stage approach was subsequently endorsed in *Elmsly*.

³ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA).

⁴ *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA).

⁵ *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

[6] In *Binnie* the Court of Appeal observed:⁶

... Potentially that level can be anywhere from 100 percent to 0 percent. A starting point at 66 percent is generally regarded as helpful in ordinary cases. [Counsel] reflected common practice when he referred to this as the two-thirds rule. If such a starting point is adopted, careful attention must be given to factors said to justify an increase or a decrease.

[7] For completeness, the Court is empowered by reg 68 of the Employment Court Regulations 2000 (the Regulations) to have regard to the conduct of the parties tending to increase costs or contain costs when exercising the discretion conferred by cl 19 of sch 3 to the Act.

TWL's actual costs

[8] TWL's actual costs were \$78,015 (plus GST). Copies of the invoices paid by that company were attached to Ms Swarbrick's submissions. An adjustment to this amount was made by Ms Swarbrick to remove the costs incurred for attendances relating to interlocutory applications where the Court determined they should lie where they fell. The adjusted total of invoiced costs is \$64,053. Two-thirds of that sum is \$42,702.

[9] Ms Swarbrick submitted that costs claimed on this adjusted basis were reasonably incurred. To support that submission, she relied on attendances being required for about 18 months, and the litigation being factually complex, because of the steps required to address wide-sweeping claims or allegations by Ms Twentyman. Furthermore, from an early stage TWL placed Ms Twentyman on notice about concerns over the presentation of her case and the effect that might be felt on the costs being incurred by all parties.

[10] I accept the litigation was factually complex. TWL was required to address a significant number of claims by Ms Twentyman that ultimately were unfounded but needed to be dealt with. The trial was scheduled to last for five days but was completed inside four. Taking evidence occupied three of those days, with submissions being given on the fourth day. Ms Twentyman gave evidence, as did

⁶ *Binnie*, above n 4, at [14].

nine witnesses for TWL. The responsibility fell to TWL to prepare an extensive bundle of documents extending to over 800 pages of material.

[11] Ms Swarbrick was assisted by junior counsel in the preparation and presentation of TWL's case and the costs claimed reflect that; however, I accept that the circumstances of this case justify Ms Swarbrick having assistance.

[12] Helpfully, Ms Swarbrick has attempted to illustrate the reasonableness of this claim for costs by comparing it with what might have been awarded had the Court's guideline scale applied. In doing so, she assumed the Court might have made an order based on Category 2, Band B, with Category 2, Band C applying to attendances to prepare the bundle. On that basis, and acknowledging the assumptions that were made, had the scale applied, Ms Swarbrick calculated the costs claimed would have been \$42,314.25, which is very close to the amount now sought.

[13] Ms Swarbrick also addressed Ms Twentyman's personal circumstances, anticipating submissions about them, given the Court's earlier decision on security for costs.⁷ In the absence of submissions from Ms Twentyman, or any other information to suggest her circumstances might be relevant, there is no basis for an adjustment to any award of costs or to contemplate declining to make one.

[14] Finally, Ms Swarbrick did not seek an uplift under reg 68 of the Regulations.

[15] I consider TWL is entitled to an award of costs. However, the amount should be rounded to \$42,000.

[16] TWL's claim for disbursements covers producing the bundle of documents, travel expenses, and accommodation for witnesses to assemble in Rotorua for the trial. The amount claimed for travel-related disbursements has been broken down to separate flights, meals and related expenses such as taxi fares to and from court or reimbursement for mileage. Witnesses travelled from Auckland, Christchurch, Dunedin, Wellington and Taupo to give evidence. They were cross-examined by Ms

⁷ *Twentyman v The Warehouse Ltd*, above n 2.

Twentyman and there is no suggestion their evidence was unnecessary or could have been secured in some other way.

[17] No claim for disbursements is made to cover the costs of counsel travelling from Auckland to Rotorua or, for that matter, in relation to the expenses they incurred such as for accommodation and meals.

[18] I am satisfied the claim for disbursements is reasonable.

Stay of execution

[19] On 8 October 2015 Chief Judge Colgan issued an interlocutory judgment dealing with an unsuccessful application by TWL for security for costs for the trial. However, the Court noted:⁸

... I think the situation can be dealt with most justly by requiring the plaintiff to give security for the costs and disbursements ordered by the Authority and in respect of which the plaintiff has taken no step to meet her responsibilities, but as a condition of granting a stay of execution of the remedies by TWL.

[20] Later in that decision the Court said:⁹

I will stay execution of the Authority's remedies but on condition that these are secured by the plaintiff, what might be described as requiring security for past costs. In these circumstances, I do not order security for future costs.

[21] In that judgment Ms Twentyman was given an election. She had an opportunity to provide security in the sum of \$9,856.43 awarded to TWL for costs and disbursements in the Authority, or to pay that sum to the Registrar of the Court at Auckland to be held on interest-bearing deposit pending agreement or an order of the Court.¹⁰

[22] For the avoidance of doubt, Ms Swarbrick has now sought to have that stay formally revoked because my decision dismissing Ms Twentyman's challenge has

⁸ At [34].

⁹ At [35].

¹⁰ At [36].

removed the necessity for it. I agree that the stay is no longer appropriate and that situation needs to be formally recognised.

Conclusion

[23] The following orders are made:

- (a) Ms Twentyman is to pay TWL costs of \$42,000 and disbursements of \$5,539.68.
- (b) The stay granted on 8 October 2015 is revoked.

KG Smith
Judge

Judgment signed at 1.30 pm on 29 March 2017