

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2017] NZEmpC 54  
EMPC 320/2015**

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

AND IN THE MATTER of an application for costs

BETWEEN SANDRA MARX  
Plaintiff

AND SOUTHERN CROSS CAMPUS BOARD  
OF TRUSTEES  
Defendant

**EMPC 194/2016**

IN THE MATTER OF an application for rehearing

AND IN THE MATTER of an application for costs

AND BETWEEN SANDRA MARX  
Plaintiff

AND SOUTHERN CROSS CAMPUS BOARD  
OF TRUSTEES  
Defendant

Hearing: On the papers filed on 8 July, 12 August 2016, 15 and 23  
September 2016 and 27 February, 23 and 27 March 2017

Appearances: S Marx, plaintiff in person  
H K Harkess and L Cole, counsel for defendant

Judgment: 12 May 2017

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**COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS**

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[1] The defendant has applied for costs against the plaintiff. The application follows the dismissal of a challenge<sup>1</sup> to a determination of the Employment Relations Authority,<sup>2</sup> and the dismissal of a subsequent application for rehearing.<sup>3</sup>

[2] As to the unsuccessful challenge, the defendant seeks a contribution towards its costs of \$18,764. In respect of the unsuccessful application for a rehearing, the defendant seeks a contribution towards its costs of \$13,333, together with disbursements of \$645.20.

[3] Mrs Marx is opposed to any order of costs being made against her, for reasons fully set out in her memoranda. Her opposition is predominately focussed on the perceived merits of her claim.

[4] The starting point is cl 19(1) of sch 3 of the Employment Relations Act 2000 (the Act). It confers a broad discretion as to costs, providing that:

**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 ... as the court thinks reasonable.

[5] Regulation 68(1) of the Employment Court Regulations 2000 also deals with costs. It provides that, in exercising the Court's discretion under the Act to make orders as to costs, the Court may have regard to any conduct of the parties tending to increase or contain costs.

[6] The discretion to award costs, while broad, is to be exercised judicially and in accordance with principle. The primary principle is that costs follow the event. The usual starting point in ordinary cases is 66 per cent of actual and reasonable costs. From that starting point factors that justify either an increase or a decrease are assessed. I approach the issue of costs in this case on the usual basis.

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<sup>1</sup> *Marx v Southern Cross Campus Board of Trustees* [2016] NZEmpC 71.

<sup>2</sup> *Marx v Southern Cross Campus Board of Trustees* [2015] NZERA Auckland 308.

<sup>3</sup> *Marx v Southern Cross Campus Board of Trustees* [2017] NZEmpC 4.

[7] I accept that the defendant incurred actual costs of \$32,368.26 in responding to the plaintiff's challenge. Such costs are supported by copies of invoices which are before the Court. I also accept, based on the material before the Court, that the defendant incurred actual costs of \$22,756 in opposing the plaintiff's application for rehearing.

[8] I have no trouble concluding that the actual costs incurred by the defendant in relation to the challenge and the rehearing application were reasonable, including having regard to the broad range of issues raised by the plaintiff both at, and in the lead-up to, the substantive hearing and on the rehearing application; and the way in which the plaintiff pursued the proceedings.

[9] I am mindful that the purpose of a costs order is not to punish an unsuccessful party. I have also considered Mrs Marx's position as a litigant in person. It is, however, appropriate in this case that costs follow the event and that the defendant, who was wholly successful in defending the challenge and in opposing the rehearing application, receive a reasonable contribution to its costs. As was observed in *Scarborough v Micron Security Products Ltd*:<sup>4</sup>

While some latitude may generally be expected in such circumstances, it does not provide an impenetrable shield in relation to costs, or a licence to pursue hopeless claims or scandalous allegations with impunity. If it were otherwise it would place the opposing party, and the administration of justice generally, in an invidious position.

[10] Mrs Marx says that she is a pensioner, and she appears to be in a constrained financial situation. I accept that her financial position is relevant to determining a just award of costs but it is not decisive and must be weighed against other relevant factors, including the interests of the defendant, the broader public interest, and the way in which she has pursued her claims against the defendant (which unnecessarily increased costs).

[11] I am satisfied that it is consistent with the overall interests of justice, and consistent with equity and good conscience, that Mrs Marx be ordered to make a contribution towards the defendant's costs. While I accept that such an order may

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<sup>4</sup> *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105 at [31].

cause some difficulties for her, I do not consider, based on the material before the Court, that she would be unable to pay, or that the defendant should in any event be denied a costs order in its favour.

[12] I record that counsel for the defendant confirmed, by way of supplementary submissions, that the defendant was not pursuing a claim for costs calculated on a GST inclusive basis.

[13] I am satisfied that an award of costs of \$18,764 on the plaintiff's unsuccessful challenge is appropriate, and that an award of costs on the plaintiff's unsuccessful application for rehearing of \$13,333 is appropriate. I note for completeness that an application of the Court's guideline costs scale to the rehearing application would result in a lower figure. However, even accepting that the scale applies to the second proceeding, I would have considered that an order reflecting a contribution of two thirds of the defendant's actual and reasonable costs was warranted having regard to the particular circumstances.

[14] I am also satisfied that the disbursements claimed in relation to the rehearing application (totalling \$645.20) were necessarily incurred and reasonable in amount.

[15] The following orders are accordingly made:

- (a) the plaintiff is ordered to pay to the defendant a costs contribution of \$18,764 on the plaintiff's unsuccessful challenge;
- (b) the plaintiff is ordered to pay to the defendant a costs contribution of \$13,333 on the plaintiff's unsuccessful application for a rehearing;
- (c) the plaintiff is ordered to reimburse the defendant's claimed disbursements of \$645.20.

Christina Inglis  
Judge

Judgment signed at 4 pm on 12 May 2017