**IN THE EMPLOYMENT COURT**
**CHRISTCHURCH**

**[2018] NZEmpC 159**
**EMPC 197/2017**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER | of an application for costs |
| BETWEEN | X<br>Plaintiff |
| AND | THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS<br>Defendant |

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| Hearing: | On the papers |
| Appearances: | M-J Thomas, counsel for plaintiff<br>P Chemis, counsel for defendant |
| Judgment: | 20 December 2018 |

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**COSTS JUDGMENT OF JUDGE K G SMITH**

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[1] In the substantive judgment of 17 September 2018, the plaintiff's challenge to the determination of the Employment Relations Authority was dismissed.[1] Costs of the proceeding were confirmed on a Category 2 Band B basis in accordance with the Court's Guideline Scale.[2]

[2] The parties have been unable to reach agreement on costs and the defendant has applied for an order fixing the amount payable by the plaintiff to him.

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1 *X v The Chief Executive of the Department of Corrections* [2018] NZEmpC 106.
2 See Employment Court Practice Directions at 18 <www.employmentcourt.govt.nz/legislation-and-rules>.

[3] The defendant is seeking an award of scale costs of $24,976 and disbursements of $1,697.42. In addition, an uplift from those scale costs of a further $15,000 is sought.

[4] The defendant's claim was set out in an appendix to the application and is as follows:

| | | A, B, C* | Days | $ |
|---|---|---|---|---|
| | ***Commencement*** | | | |
| 2 | Commencement of defence to challenge by defendant | B | 1.50 | 3,345.00 |
| | ***Case Management*** | | | |
| 11 | Preparation for first directions conference | B | 0.40 | 892.00 |
| 13 | Appearance at first case management conference | B | 0.20 | 446.00 |
| | ***Interlocutory applications*** | | | |
| 29 | Filing opposition to interlocutory application | B | 0.60 | 1,338.00 |
| | ***Trial preparation and appearance*** | | | |
| 36 | Plaintiff's or defendant's preparation of briefs or affidavits | B | 2.00 | 4,460.00 |
| 38 | Defendant's preparation of list of issues, authorities, and common bundle | B | 1.00 | 2,230.00 |
| 39 | Preparation for hearing | B | 2.00 | 4,460.00 |
| 40 | Appearance at hearing for sole or principal counsel | B | 3.50 | 7,805.00 |
| | | | | **$ 24,976.00** |
| | | | | |
| **Disbursements** | | | | |
| | Accommodation | | | 636.52 |
| | Air travel | | | 868.90 |
| | Taxis | | | 192.00 |
| | **Subtotal** | | | **1,697.42** |
| | **Total Costs and Disbursements** | | | **$ 26,673.42** |

[5] The reason an uplift was sought is because before the hearing an offer to settle was made on a without prejudice basis except as to costs (a Calderbank offer). If the defendant's application is granted the total sum awarded for costs would be $39,976. With disbursements the total amount payable would become $41,673.42.

[6] The defendant's application confirmed his total expenditure for legal costs was $51,667.61 so that the amount claimed would not exceed what has been paid. If the

application is granted that would mean the defendant's cost recovery, excluding disbursements, would be approximately 77 per cent of the expenditure.

[7] The plaintiff has two responses to this application:

(a) costs should lie where they fall because he is impecunious; and

(b) if costs are to be awarded there should be no uplift.

[8] The Court has a broad discretion in dealing with costs, conferred by cl 19 of sch 3 to the Employment Relations Act 2000. That discretion is supplemented by reg 68(1) of the Employment Court Regulations 2000 which provides that, in exercising it, regard may be had to any conduct tending to increase or contain costs.

[9] The Court's Guideline Scale, that has applied since 1 January 2016, assists the Court in exercising the discretion. The Guideline also recognises that, in fixing costs, the principles relating to increased and indemnity costs, the refusal of and reduction of costs, and the effect of making appropriate settlement offers, will be taken into account.

[10] The purpose of the guideline has been commented on in several cases but was succinctly stated in *Xtreme Dining Ltd v Dewar* where the Court said:[3]

> …the Guideline Scale was intended to support, as far as possible, the policy objective that the determination of costs be predictable, expeditious and consistent; but it was not intended to replace the Court's ultimate discretion under the statute as to whether to make an award of costs and, if so, against whom and how much. The Guideline Scale would be a factor in the exercise of that discretion.

[11] As has already been noted, this proceeding was provisionally allocated to Category 2 Band B which was confirmed in the substantive judgment. Aside from the plaintiff's responses to the claim, there is a disagreement over one of the items in the defendant's appendix, for filing a notice of opposition to an interlocutory application where $1,338 is sought. That item relates to the plaintiff's application for disclosure which did not need to proceed because the defendant reconsidered and voluntarily

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[3] *Xtreme Dining Ltd v Dewar* [2017] NZEmpC 10 at [25].

disclosed the documents being sought. I agree that it is not appropriate for the defendant to seek to recover the sum claimed when, effectively, the plaintiff's application succeeded before having to be decided. Deducting that amount means the claim is reduced to $23,638.

[12] The plaintiff sought a further deduction equivalent to preparation time for written submissions relating to the application for disclosure, amounting to $3,335. The outstanding disclosure issue was resolved before the application was to be heard and I am not satisfied a further deduction is justified.

## Uplift

[13] The claim for an uplift has been made because of the defendant's settlement offer on 14 December 2017, several months before the hearing began in March 2018. It is not necessary to set out all of the details of that offer except to record it involved paying a contribution towards the plaintiff's legal fees, a payment to him, for his dismissal to be treated as a resignation and for the defendant to provide a certificate of service. The offer was rejected immediately.

[14] The defendant considers that the costs it incurred after making the settlement offer were unnecessarily incurred. In February and March 2018, the defendant incurred an additional $29,980.91 in legal fees. The $15,000 uplift requested is, therefore, slightly more than 50 per cent of those fees.

[15] The plaintiff acknowledged a settlement offer was made, but disputed the appropriateness of an uplift, because he maintained he was justified in rejecting the offer when it did not address the remedy he sought, which was reinstatement.[4]

[16] In *Bluestar Print Group (NZ) Ltd v Mitchell* the Court of Appeal emphasised that a steely approach is required to Calderbank offers.[5] They should not be put aside lightly when costs are being considered. In *New Zealand School of Education v Nafissi* the Court considered a rejected Calderbank offer when determining costs. In that case,

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4 Relying on *New Zealand School of Education Ltd v Nafissi* [2012] NZEmpC 35.
5 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

although the successful party had sought reinstatement, it was not ordered and his financial remedy was slightly less than what was proposed in the offer to settle. What influenced the Court's decision on costs, however, was that the successful party conducted the proceeding in a way which increased the other party's costs.[6] He pursued a variety of unrealistic claims that failed causing unnecessary expense. That behaviour was a significant factor in the Court concluding that the Calderbank offer should be taken into account on costs even though it had not addressed the claim for reinstatement.

[17] In this case, while a steely approach to the offer is required, the same features that were relevant in *New Zealand School of Education* do not exist. The offer by the defendant did not address reinstatement. The subject was not mentioned, and why the defendant was not prepared to entertain it, or considered the plaintiff was pursuing it without a proper basis for doing so, was not addressed in the offer. In those circumstances, the plaintiff had a proper reason to reject the offer and the fact that he did so does not justify an uplift.

[18] There are no other features of the way in which the plaintiff conducted his case that would justify an uplift. The application for an uplift is declined.

[19] That leaves for consideration the plaintiff's ability to pay.

## Ability to pay

[20] The plaintiff says he is impecunious and, consequently, costs should lie where they fall. Several cases were relied on to support that proposition.[7]

[21] The plaintiff's submissions accepted that, if his impecuniosity is to be relied on, then he has the onus of establishing his financial position for consideration. An affidavit was filed describing his finances. He deposed to having no means to pay an award of costs. He partly explained his current working arrangement, by saying that

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[6] *New Zealand School of Education*, above n 5, at [29].

[7] *The Order of St John Midland Regional Trust Board v Greig* [2004] 2 ERNZ 137; *IHC New Zealand Inc v Fitzgerald* EmpC Wellington WC7/07 28 February 2007; and *Cronin-Lampe v Board of Trustees of Melville High School* [2013] NZERA Auckland 446.

he is a sole trader and had suffered a set-back when a company to which he provided services went into liquidation. He went on to say he had recently obtained a replacement contract, with another company, but had outstanding debts.

[22] Exhibited to the plaintiff's affidavit was a letter from his accountant estimating his taxable income for the year ended 31 March 2018 to be just slightly less than $20,000. He also exhibited information from the Inland Revenue Department for three financial years ending on 2016, 2017 and 2018 showing his low income.

[23] A brief undated statement of financial assets and liabilities was produced. This summary says his liabilities exceed his assets by approximately $81,000. A one page balance sheet for the plaintiff's business, as at August 2018, was produced but he did not provide an income statement for the business.

[24] While some information about the plaintiff's income to the financial year ending on 31 March 2018 was provided he did not explain his income since then. The information supplied does not explain the balance sheet, although it does appear that in his new business he either has, or has access to, assets. An unexplained entry in the balance sheet shows about $52,000 taken as drawings, describing the recipient only as Owner A. In the absence of an explanation I assume Owner A is the plaintiff. This payment does not show up in the plaintiff's statement of Assets and Liabilities, possibly because it was prepared at an earlier time than the balance sheet.

[25] There are cases which have led to either no award, or a reduced award, of costs based on the financial position of the liable party but that approach is not universal. In *Tomo v Checkmate Precision Cutting Tools Ltd* Judge Inglis (as she then was) said:[8]

> The approach to financial circumstances raises a number of issues, including the extent to which the opposing party's interests can be protected. While the approach to undue financial hardship in this jurisdiction is said to be based on the broad discretion conferred on the Court, supported by the statutory imperative that the Court exercise its powers consistently with equity and good conscience, there is a risk that the countervailing interests of the successful party (who might also be financially stretched) and broader public policy considerations become marginalised. The principles of equity and good

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[8] *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196 at [16] (footnotes omitted).

> conscience must transcend the interests of simply one party. A broader approach is required.

[26] In *Scarborough v Micron Security Products Ltd* the Court made this statement about costs:[9]

> There may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

[27] The picture created by the financial information disclosed by the plaintiff is inadequate to support his claim that he is unable to pay any order for costs. The plaintiff has not discharged the onus of establishing he is unable to pay costs. Even if that onus had been established, I am not persuaded that it would be appropriate to deprive the defendant of the benefit of an order now given the comments in *Tomo* and *Micron*. Once an order is made it will be for the defendant to decide if and when it will seek to enforce it.

## Disbursements

[28] The last issue to address is the claim for disbursements. What has been sought by the defendant is reimbursement for accommodation, air travel, and taxis totalling $1,697.42.

[29] The plaintiff's submissions are based on analysing the disbursements listed on a tax invoice to the defendant, supplied as part of the costs application, dated 20 March 2018. In that invoice, there are disbursements for meals, taxis, flights and accommodation for out of town counsel which, in fact, totals $1,825.04. The difference between the amount claimed in the application for costs, and what is

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[9] *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 812 at [38] (footnotes omitted).

referred to in the tax invoice, is for approximately $127 which seems to be the cost of meals.

[30] The plaintiff disputes the claim because there was no proper reason for out of town counsel to have been instructed. The plaintiff's point is that the defendant was entitled to counsel of its choice but he should not have to bear the burden of meeting the additional expense incurred when the preferred counsel is from out of town.

[31] The defendant's response was that it was reasonable to choose a lawyer from the department's "All of Government panel", that the disbursements had been necessarily incurred and are reasonable.

[32] I accept the plaintiff's submission. The fact that the defendant has an arrangement to secure legal services is not an adequate explanation to justify the plaintiff being required to meet those disbursements. This proceeding was conducted in a main centre, well served by experienced practitioners, and there is no reason for the plaintiff to bear the disbursement costs of the defendant's choice in those circumstances.

## Outcome

[33] The defendant is entitled to an order of costs for this proceeding. The plaintiff is ordered to pay the defendant costs of $23,638.

[34] There is no order for costs for the time and effort taken to prepare the application for costs.

K G Smith
Judge

Judgment signed at 11.10 am on 20 December 2018