IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2020] NZEmpC 24
EMPC 70/2019

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	CBA Plaintiff
AND	ONM Defendant

Hearing: (On the papers)

Appearances: S Henderson, counsel for CBA
S Dyhrberg, counsel for ONM

Judgment: 10 March 2020

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves costs issues arising from my substantive judgment of 15 October 2019.[1]

[2] CBA seeks scale costs totalling $69,512 including disbursements totalling $3,069.98. The thrust of the submissions made by Mr Henderson, counsel for CBA, is that the case had a number of unusual features justifying an award of the amount reflected in the scale on a Category 2, Band B basis, save for one step; and no

[1] *CBA v ONM* [2019] NZEmpC 144.

deduction is necessary, even given the fact that some aspects of CBA's claim did not succeed, or that two Calderbank offers were declined.

[3] Ms Dyhrberg, counsel for ONM, accepted that costs on a 2B basis are appropriate, but submits that some steps in the assessment of scale costs are either excessive or not appropriately included; that there should be a reduction to reflect the fact that CBA did not succeed on all matters; and there should be a further reduction to reflect the generous Calderbank offers which were made.

[4] Accordingly, the Court must consider:

a) quantum, with reference to the scale provisions;

b) whether a reduction should be made having regard to the extent of CBA's success; and

c) whether a further reduction should be made having regard to the Calderbank offers.

The findings made by the Court

[5] Before outlining the applicable legal principles and discussing the issues just identified, it is necessary to briefly summarise the findings made by the Court.

[6] CBA raised a personal grievance alleging that substantial remedies were justified because, after a settlement agreement had been entered into with her employer including a provision that she would be able to return to work, that process did not happen in a timely way.

[7] There were three causes of action. The first related to unjustified delay occasioned by the process adopted by ONM on return-to-work issues. This aspect of the first cause of action was established. However, a further element of that cause of action was an assertion that ONM was also liable to pay CBA wages beyond that which

had been paid up to the date of the substantive hearing. This was not established. Accordingly, the first cause of action was made out, but not to the full extent pleaded.[2]

[8] A second cause of action asserted that Ms A, who had been involved in the issues giving rise to the settlement agreement, continued to be involved in the return-to-work arrangements. I found that a fair and reasonable employer could have been expected to recognise Ms A should withdraw from management of CBA's return-to-work earlier than in fact occurred. The second cause of action was thereby established, although I noted it overlapped with the first cause of action.[3]

[9] The third cause of action alleged that there was also a personal grievance by discrimination; that claim was dismissed.[4]

[10] In respect of the established personal grievance based on the first and second causes of action, I ordered ONM to pay CBA the sum of $30,000 for humiliation, loss of dignity and injury to feelings, within 21 days. There were no issues as to contribution.[5]

Relevant principles

[11] Schedule 3 cl 19 of the Employment Relations Act 2000 (the Act) describes the Court's broad jurisdiction as to costs. Additionally, reg 68 of the Employment Court Regulations 2000 provides that in the exercise of that discretion, the Court may have regard to any conduct of the parties intending to increase or contain costs, including any offer made by either party to the other at a reasonable time before the hearing to settle all or some of the matters at issue between them.

[12] The Court's Guideline Scale as to Costs, which has been in place since 1 January 2016, is intended to support, as far as possible, the policy objective that the determination of costs be predictable, expeditious and consistent; but as the Practice Direction which introduced this scale states, it was not intended to replace the Court's

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2 At [64]–[116].
3 At [124].
4 At [125]–[137].
5 At [138]–[158].

ultimate discretion under the Act as to whether to make an award of costs, and if so, against whom and how much. The Guideline Scale is a factor in the exercise of the Court's broad discretion.

Discussion

Quantum

[13] Many of the steps referred to in the plaintiff's schedule of costs claimed under Category 2, Band B of the scale are not in dispute. Before dealing with those that are, however, I comment on the issue of the appropriate daily rate. This figure is determined by sch 2 of the High Court Rules 2016. Until 1 August 2019, the appropriate daily rate for Category 2 proceedings was $2,230; from that date the figure was $2,390.[6] The figure used for the purposes of the plaintiff's claim was $2,390 for all steps. The Court's determination must proceed on the basis of the prescribed rates, and I therefore have modified the claim accordingly, using $2,230 up to 1 August 2019, and $2,390 from that date onwards.[7]

(a) Step three:[8] *commencement of other proceedings by plaintiff*

[14] Mr Henderson submits that for this step, only, Band C would be appropriate, since the issuing of proceedings required a comparatively large amount of time. For such a step, Band C provides for eight days.

[15] Ms Dyhrberg submitted that commencement of the proceedings should be dealt with under Step 1 of the scale, and under Band B. She says two days would be appropriate.

[16] She also points out that a claim has been made under Step 5, which relates to applications for special leave to remove a matter, claimed under Band B at 1.5 days. Since it is common ground that this step should be included, I make no further comment about it.

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6 High Court Amendment Rules 2019, r 11.
7 See Appendix A.
8 I utilise the step reference adopted by Mr Henderson in his schedule.

[17] The question relates to a fair allowance for the preparation of the statement of claim.

[18] The matter was commenced by the filing of a statement of problem in the Employment Relations Authority; the proceeding was then removed to the Court. Then it was necessary for a statement of claim to be filed in the Court in a form different to that which had been used for the original statement of problem.

[19] In my view, it is appropriate to adopt Step 3, using Band B. I do not consider the circumstances were, at the stage the matter was pleaded, so complex as to justify Band C. Three days should be allowed. I am not persuaded that any further allowance is necessary when fixing a reasonable contribution to costs.

(b) Steps 29 and 30: preparation of memoranda

[20] ONM applied for an adjournment on 9 April 2019. A claim has been made for the preparation of a memorandum of opposition of that day, and for the preparation of submissions in opposition dated 11 April 2019. I declined the adjournment in a minute dated 15 April 2019.

[21] Ms Dyhrberg submitted that costs in respect of this application, the first of two for an adjournment made by ONM, were dealt with in my subsequent judgment of 7 May 2019. That is not the case, since that judgment dealt only with a later application for an adjournment. I allow the claim for the submission. I disallow the claim for a memorandum of opposition, since such a document was not filed.

(c) Step 43: preparation of briefs and affidavits

[22] Two and a half days has been claimed for the preparation of briefs and affidavits, prepared for the fixture which was to have proceeded on 7 May 2019. Ms Dyhrberg submits that these steps were also covered by the award of costs made with regard to the application for adjournment. I disagree. The costs that were awarded on that occasion related to the attendances pertaining to the various issues I resolved in the judgment I issued at the time.[9] The briefs were originally filed for the

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9 *CBA v ONM* [2019] NZEmpC 53 at [29]–[33].

purposes of the substantive fixture. Although the proceeding did not go ahead at that time, these materials were considered by the Court at the later fixture on 15 October 2019. I allow this step.

(d) Step 39: preparation for hearing

[23] Mr Henderson included a claim for preparation for the hearing held on 7 May 2019. Costs with regard to that hearing were dealt with in my judgment of that date. This item is disallowed.

(e) Step 13: preparation for teleconference

[24] A claim for 0.4 of a day was made for preparation for a telephone directions conference held on 12 June 2019. Preparation for a directions conference is only permitted in respect of a first such conference under Step 11. However, under Step 12, a claim may be made for the filing of a memorandum for a first or subsequent directions conference. The conference on 12 June 2019 was a subsequent directions conference. I amend the claim from Step 13 to Step 12, so that the figure of 0.4 stands.

(f) Steps 37 and 40: mediation

[25] A claim is made for two days in respect of preparation for mediation, and of a memorandum as to issues and agreed facts, and as to the plaintiff's position. One day is also claimed for the appearance of counsel at the one-day mediation.

[26] Ms Dyhrberg submits that these claims should not be permitted. She points out that there is conflicting authority as to whether mediation costs are recoverable, referring to dicta to that effect in *Stormont v Peddle Thorpe Aitken Ltd*.[10] In that particular instance, it was held that it was not appropriate to award mediation costs where the parties agreed to attend mediation to reach a mutually acceptable resolution, and where the defendant had met the costs of mediation.[11] Ms Dyhrberg submitted the same approach should be adopted in the present case.

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10 *Stormont v Peddle Thorpe Aitken Ltd* [2017] NZEmpC 159 at [15].
11 At [15].

[27] Whether costs in relation to mediation should be awarded requires a case-specific assessment. It may well be unusual to do so.[12] But this was an unusual case. Moreover, I am satisfied that mediation was an essential part of the proceeding. On a number of occasions, the parties were urged to attend mediation promptly.[13] In spite of the Court's statements on this topic, mediation for one reason or another did not occur until shortly before the substantive fixture. Although no formal direction to mediation by a member of the Mediation Service was made, this was because the Court considered it appropriate to recommend that the parties obtain the assistance, in somewhat difficult circumstances, of a senior private mediator. This occurred and resulted in constructive return-to-work proposals being agreed. I am in no doubt that these steps should be allowed.

(g) Step 48: claim for second counsel at hearing

[28] Ms Dyhrberg submits that the proceedings were not of such complexity or of such a nature that the appearance of two counsel was warranted, particularly on a hearing that proceeded on a submissions-only basis. In fact, both parties appeared with second counsel, which confirms such a resource was appropriate. I allow this step, at 50 per cent of the amount allowed for principal counsel under Step 47.

Disbursements

[29] Turning to the disbursements three issues arise.

[30] A claim was made for one night's accommodation for counsel's attendance at mediation, $239.70. This is opposed on the basis that the costs of mediation should not be awarded. For the reasons I have already given, I disagree. This claim is allowed.

[31] Accommodation for two nights in relation to the substantive hearing is claimed, $401.88. Ms Dyhrberg submits that a claim for accommodation for the night prior to the hearing is appropriate, but not for the night following the hearing. I agree.

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12 *Quan Enterprises Ltd v Fair* [2012] NZEmpC 62 at [9] referring to *RHB Chartered Accountants Ltd v Rawcliffe* [2012] NZEmpC 31, [2012] ERNZ 51.

13 Minute of 28 March 2019; Minute of 15 April 2019; Judgment of 7 May 2019; and Minute of 13 June 2019.

There is no apparent reason as to why counsel's attendance in Wellington would have been necessary following the hearing. I reduce that claim to $200.94.

[32] The result of the foregoing is that the total costs pursuant to the scale are $53,560, and disbursements of $2,869.04.

Mixed success

[33] Ms Dyhrberg submits that the Court made findings in favour of the plaintiff in relation to only half of her claims; in particular, she did not succeed on a claim for any further payment of wages under the first cause of action; and was held not to have discriminated against the plaintiff under the third cause of action. It is submitted that considerable time and effort was required to address these issues.

[34] I recently reviewed the principles relating to the treatment of costs where the successful party does not succeed on all matters: *Zhang v Telco Asset Management Ltd*.[14] In summary, although it is not usual for costs to be assessed on an issue-by-issue basis, having regard to the broad discretion bestowed on a trial Judge, and the existence of the equity and good conscience provision, it is permissible to do so. Care, however, has to be taken to ensure that the Court does not order a contribution to costs on issues on which the party claiming costs did not succeed.[15]

[35] Ms Dyhrberg submits that in the circumstances, scale costs should be reduced by 50 per cent for this reason.

[36] In my view, such a reduction is excessive. Standing back, I consider a 30 per cent reduction is appropriate.

Calderbank offers

[37] The judgment of the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* provides a helpful description of the applicable principles when considering Calderbank offers.[16]

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14 *Zhang v Telco Asset Management Ltd* [2020] NZEmpC 9.
15 At [28].
16 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

[38] In short, such an offer should not be unreasonably rejected, and a "'steely' approach" is required when assessing any such offer.[17]

[39] On 11 July 2019, the defendant offered to pay compensation of $30,000 for humiliation, loss of dignity and injury to feelings, and costs of $3,000. This offer was rejected.

[40] On 8 August 2019, the defendant again offered compensation for $30,000 for humiliation, loss of dignity and injury to feelings, and increased its offer of costs to $22,500 plus GST on production of an invoice. This offer was also declined.

[41] The amount of compensation awarded was of course the same as that which was ultimately fixed by the Court.

[42] Counsel's submissions focused on the second of the two offers. In short, the question is whether it was unreasonable to have rejected the second offer because the amount offered for costs was insufficient.

[43] To this point, my assessment of the entitlements to costs and disbursements is $55,532.79, less 30 per cent as discussed, that is, $38,872.95.

[44] Given that outcome, it was not unreasonable to decline the second Calderbank offer, because the total sum offered for costs of $22,500 was well short of the sum to which the plaintiff is now entitled.

Full scale costs?

[45] However, Mr Henderson submitted that standing back full scale costs should be awarded in any event. This would be justified, he said, having regard to the disparity between the parties – a well-resourced government organisation on the one hand, and a vulnerable employee on the other. He also suggested that the delay was so egregious as also to warrant "full scale costs".

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[17] At [20] and quoting *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [53].

[46] For her part, Ms Dyhrberg responded that these factors were not relevant to the assessment of costs, and reminded the Court that costs are not intended to punish.

[47] For the purposes of this case, the starting point is the categorisation of costs. It is common ground between the parties that – except for the one step mentioned earlier – the appropriate classifications were Band B (a normal amount of time being reasonable) and Category 2 (proceedings of average complexity requiring a representative of skill and experience considered average in the Employment Court).

[48] These factors define the framework within which costs are to be assessed; but as I indicated, the Court has an ultimate discretion to increase or decrease the scale amount. The Court must exercise that discretion on a principled basis. I am not persuaded that having applied the applicable principles, the Court should at this stage of the exercise, award "full scale costs" notwithstanding its earlier reasoning that a reduced amount is appropriate.

[49] For the avoidance of doubt, I agree that the evaluation of costs should not be confused with an assessment of the merits of the circumstances which the Court was required to consider. The defendant's conduct on the return-to-work issues is not a relevant factor when assessing costs in this case.

[50] For all these reasons, I am not persuaded that there should be any further adjustment of the amount of costs, as evaluated to this point.

Conclusion

[51] ONM is to pay to CBA costs and disbursements totalling $55,532.79, less 30 per cent having regard to the issue of mixed success, which results in a figure of $38,872.95.[18] This sum is to be paid within 14 days.

[18] See Appendix A.

[52] I make no order for costs in respect of the application for costs.

B A Corkill
Judge

Judgment signed at 10.45 am on 10 March 2020

APPENDIX A – Scale costs, and disbursements

Step	Costs – Description	Days	Total ($)	Comments
3	Commencement of other proceedings by plaintiff	3	$6,690	Partially allowed
5	Application for special leave to remove matter	1.5	$3,345	Agreed
11	Preparation for first directions conference	0.4	$892	Agreed
13	Appearance (telephone) first conference	0.2	$446	Agreed
11	Preparation for second directions conference	0.4	$892	Agreed
13	Directions/case management conference, 27 March 2019	0.2	$446	Agreed
22	Notice requiring disclosure, 4 April 2019	0.8	$1,784	Agreed
29	Memorandum of opposition, 9 April, 0.6, $1,434 claimed			Disallowed
30	Submissions in opposition to application for adjournment, 11 April 2019	1	$2,230	Allowed
43	Preparation of briefs/affidavits for 7 May fixture	2.5	$5,575	Allowed
39	Preparation for hearing on 7 May, 2 days, $4,460			Disallowed
12	Memorandum/application, 30 May 2019	0.4	$892	Agreed
12	Memorandum for directions conference, 30 May 2019	0.4	$892	Agreed
12	Subsequent memorandum/submissions, 11 June 2019	0.4	$892	Agreed
12	Filing memorandum for directions conference, 11 June 2019	0.4	$892	Allowed
13	Appearance, directions telephone conference, 12 June 2019	0.2	$446	Agreed
37	Preparation for mediation on 8 August 2019 for the plaintiff including memoranda as to issues, agreed facts and the plaintiff's position	2	$4,780	Allowed
40	Appearance of counsel at a one-day mediation	1	$2,390	Allowed
43	Plaintiff's preparation of briefs or affidavits for substantive hearing	2.5	$5,975	Agreed
44	Plaintiff's preparation of list of issues, agreed facts, authorities and common bundle	2	$4,780	Agreed
46	Preparation for substantive hearing	2	$4,780	Agreed
47	Appearance at substantive hearing for principal representative	0.75	$1,792.50	Agreed
49	Other steps in proceedings not specifically mentioned (submissions, 29 August 2019)	0.4	$956	Agreed
48	Claim for second counsel at substantive hearing. Submissions in accompanying memorandum.	0.375	$896.25	Allowed

	Disbursements			
	Return flights – Wellington/Whangarei for mediation, 8 August 2019		$1,112	Allowed
	Wellington/Whangarei for hearing – 13 August 2019		$1,154	Agreed
	Taxi fares		$162.40	Agreed
	Accommodation for one night attending mediation		$239.70	Allowed
	Accommodation for one night – substantive hearing		$200.94	Partially allowed
	TOTAL		**$55,532.79**	
	Less 30 per cent		**$38,872.95**	