IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 85
ARC 31/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	LABOUR INSPECTOR (MELISSA ANN MACRURY) Plaintiff
AND	CYPRESS VILLAS LIMITED First Defendant
AND	BARRY EDWARD BRILL Second Defendant

Hearing: On the papers

Appearances: S Blick and S Carr, counsel for plaintiff
No appearance for the first defendant
B E Brill, as counsel on his own behalf

Judgment: 16 June 2020

COSTS JUDGMENT OF JUDGE M E PERKINS

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[1] These proceedings involved a challenge to a determination of the Employment Relations Authority.[1] A full Court of the Employment Court dealt with preliminary issues arising in the challenge.[2] Barry Edward Brill, who was at that stage a proposed second defendant in the proceedings, applied for and was granted leave to appeal against the full Court's decision to the Court of Appeal.[3] His appeal was successful,[4]

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1 *Labour Inspector (MacRury) v Cypress Villas Ltd* [2014] NZERA Auckland 124.
2 *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157, [2015] ERNZ 1091.
3 *Brill v Labour Inspector (MacRury)* [2016] NZCA 262.
4 *Brill v Labour Inspector* [2017] NZCA 169, [2017] ERNZ 236.

and the matter was then referred back to the Employment Court for the hearing of the challenge.

[2] A hearing then proceeded on the facts. During the course of that hearing, a preliminary finding was made in accordance with the statutory provision applying to the case, and Mr Brill was confirmed as second defendant.[5]

[3] Following Mr Brill giving evidence in his own defence, the action which had been commenced against him by the Labour Inspector was dismissed. The final determination of the matter was dealt with by a judgment dated 11 March 2020.[6] In that judgment, I held that costs were to follow the event and Mr Brill would be entitled to an order for costs. Costs were reserved in order to enable the parties to endeavour to resolve the matter between themselves. If no resolution could be reached, I set timetabling for submissions to be filed by memoranda. No resolution could be reached, and memoranda have now been received and considered. I should mention that Mr Brill is a practising barrister and solicitor and is entitled to costs in defending the matter on his own behalf.[7]

[4] In his submissions, Mr Brill refers throughout to the High Court Rules 2016 as they relate to costs. Pursuant to reg 6(2)(a)(ii), of the Employment Court Regulations 2000 (the Regulations) the High Court Rules only need to be resorted to in the event that the Employment Relations Act 2000 (the Act) and the Regulations do not provide for disposition of the matter under consideration. The Act and Regulations cover costs, and the Court has its own procedures for disposing of cost applications without resort to the High Court Rules.

[5] The Court has a wide discretion on costs. The starting point is sch 3, cl 19 of the Act which reads as follows:

> (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.

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5 Employment Relations Act 2000, s 234 (now repealed). *Labour Inspector v Cypress Villas Ltd* [2019] NZEmpC 97.

6 *Labour Inspector (MacRury) v Cypress Villas Ltd* [2020] NZEmpC 27.

7 See *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335.

> (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.

[6] Regulation 68 of the Regulations provides for matters which may be taken into account by the Court in the exercise of its discretion. That regulation reads as follows:

> (1) 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, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.
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> (2) Under subclause (1), the court—
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> (a) may have regard to an offer despite that offer being expressed to be without prejudice except as to costs; but
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> (b) may not have regard to anything that was done in the course of the provision of mediation services.

[7] These provisions show, of course, that the procedures applying in the Employment Court are similar to those applying to costs under the High Court Rules upon which Mr Brill has relied.

[8] In the present case, the plaintiff Labour Inspector accepts that the Court's Guideline Scale applying in the Employment Court should be adopted in calculating costs to be awarded. On the other hand, Mr Brill is seeking increased costs. This is opposed by the plaintiff. Mr Brill relies upon three grounds for the submission that increased costs should be awarded.

[9] The first ground raised is that, following the judgment in the Court of Appeal, a Calderbank offer was made in a letter from Mr Brill's then solicitors dated 26 September 2018. This was on the basis that Mr Brill was willing to provide a sworn affidavit setting out facts which would persuade the Labour Inspector that he was not liable. He also stated that he would agree to any reasonable confidentiality clause if so required in any settlement. He would also agree to the proceedings being discontinued with no further issue as to costs. It is unclear whether a monetary offer was also being made. Counsel for the Labour Inspector appears to be of the view that the letter included an offer of a monetary payment that had previously been made in mediation and was being repeated. I do not read the letter containing the Calderbank

offer as containing a monetary offer as well. I do make the comment, however, that the reference to the offer at mediation in paragraph [1] of the letter containing the Calderbank offer breaches s 148 of the Act, as it reveals confidential information from the mediation. In the circumstances, however, I consider that was nothing more than an inadvertent breach. So far as the sworn affidavit was concerned, the letter containing the Calderbank offer also annexed a draft form of the affidavit upon which the Labour Inspector might receive necessary assurances so that the proceedings could be discontinued. The offer was rejected by the plaintiff.

[10] The second and third grounds for increased costs are that Mr Brill alleges that the Labour Inspector, by pursuing the case against him when the Labour Inspector would have known from the facts that the case could not succeed, was vexatious and was in pursuit of a claim which clearly lacked merit.

[11] So far as the Calderbank offer is concerned, Mr Brill, in his submissions, relied upon *The Commissioner of Salford School v Campbell*[8] in which the Court of Appeal approved a passage from an earlier judgment, *Bluestar Print Group (NZ) Ltd v Mitchell*.[9] These cases confirm that, where a Calderbank offer is made prior to trial and the wisdom of hindsight reveals the unreasonableness of a prior rejection of the offer, the Courts are required to take a "steely approach" to the issue of costs.

[12] One aspect of a Calderbank offer, of course, is to direct the opposing party's attention towards the issue of the risks of trial and to not impose unnecessarily upon the Court's resources. In the present case, another factor to be taken into account using hindsight is that during the course of the hearing it soon became apparent that one of the main planks of the Labour Inspector's pleaded claim, that Mr Brill negotiated and signed the employment agreement with the employee involved, was incorrect. That is a matter which Mr Brill had firmly raised prior to the hearing proceeding. It appears to have been ignored by the Labour Inspector and her legal counsel. In these circumstances, there may be some grounds for Mr Brill's submission that increased costs might be awarded but for the fact that there is a difficulty with which I shall deal shortly.

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8 *The Commissioner of Salford School v Campbell* [2016] NZCA 126 at [13].
9 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [19]-[20].

[13] As far as the second ground is concerned, I do not accept the submission that the plaintiff acted vexatiously in continuing the proceedings. That is describing the actions of the Labour Inspector too strongly. It ignores a primary feature of this case: that it was commenced to pursue unpaid minimum wages and holiday pay where the first defendant, of which Mr Brill was sole director, was seriously in breach of payment to the employee of those minimum entitlements. Nevertheless, if a proper assessment had been made following the Court of Appeal's judgment, it may not have been difficult for the Labour Inspector to then reach the view that the proceedings against Mr Brill, by that stage, lacked merit, so far as the viability of proving the final stage under the legislative provision was concerned.

[14] I have difficulty, however, in making an allowance for increased costs. I have no real evidence from Mr Brill upon which to make a comparison between the costs under the Court's Guideline Scale and what would have, hypothetically in this case, been indemnity costs. That is always a likely difficulty, of course, in a case such as this where a barrister and solicitor is representing themselves in litigation and no formal accounts are rendered. At the very least, I should have had evidence of normal hourly rates charged and a breakdown of the reasonable time and attendances expended by Mr Brill in the matter.

[15] Nevertheless, even if I had received such information, standing back and exercising my overall discretion in this matter, I consider that reimbursing Mr Brill to the extent of the costs calculated under the Court's Guideline Scale would be reasonable. I keep in mind that the Labour Inspector is in a different position from an ordinary litigant and has a strong obligation placed upon her to take steps to enforce minimum standards of employment on behalf of vulnerable employees. In the present case, the employee was in a vulnerable position, and as it turns out, taken advantage of by the first defendant, albeit that Mr Brill was without knowledge of the situation which occurred.

[16] For these reasons, I am not prepared to award increased or indemnity costs in favour of Mr Brill. I now turn to the quantum and the calculations made by each of the parties under the Court's Guideline Scale, as there are some areas of dispute in that regard.

[17] I deal with Mr Brill's schedule of costs annexed to his memorandum in reply, which updated the earlier schedule he filed. As pointed out in the submissions by counsel for the plaintiff, there has already been a settlement between the parties on costs in respect of the earlier Employment Court proceedings, the application for leave and the appeal to the Court of Appeal.

[18] The first claim (item 2) claimed by Mr Brill is the sum of $3,345, which he refers to as a claim for commencement of the defence to the challenge filed in the Court. The matter originally dealt with by the Employment Court was the preliminary issue only. However, the pleadings had been completed by that stage. In his submissions, Mr Brill says this item refers to his reformulation of his defence following the judgments of the full Court and the Court of Appeal. No amended pleadings were filed following the judgment of the Court of Appeal. However, I am prepared to accept that Mr Brill would have had attendances dealing with the judgments and their effect upon his defence to the challenge. I allow one-half day for this item amounting to $1,115. The claim for $3,345 is excessive for this item.

[19] The second and third claims, (items 11 and 12) each claim $892 for preparation for the directions conference and filing the memorandum for the directions conference. The preparation of the memorandum is part of the overall preparation for the conference, and this claim is therefore duplicated. Only $892 is allowed for these two items.

[20] There is no dispute on the fourth claim (item 13) for appearance at the directions conference. The sum of $446 is allowed.

[21] The fifth claim (item 23) seeks the sum of $4,460 for the preparation of a list of documents on disclosure. This item is disputed, as it partly duplicates attendances claimed in the eighth claim (item 38), $2,230, for preparation of a list of issues, agreed facts, authorities and a common bundle. No list of documents was provided to the plaintiff or filed in Court. I will allow two days in total for the fifth and eighth claims amounting to $4,460.

[22] The sixth claim (item 27) is for inspection of documents and is not disputed. The sum allowed is $2,230.

[23] The seventh claim (item 36) is for preparation of briefs and is not disputed. The sum of $4,460 is allowed.

[24] The ninth claim (item 39) is similarly not disputed. The sum of $4,780 is claimed for preparation for the hearing and is allowed.

[25] Similarly, the tenth claim (item 40) for appearance at the hearing is not disputed. The sum of $7,170 is allowed for this.

[26] The eleventh claim (item 33) is disallowed. Preparation of written submissions is part of the preparation for the hearing.

[27] Claims 12 and 13 relate to the claim for costs itself. Claim 12 (item 28) is for preparation of an application for an extension of time on the filing of submissions on costs; $1,434. Claim 13 (item 29) is for preparation of the written submissions on costs; $2,390. The need for the application for an extension of time arose from the failure of the plaintiff to respond in a timely fashion to Mr Brill's proposals on costs in an effort to settle them. Timetabling had been set in my judgment but not adhered to. A total claim for $3,824 is excessive for these items. I accept that Mr Brill would have incurred extra attendances on the issue of the application for, and quantification of, costs. I will allow $1,000 in total for both of these claims.

[28] In conclusion, this means that the total allowance for costs is $26,553. There is an order for this sum against the plaintiff.

M E Perkins
Judge

Judgment signed at 4.30 pm on 16 June 2020