IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2020] NZEmpC 96
EMPC 71/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	INNOVATIVE LANDSCAPES (2015) LIMITED Plaintiff
AND	CELIA POPKIN Defendant

Hearing: On the papers

Appearances: C McNoe, agent for plaintiff
E Yu and LC Taylor, counsel for defendant

Judgment: 1 July 2020

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Costs generally follow the event. Ms Popkin succeeded in defending the company's challenge to a determination of the Employment Relations Authority.[1] Ordinarily she would be entitled to costs. Ms Popkin was represented by lawyers from the Community Law Centre. While the Community Law Centre incurred the costs of making two of its lawyers available to prepare for and appear at the hearing on Ms

[1] *Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 40; *Popkin v Innovative Landscapes (2015) Ltd* [2019] NZERA 64 (Member Dallas).

Popkin's behalf, Ms Popkin herself has not incurred any legal costs. The question is whether the Court may make an order of costs in such circumstances.

[2] There is limited authority on the matter.[2] I have concluded it is within the Employment Court's broad discretion to order a contribution to legal costs in proceedings conducted on a pro bono basis (including by the Community Law Centre), and that an order is appropriate in the circumstances of this case, for the reasons that follow.

Analysis

[3] As the Employment Relations Act 2000 makes clear, the Court has a broad discretion to make an order for costs.[3] The Court has developed a Guideline Scale for calculating costs.[4] While the Guidelines broadly reflect the approach to costs applied by the High Court, there are some important variations. And, as the Guidelines make plain, they provide guidance, not a straight-jacket, for cost-setting. The Court retains a discretion to act flexibly insofar as that is consistent with the statutory scheme.

[4] The question as to whether the Employment Court's broad discretion to award costs extends to circumstances where a litigant is represented on a pro bono basis, and has accordingly incurred no legal costs themselves, largely centres on a proper interpretation of the power Parliament has conferred on this, as opposed to any other, Court. The point was emphasised by Kirby J in *Re JJT; Ex Parte Victoria Legal Aid*:[5]

> Although the word "costs" may import notions of a general kind from the forms of orders which have been made in courts of laws for centuries, such *preconceptions must not distract the Court from the task of construction which each statutory provision for costs invokes.* As with any other legislative measure, the law in question must be construed to achieve its identified purposes. *A section empowering orders for costs will be construed in the context of any peculiarities of the legislation in which it appears*.

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2 See, for example, *Chevelle Motors Ltd v Cranswick* [2017] NZEmpC 112 at [5]; *Meyer v Ports of Auckland Ltd* [2004] 2 ERNZ 115 (EmpC).

3 Employment Relations Act 2000, sch 3, cl 19; Employment Court Regulations 2000, reg 68.

4 "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.

5 *Re JJT; Ex Parte Victoria Legal Aid* [1998] HCA 44, 195 CLR 184 at 200 (emphasis added).

[5] The Employment Relations Act contains a number of what Kirby J would term "peculiarities", reflecting the special nature of the jurisdiction, the unique dynamics inherent in employment relationships and the way in which the employment institutions in New Zealand are expected to support industrial relations. Relevant too is the statutory directive that the Court exercise its jurisdiction consistently with equity and good conscience.[6] These peculiarities inform the proper nature and scope of the Court's statutory discretions, including as to awards of costs in employment matters. While more generally applicable principles as, for example, developed in the High Court over time, are part of the mix, they must not be applied to the point that the underlying statutory objectives are undermined.

[6] None of this is novel. In *Victoria University of Wellington v Alton-Lee* (decided under the Employment Contracts Act 1991), the Court of Appeal acknowledged that the Employment Court had developed an approach to costs that deviated from the 'standard' approach which applied in other Courts.[7]

[7] The 'standard' approach, as the Court later explained in *Joint Action Funding Ltd v Eichelbaum*, included "costs actually incurred," as comprising legal costs billed by a lawyer to their client for services rendered. With reference to r 14 of the High Court Rules, costs were taken to mean "actual costs", separate from expenses such as disbursements and witness related costs. The Court held that the proper understanding of the phrase 'costs actually incurred' was: "confined to legal costs billed by a lawyer retained by a party litigant for legal services provided by the lawyer to that litigant."[8] It followed that:

> [44] Because a lawyer-litigant who has no separate legal representation will not have a liability for such costs actually incurred, the effect of the sixth general principle in r 14.2(f) will be that no award of costs should be made in favour of such a party. In mathematical terms, a lawyer-litigant's "costs incurred" will be zero and hence no award of costs can be made.

[8] The *Joint Action Funding Ltd* approach was subsequently applied in cases involving representation by in-house counsel and lawyers acting pro bono. The High

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6 Employment Relations Act 2000, s 189.
7 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 at [47].
8 *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70 at [43].

Court's judgment in *Karmarkar v Manda* provides a useful example.[9] There, the successful party, Mr Manda, had been represented on a pro bono basis. The Court held that he was not entitled to a contribution to costs because he had not incurred any costs or been invoiced for any costs in relation to the proceeding.[10]

[9] Things have since moved on. The Supreme Court revisited the costs issue in *McGuire v Secretary for Justice,* reaffirming the primary rule (that a litigant in person is not entitled to costs), and reinstating the lawyer-litigant and employed lawyer exceptions. In delivering a separate judgment, France J observed:[11]

> [93] In that respect, I agree with the submission for the Secretary for Justice that the focus in Joint Action Funding on invoiced costs is wrong. The employed solicitor can recover costs under the High Court Rules 2016 on the basis that the Rules envisage costs being recoverable where legal costs have been incurred. The word "actually" does not require an invoice. On this basis, the removal of the lawyer-litigant exception need not prevent the employed solicitor from recovering costs.

[10] The discussion of the policy imperatives underpinning the exception for employed lawyers is of relevance to an analysis of this Court's discretion to award costs in circumstances such as the present. In this regard it was said that:[12]

> [83] Assuming the primary rule remains, there are likewise public policy justifications for the lawyer in person exception. *The work in respect of which costs are sought is of a legal character and carried out by a lawyer. It is exactly the same sort of work as would be properly the subject of an award of costs if carried out by a third-party lawyer.* The mechanisms for assessing costs provided by rules of court are appropriate for the exercise. Where a lawyer in person can recover costs, the costs exposure of the other party will probably be lower than if a third-party lawyer is retained.

[11] It seems to me that the analysis applies with equal force to legal representation provided by the Community Law Centre or lawyers appearing on a pro bono basis on behalf of a party in this Court. Refusing to award costs in such circumstances would effectively treat a litigant such as Ms Popkin as a litigant in person (although she is plainly not) and caught by the primary rule. The point is that the services provided by

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9 *Karmarkar v Manda* [2018] NZHC 2081. Note that the High Court's approach to costs was subsequently disapproved by the Court of Appeal; *Karmarkar v Manda* [2019] NZCA 130.

10 At [19]-[23].

11 *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [93] (footnotes omitted). at [93].

12 At [83] (emphasis added).

the Community Law Centre in representing her are far more analogous to those provided by an in-house lawyer. And, just as use of an in-house lawyer in litigation does not lead to an increase in legal expenses for a party over and above those they would have incurred if the litigation had not taken place, nor does the use of representation provided by a Community Law Centre.

[12] There have been a number of cases in which costs have been ordered in circumstances where a party has been represented by a lawyer acting on a pro bono basis. The key point which emerges is that the term 'actually incurred' ought to be given a broader meaning than simply what has been billed.

- In *Marino v The Chief Executive of the Department of Corrections* (a costs judgment following a finding of unlawful detention), the Court of Appeal rejected a submission by the Crown that costs should be limited to only those paid by the successful party. Such an approach would, it was said, "exploit [Mr Marino's] counsel's willingness to undertake work on a pro bono or discounted basis."[13]

- In *NR v MR* the Court of Appeal again dismissed the relevance of the charging arrangements in place between a successful party and their representative, making it clear that such arrangements were of no concern of the Court:[14]

> [41] I assume that M R's lawyers may work on a conditional fee arrangement, but such arrangements are permitted. They may even work pro bono, receiving only such amount by way of fees as N R is ordered to pay. None of this is of concern to a court, which does not ordinarily supervise litigation funding and finds inherently nothing wrong with a lawyer acting on the basis that he or she will be paid on a win and not on a loss. The court's only concern is to ensure that N R is not required to pay more by way of costs than is needed to indemnify M R. That concern can readily be addressed, if it be thought necessary, by requiring a solicitor's undertaking, or for that matter an affidavit, in any given case to the effect that M R has incurred a liability to pay not less than the sum awarded. It does not require that N R be permitted to intervene in the relationship between M R and her lawyers.

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13 *Marino v The Chief Executive of the Department of Corrections* [2017] NZCA 2 at [3].
14 *NR v MR* [2014] NZCA 623, (2014) 22 PRNZ 636 at [41] (footnotes omitted).

- In *Ye v Minister of Immigration* costs were awarded to the second respondent for the services of a solicitor acting pro bono, Glazebrook J observing that:[15]

> [360] Costs of $12,000 plus usual disbursements are to be paid by the Crown to the second respondent in CA184/06, on condition that the costs award is used to pay the fees of counsel involved in the appeal. Mr Bassett, in the best traditions of the Bar, was prepared to act for Ms Ding in the appeal on a pro bono basis but that should not inhibit him and any other counsel involved in the appeal from rendering an account for their services up to the level of this costs award. There are no other costs awards.

[13] The relevance of the applicable statutory framework to the costs-setting exercise has been underscored in costs decisions arising in other specialist jurisdictions. In *In Tandem Maritime Enhancement Limited v Waikato Regional Council* the Environment Court emphasised the importance of encouraging (rather than discouraging) the provision of pro bono services in achieving the statutory purposes set out in the Resource Management Act. It stated:[16]

> There is, of course, no presumption in cases before this Court that costs will follow the event should a party's cause prove successful. However, where an award of costs is deemed, the award takes account of all circumstances, including the assistance provided by counsel. A *pro bono* arrangement of the kind mentioned not only facilitates participation by under-funded public interest groups in the RMA appeal process, but generally assists the Court's decision-making in promoting the legislative purpose that is directed to the sustainable management of natural and physical resources.
> …
> … Importantly, at the risk of repetition, pro bono work by lawyers who practice in the resource management field is beneficial in aiding more ready and effective participation by public interest bodies and others concerned with good environmental outcomes via decisions of this Court under the RMA.

[14] The Court concluded that declining to have regard to the costs associated with the provision of pro bono representation would likely inhibit the willingness of counsel to act on such a basis and would, in turn, detract from the Court's ability to support the broader legislative purpose of the empowering statute. Pro bono arrangements, it was said, were of assistance to the Court.

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15 *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [360].

16 *In Tandem Maritime Enhancement Ltd v Waikato Regional Council* (2000) 6 ELRNZ 329 at [9], [11].

[15] The underlying statutory purpose was also considered relevant in assessing the way in which the costs discretion under the Social Security Act 1964 should be exercised in *Chief Executive of the Ministry of Social Development v Genet.* Williams J observed:[17]

> [26] In my view, s 12O [*discretion to award costs*] *should be liberally construed in light of the Act's purpose of providing financial assistance to vulnerable people, and the Authority's function of providing simple, fast, cheap, and therefore accessible justice for those people*. The role of lay advocates within that framework is, I sense, of considerable importance. They are not lawyers, but they are experienced in, and knowledgeable about the operation of the Act and its associated bureaucracy. Their services are inexpensive, indeed often free, as was the case here. They help to make the Act's systems work, particularly where the beneficiary has difficulties, for whatever reason, in interacting with Ministry officials. In those circumstances, I apprehend that the lay advocate becomes indispensable both for the beneficiary and the bureaucracy. That seems to have been the position in the case of this respondent.

[16] The importance of giving voice to the special nature of the particular Court, within its statutory framework, was recently emphasised in respect of a claim in the Māori Land Court. In *Taipari v Hauraki Maori Trust Board* Judge Milroy observed:[18]

> The Māori Land Court has a role in facilitating amicable, ongoing relationships between parties involved together in land ownership, and these concerns may sometimes make awards of costs inappropriate.

[17] Against this background I return to the claim for costs for representation provided by the Community Law Centre in this case.

[18] A review of the Employment Relations Act, the role of the Court and the applicable statutory objectives leads inexorably to the conclusion that the mere fact that a litigant has been represented on a pro bono basis is not an impediment to a contribution to the costs of their representation.

[19] The overarching purpose of the Employment Relations Act (to promote "good faith in all aspects of the employment environment and of the employment relationship") extends to addressing the inherent power imbalance that exists between

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17 *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541 at [26] (emphasis added).

18 *Taipari v Hauraki Maori Trust Board* (2009) 120 Hauraki MB 225 at [10].

employers and employees. The imbalance of power is often (though not always) characterised by an imbalance in financial power, which manifests in disparate levels of access to legal services and resources. Community Law Centres and lawyers acting on a pro bono basis have an integral role to play in supporting access to this Court in those circumstances. Inability to recover costs would likely significantly disincentivise the provision of such services and impede access to the Court, in turn reinforcing, rather than addressing, the imbalance that the Employment Relations Act seeks to address.

[20] I do not accept the submission made on behalf of the company that pro bono representation takes the cost risk out of litigation for the party concerned. As Priestley J observed in *Potaka-Dewes v Attorney-General*, litigants who are assisted on a pro bono basis are not necessarily immune from costs should they fail.[19] And counsel acting pro bono have heightened obligations to ensure that hopeless or weak cases are not pursued.

[21] In my view the work of Community Law Centres and lawyers acting on a pro bono basis in this jurisdiction is indispensable for ensuring that the underlying purposes of the statute are met, including that those in the most vulnerable position have access to the Employment Court for ventilation of their employment disputes. That work should not be thwarted by adopting an unnecessarily restrictive approach to costs awards. More fundamentally, such an approach would risk undermining, not supporting, the underlying objectives of the Act. I conclude that the Court may order costs in circumstances where a party has been represented on a pro bono basis, consistently with its broad discretion informed by the underlying purposes and objectives of the statutory scheme.

[22] In this case it is clear that legal costs were incurred in defending the challenge brought by the plaintiff. The amount sought by way of contribution is relatively modest and less than would have been payable on a strict application of the Costs Guideline scale. I note for completeness that while I accept that the company is in

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[19] *Potaka-Dewes v Attorney-General* HC Auckland CIV-2008-404-6327, 4 May 2009 at [10].

financial difficulty, I do not consider it necessary or appropriate in the circumstances to reduce the amount of costs I would otherwise order.[20]

Conclusion

[23] The plaintiff is accordingly ordered to pay the defendant the sum of $15,680 (rounded down), together with disbursements of $80. Such sum is to be paid within a period of 28 days from the date of this judgment.

[24] I direct that the costs and disbursements ordered against the plaintiff be paid by Ms Popkin to the Community Law Centre.[21]

Christina Inglis
Chief Judge

Judgment signed at 12.15 pm on 1 July 2020

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[20] *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 812 at [38]; *Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13 at [14].

[21] See the approach adopted by Glazebrook J in *Ye v Minister of Immigration*, above n 15, at [360].