IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 178
EMPC 144/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	UXK Plaintiff
AND	TALENT PROPELLER LIMITED Defendant

Hearing: On the papers

Appearances: A Fechney, advocate for the plaintiff
R Upton, counsel for the defendant

Judgment: 27 September 2022

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In my substantive judgment of 13 June 2022,[1] I allowed a challenge as to a determination made by the Employment Relations Authority that certain witness summonses should be issued.[2] My judgment also dealt with an application for non-publication of UXK's name and identifying details.

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1 *UXK v Talent Propeller Ltd* [2022] NZEmpC 101.
2 The determination was in the form of two documents described as "Minutes".

[2] I reserved costs. I recorded the Court had been told UXK was legally aided for the purposes of the challenge. The parties were invited to discuss the issues but, if these could not be resolved directly, any relevant application could be made.

[3] Apparently, the parties were unable to resolve the costs issue themselves, although there is no evidence before the Court as to the efforts made in that regard. The Court expects practitioners to use their best endeavours to resolve costs issues before seeking Court assistance.

[4] Ms Fechney sought a costs order for her client, UXK. She confirmed that UXK was legally aided, and that costs have, or would be, approved for services rendered with regard to the challenge and as to the preparation of her costs memorandum. She said the Court should proceed on the basis of an invoiced sum for 61 hours of work, less one hour in respect of an application for stay of proceedings which was resolved informally, but plus two hours for work relating to the costs submission, all of which amounted to $6,222.39, including GST. The legal aid rate was $82 per hour, excluding GST. For eight hours, or one day, of work there was accordingly a capped payment of $656.

[5] She also submitted that the invoiced sum was considerably less than the amount which an assessment would produce according to the Court's Guideline Scale as to Costs (the Guideline).[3] She said that on a Category 2, Band B basis for 8.3 days, with the appropriate daily recovery rate being $2,390, the Guideline produces a figure of $19,837.

[6] Ms Fechney invited the Court to find that, but for the constraints of the legal aid grant, the scale sum would have been awarded, so that she can then obtain recompense under s 105 of the Legal Services Act 2011 (the LSA). That section provides that no legal aid provider may receive payment from, or in respect of, a person to whom legal aid services are provided unless authorised under the LSA, or by the Legal Aid Commissioner. Ms Fechney submitted an uplift of the legal aid grant

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

could be approved under this provision, and that a reasonable amount would thereby be reimbursed for services rendered.

[7] Mr Upton, counsel for Talent Propeller Ltd (Talent), submitted that Talent should be regarded as the successful party and it should receive Guideline costs in the sum of $13,145. Then, Mr Upton argued that, although UXK is legally aided, the situation is one where s 45 of the LSA should apply. I infer he contends that there are exceptional circumstances under that section, justifying the award of costs in favour of the unsuccessful defendant. In the alternative, he said the amount claimed by UXK was excessive.

Analysis

Relevant principles

[8] The starting point for the assessment of costs is cl 19 of sch 3 of the Employment Relations Act 2000, which confers a broad discretion.

[9] The discretion to award costs must be exercised judicially, and in accordance with that, and other well established principles.[4] Normally, costs follow the event.

[10] The Guideline may be a factor in the exercise of the Court's discretion.

[11] Reference should also be made, as it was by both representatives, to the Court of Appeal judgment of *Curtis v Commonwealth of Australia* where the issue was whether a successful party funded by legal aid could recover scale costs or some lesser amount.[5]

[12] For the purposes of that case, the Court said:[6]

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4 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA).
5 *Curtis v Commonwealth of Australia* [2019] NZCA 126.
6 At [22].

> The quantum [of costs] should be according to the Court of Appeal scale. Costs should be scale costs or the amount paid out by the [Legal Services] Commissioner for the appeal, whichever is the lesser figure. Thus costs should not exceed scale, or (if they are less), the amount paid for legal services.[7]

Who was the successful party?

[13] Before turning to the submissions raised by Ms Fechney concerning legal aid issues, I must deal with Mr Upton's submission that Talent was in fact the successful party even though UXK's challenge was allowed over its opposition.

[14] In my judgment, I analysed in some detail the issues that arose from the witness summonses which the defendant had sought in respect of two medical practitioners who had attended UXK; the Authority authorised the issuing of the summonses in the form submitted by the defendant.

[15] I found that the Authority had the ability to issue a witness summons so that a medical practitioner may give relevant evidence, and produce documents, but that would be subject to any considerations that might establish this would be inappropriate.[8]

[16] The controversial aspect of the two witness summonses related to the fact that each of them required the medical practitioners involved to produce UXK's confidential medical records for a period of several months in each instance.

[17] After reviewing various provisions relating to the disclosure of health information under the Health Information Privacy Code, and the confidentiality provisions of the Evidence Act 2006, I noted that the Authority had not been asked by either party to undertake an analysis under s 69 of that Act. Thus, the privacy of sensitive medical records to be summonsed for production to the Authority was not addressed, as was necessary in the circumstances.

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7 This dicta was relied on by the Court in *McKinley v Wellington Cosmetic Clinic Ltd* [2021] NZEmpC 211.

8 *UXK*, above n 1, at [72].

[18] I concluded that the extent of medical records required from the health practitioners was excessive, and that disclosure of these would have an irreversible and substantive effect on UXK.[9] Accordingly, the challenge was allowed.[10]

[19] Rather than simply setting aside the witness summonses and inviting the Authority to reconsider the issues in light of my judgment, I suggested to counsel, and it was agreed, that relevant questions be put to the practitioners to be answered by affidavit, the intention being that this would diminish the health information privacy issues which would otherwise arise.[11]

[20] The problem in the case related to the scope of medical documentation sought by Talent via the witness summonses.

[21] Mr Upton submitted that the issues as to confidentiality of medical records could have been resolved informally between the parties, that the plaintiff should have instituted a dialogue, and that this is relevant to costs. This issue is a two-way street. It is not apparent that either representative initiated discussion as to practical options.

[22] I see no reason why UXK should not be entitled to the costs involved in bringing the challenge, despite Mr Upton's submissions to the contrary. The circumstances were not straightforward. It was not apparent that the appropriate principles as to patient confidentiality were explored with the Authority.

[23] The defendant had sought an authorisation for issuing witness summonses that were unduly wide in scope. The defendant must, in those circumstances, carry the primary responsibility for the problems which arose.

[24] The remaining issue concerned non-publication. Ms Fechney had argued that the Court should make a permanent order. However, the Authority's hearing had yet to take place, which would include investigation of the contested issue as to non-publication. In these circumstances, it was inappropriate for the Court to undertake its own inquiry as to the pros and cons of a permanent order of UXK's name and

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9 At [111].
10 At [112].
11 At [113]–[119].

identifying details ahead of the Authority's investigation. I did, however, make interim orders of her name and details, along with a permanent order in respect of the evidence which had been placed before the Court as to her health information.

[25] In the result, the non-publication application did not succeed, but a relatively modest proportion of time was devoted to this issue.

[26] Standing back, this is not a case where it is appropriate to conclude that Talent was the successful party, or even that there was a mixed outcome justifying a decrease in what would otherwise be ordered for costs.

Legal aid issues

[27] Turning to the issues raised by Ms Fechney as to the legal aid position, I find that prima facie an order should be made that Talent pay UXK a contribution to her costs in terms of the approach she advocated. That is, quantum should be based on the legal aid invoices actually rendered, after a suitable reduction for an application for stay that was not contested, and after allowing for the preparation of the costs memorandum. As mentioned, that totals $6,222.39. Such an approach is in accordance with the Court of Appeal dicta in *Curtis*.

[28] More difficult, however, is whether the Court should find that a higher contribution to costs is justified because Ms Fechney wishes to make an application to the Legal Services Commissioner under s 105 of the LSA.

[29] She produced a letter sent from the Commissioner to a practitioner who was involved in another case before the Authority, which outlined the approach the Commissioner said he would adopt when considering an application under s 105. The Commissioner indicated that, at least in that instance, any application would have to be accompanied by the relevant costs decision. That decision would have to confirm the Authority's awareness of the cost of the grant and set out reasons for an award of costs being in excess of the costs of legally aided representation.

[30] Ms Fechney submitted that, but for the constraints of the legal aid grant, she would have been justified in seeking a costs award based on the Guideline, which she

said would total $19,837. She also emphasised there were sound reasons for the Court to take such a step. She argued that providing representatives with an opportunity to apply to the Commissioner for an uplift would be a practical way of addressing the legal aid crisis, as it would encourage more practitioners to become legal aid providers. That all said, her submissions proceeded on the basis that the defendant's liability should be restricted to payment of the legal aid invoices which had been rendered thus far.

[31] If there had been no grant of aid, the attendances undertaken by Ms Fechney may have resulted in an award being made under the Guideline, if her client's actual costs exceeded the scale assessment. However, no evidence has been provided as to Ms Fechney's usual charge out rate.

[32] The position is different where work is undertaken on a pro bono basis and the practitioner providing that service then seeks costs, as happened in *Innovative Landscapes (2015) Ltd v Popkin.*[12] But even in that particular instance, the sum sought was "less than would have been payable on a strict application of the Costs Guideline Scale".[13] That is, the scale did not determine the appropriate order.

[33] In the absence of advice as to what the position would have been if legal aid had not been granted, I am unable to determine what an alternative award may have been.

[34] But more importantly, it is not appropriate for the Court to make a finding as to what costs might have been but for the grant of legal aid. Ms Fechney and her client agreed the challenge would be funded via legal aid, which meant Ms Fechney's services were guaranteed for payment by the LSA, albeit at what was likely to have been a modest hourly rate for services rendered on a capped basis. However, there were certain other checks and balances which also applied, such as the protection of the legally aided client from a costs order albeit subject to the provisions of s 45 of the

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12 *Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 96, [2020] ERNZ 262. See also *Cowan v Kidd* [2020] NZEmpC 157 at [12].

13 *Popkin*, above n 12, at [22].

LSA. Moreover, the defendant, as the opposing party, proceeded on the basis that UXK was legally aided, taking any relevant strategic decisions accordingly.

[35] Finally, it would appear that the Commissioner's policy with regard to s 105 may turn on whether, notwithstanding a legal aid grant, a judicial body is nonetheless persuaded that a costs liability that exceeds the amount of the legal aid grant is appropriate. It is unclear what circumstances would lead to a finding of an increased costs liability which would then persuade the Commissioner to exercise the s 105 discretion; the section itself does not spell out qualifying criteria.

[36] Although the Court understands why Ms Fechney has raised concerns as to the use of a rate which is subject to significant constraints, in the end, any question of uplift is a matter between her and the Commissioner.

[37] The Court's role is to determine the appropriate contribution as to costs which should be made inter partes.

Result

[38] Talent is to pay UXK the sum of $6,222.39 within 21 days.

B A Corkill
Judge

Judgment signed at 11.15 am on 27 September 2022