IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 195
EMPC 49/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND POST PRIMNARY TEACHERS' ASSOCIATION Plaintiff
AND	BOARD OF TRUSTEES FOR RODNEY COLLEGE First Defendant
AND	THE SECRETARY FOR EDUCATION Second Defendant

Hearing: On the papers

Appearances: P Cranney, counsel for plaintiff
No appearance for first defendant
S Hornsby-Geluk and M Vant, counsel for second defendant

Judgment: 26 October 2022

COSTS JUDGMENT OF JUDGE KATHRYN BECK

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[1] The plaintiff has applied for costs following its successful challenge[1] to a determination of the Employment Relations Authority which found in the defendants' favour.[2] It also applies for costs in the Authority.

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1 *New Zealand Post Primary Teachers Assoc v Board of Trustees for Rodney College* [2022] NZEmpC 118.

2 *New Zealand Post Primary Teachers Assoc v Board of Trustees for Rodney College* [2018] NZERA Auckland 11 (Member Tetitaha).

[2] The plaintiff seeks scale costs in the sum of $46,444 and disbursements, being the two filing fees of $71.56 and $204.40, on the basis that it was the successful party and costs should follow the event.

[3] Mx Hornsby-Geluk, counsel for the second defendant, disputes that costs can be claimed for the Authority proceeding, submitting that an application for costs was to be filed within 14 days of the determination being issued; no such application was made. Mx Hornsby-Geluk also says that the Authority's recent practice direction provides that, from 2 May 2022, the Authority's discretion regarding costs is generally to be exercised on the presumption that the parties will bear their own costs in respect of certain matters, including "disputes about the application, interpretation or operation of a collective agreement."[3]

[4] There is no dispute between the parties as to quantum if scale costs are awarded. However, the second defendant proposes that, on the basis that both parties were partially successful and will derive a benefit from the outcome of the proceedings, costs should lie where they fall.

Approach

[5] The starting point for costs in the Employment Court is cl 19 of sch 3 to the Employment Relations Act 2000 (the Act). It confers a broad discretion as to costs. A guideline scale has been adopted to guide the setting of costs.[4] As the guidelines make clear, the scale is intended to support (as far as possible) the policy objective that the determination of costs be predictable, expeditious and consistent.

[6] The guideline scale is not intended to replace the Court's ultimate discretion as to costs.

[7] The submissions of the parties give rise to further considerations. The first consideration concerns those cases where there is a mixed measure of success. In

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3 Andrew Dallas "Practice Note 2: Costs in the Employment Relations Authority – Te Ratonga Ahumana Taimaihi" (29 April 2022) Employment Relations Authority <www.era.govt.nz> at [5].

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

Health Waikato Ltd v Elmsly, the Court of Appeal noted that costs usually follow the event and that in most cases it is clear who has been successful and thus prima facie entitled to an award.[5] However, the Court also held:[6]

> [35] But cases where the parties have mixed success are by no means rare and in such instances it is not necessarily easy to determine who "won" the case so as to be entitled presumptively to costs.
> ...
> [39] It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.

[8] The second consideration concerns the issue of whether costs should lie where they fall in a case involving the interpretation, application and operation of a collective agreement. On this issue, I adopt the following dicta of Judge Inglis (as she then was):[7]

> [6] Some doubt has been cast on whether these [costs] principles apply to disputes relating to the interpretation, application, and operation of collective agreements. In *Maritime Union of New Zealand v C3 Ltd*, Judge Travis accepted that the principles expressed in *Binnie v Pacific Health Ltd* may not be applicable to disputes.[8] And in *Maritime Union of New Zealand Inc v TLNZ Ltd*, the Chief Judge drew a distinction between cases involving an individual employee and ones in the nature of a generalised dispute applicable to a workforce generally.[9]
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> [7] I prefer to approach the issue of costs in this case in accordance with the general approach endorsed by the Court of Appeal in cases such as *Binnie*, and to have regard to factors such as the benefit both parties will obtain from the proceedings and the nature of the claim, in assessing the extent to which the starting point of 66 percent of the actual and reasonable costs incurred by the successful party might be affected. That is because it is consistent with the principles applying to costs awards in all courts, that party and party costs should generally follow the event and amount to a reasonable contribution to costs actually and reasonably incurred by the successful party.
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> [8] While a challenge involving a dispute as to the interpretation of a collective agreement raises different issues to a case involving (for example) a personal grievance by an employee, it is not otherwise unusual or out of the ordinary. There is nothing to suggest that in referring to the usual approach to be adopted in "ordinary" cases, the Court of Appeal in *Binnie* was intending

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5 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).
6 At [35] and [39].
7 *Postal Workers Union of Aotearoa v New Zealand Post Ltd* [2012] NZEmpC 68 at [6]–[8].
8 *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14]; and *Maritime Union of New Zealand v C3 Ltd* [2012] NZEmpC 13 at [16].
9 *Maritime Union of New Zealand Inc v TLNZ* [2008] ERNZ 91 (EmpC) at [23].

> to limit that approach to a particular class of case (namely personal grievances).

[9] I note that Judge Inglis's approach has subsequently been affirmed by Judge Ford in *New Zealand Meat Workers Union v AFFCO New Zealand Ltd* [10] and by a full Court of Judge Holden and Judge Corkill in *Vulcan Steel Ltd v Manufacturing & Construction Workers Union.*[11]

[10] The third consideration concerns the issue of whether costs should be decreased where both parties benefit from a determination. Judge Inglis (as she then was) observed in *Postal Workers Union of Aotearoa v New Zealand Post Ltd*:[12]

> [23] The challenge involved a dispute about the interpretation of a collective agreement. While this is not a case where the outcome of the proceedings will result in a wider benefit to the postal industry as a whole, there is an ongoing relationship between the parties. Both will derive a benefit from the outcome of the proceedings, in the sense of having an authoritative interpretation of their collective agreement. I consider that this factor weighs in favour of a decrease in the costs that might otherwise be imposed.

[11] In that decision, an award of costs of $7,500 was granted where the defendant had originally sought $16,000. However, the Court considered the plaintiff's inability to pay as well as the mutual benefit of the parties when applying this discount.

[12] In *E tū Inc v New Zealand Transport Agency,* Judge Corkill allowed a 50 per cent reduction to take into account the fact that the Court's resolution of the interpretation issue was mutually beneficial to the parties.[13] However, in *Vulcan Steel Ltd v Manufacturing & Construction Workers Union,* the full Court noted that the unsuccessful party was primarily responsible for the drafting issues and that although the Court's conclusions could potentially be of assistance to both parties in any subsequent bargaining, that was not sufficient reason for a reduction.[14]

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10 *New Zealand Meat Workers Union v AFFCO New Zealand Ltd* [2012] NZEmpC 154 at [21].
11 *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 144.
12 *Postal Workers Union of Aotearoa v New Zealand Post Ltd,* above n 7, at [23].
13 *E tū Inc v New Zealand Transport Agency* [2017] NZEmpC 80 at [29].
14 *Vulcan Steel Ltd v Manufacturing & Construction Workers Union,* above n 11, at [27].

First issue: should costs lie where they fall?

In the Authority

[13] Mx Hornsby-Geluk submitted that the Authority costs should lie where they fall because the second defendant did not seek costs in respect of the Authority decision and because of the Authority's practice note which states there is a presumption against the Authority awarding costs in respect of matters relating to the interpretation of collective agreements.

[14] Under cl 19 of sch 3 to the Act, the Court has power to award costs in respect of an Authority determination even where the Authority has not made an award of costs.[15] However, when the Court makes such an award, it stands in the shoes of the Authority and applies the principles that would be applied in the Authority.[16]

[15] The Authority uses a notional daily tariff based on the length of the investigation meeting held in each matter. The current tariff is $4,500 for the first day and $3,500 for any subsequent day. The Authority's practice note states that the discretion to award costs is exercised on a presumption that parties bear their own costs in respect of "disputes about the application, interpretation or operation of a collective agreement".[17]

[16] Therefore, standing in the shoes of the Authority, I must consider whether the presumption against costs in this situation has been overturned. The plaintiff's submissions do not provide any grounds for the presumption not to be followed.

[17] On that basis, I find that costs should lie where they fall in respect of the Authority proceedings.

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15 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 at [12]–[14].
16 At [19] and [43]–[47].
17 Andrew Dallas, above n 3, at [5].

In the Court

[18] Mx Hornsby-Geluk also submitted that costs in the Court should lie where they fall because the second defendant had been partially successful, noting that the Court did not adopt the interpretation proposed by the plaintiff.

[19] The plaintiff effectively submitted that a school is "not open for instruction" outside the hours of 9 am to 3 pm on school days during the school term.

[20] On the other hand, the second defendant submitted that a school is "not open for instruction" only during vacation or school holiday periods.

[21] The Authority accepted the second defendant's position.[18]

[22] The interpretation that was ultimately adopted by the Court was:[19]

> ... the words "times when the school is not open for instruction" mean weekends, public holidays, Easter Tuesday, vacations and times before 8:30 am and after 4:30 pm on days during the school term.

[23] This interpretation is significantly more expansive than that proposed by the second defendant and while not exactly the same as that proposed by the plaintiff, it is more closely aligned to its interpretation. I consider that the plaintiff was primarily successful in this proceeding.

[24] Accordingly, this is not a case where costs should lie where they fall.

Issue two: decrease in costs

[25] Mx Hornsby-Geluk submitted there were several factors which would justify a costs reduction.

[26] Counsel submitted that both parties derived a benefit from the proceedings.

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[18] *New Zealand Post Primary Teachers Association v Board of Trustees for Rodney College,* above n 2, at [41].

[19] *New Zealand Post Primary Teachers Association v Board of Trustees for Rodney College,* above n 1, at [143].

[27] I agree that the Court's decision will be useful for both parties, particularly in relation to any future bargaining. However, I do not consider that a reduction of any more than 20 per cent on scale costs is warranted. This is consistent with the cases outlined above. I consider that this deduction also takes into account whatever small measure of success was achieved by the second defendant.

[28] Mx Hornsby-Geluk also noted that Mr Cranney has failed to provide any evidence of actual costs incurred as is standard practice in an application for costs. It was submitted that without that evidence the Court is unable to assess whether the costs were actually or reasonably incurred. This submission has some weight. The Court of Appeal in *Binnie v Pacific Health Ltd* stated that the first step in deciding costs is to assess whether the costs actually incurred by the plaintiff were reasonably incurred.[20] It is difficult to assess whether costs have been reasonably incurred without information about what costs were incurred. However, as I have already concluded that there should be a 20 per cent reduction on scale costs, no further reduction is necessary in respect of this ground.

Result

[29] Costs in the Authority shall lie where they fall.

[30] In respect of the Court proceedings, the plaintiff seeks scale costs of $38,240 and disbursements of $204.40 being the filing fee. Eighty per cent of $38,240 is $30,592.00.

[31] The second defendant is ordered to pay the plaintiff the sum of $30,592 as a contribution to its costs, plus $204.40 for the disbursements incurred, within 14 days of the date of this judgment.

Kathryn Beck
Judge

Judgment signed at 12.15 pm on 26 October 2022

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[20] *Binnie v Pacific Health Ltd*, above n 8, at [14].