IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 199
EMPC 97/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	URBAN DECOR LIMITED Plaintiff
AND	MINGXIA YU First Defendant
AND	YAN JIN Second Defendant

Hearing:	On the papers
Appearances:	D Zhang and E Tie, counsel for plaintiff M Moncur, advocate for defendants
Judgment:	7 November 2022

COSTS JUDGMENT OF JUDGE KATHRYN BECK

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[1] Urban Decor Limited has applied for costs following its successful challenge to the Employment Relations Authority's determination, which had found that the defendants were unjustifiably dismissed from their employment.[1] The plaintiff has also applied for costs in respect of the Authority proceedings.

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[1] *Yu v Urban Decor Ltd* [2021] NZERA 60 (Member Craig).

[2] In its judgment on the challenge, the Court concluded that the defendants were not unjustifiably dismissed from their employment but had resigned, and set aside the Authority's determination.[2]

[3] Whilst the parties were encouraged to settle costs between them, they have been unable to do so.

[4] In respect of costs in the Authority, counsel for the plaintiff submits that applying the Authority's daily tariff rate to the three-day Authority investigation, the starting point should be $11,500. However, it is submitted that those costs should be increased to $17,250 because the plaintiff made a Calderbank offer which was rejected and because the defendants' conduct unnecessarily prolonged the investigation meeting.

[5] In respect of costs in the Court, counsel for the plaintiff have provided a schedule of scale costs of $30,114 with disbursements for the filing fee of $204.44. Counsel submit that the defendants' conduct has increased the time and expense of this proceeding by repeatedly failing to file compliant statements of defence and filing a security for costs application which was completely without merit.

[6] On the other hand, Ms Moncur for the defendants submits that the Authority proceedings only took 2.5 days, so costs should not be awarded for a three day hearing. In relation to the Court, she says that costs should reflect the fact that the challenge was not complicated and was dealt with on the papers. In light of that fact, she also submits that the costs claimed by the plaintiff are grossly exaggerated and that the defendants' application for security for costs was not unreasonable. She submits that costs should be reduced because Ms Yu was successful on the 90-day issue and that the claimed costs would place an unfair burden on the defendants.

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[2] *Urban Decor Ltd v Yu* [2022] NZEmpC 56.

Legal principles

[7] Under cl 19 of sch 3 to the Employment Relations Act 2000 (the Act), the Court has power to award costs in respect of the Authority.[3] 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.[4] 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.[5] Where a party's behaviour has unnecessarily increased the costs of a proceeding or where a settlement offer has been rejected, a costs award may be increased or decreased as appropriate.[6]

[8] The starting point for costs in the Court is cl 19 of sch 3 to the Act. It confers a broad discretion as to costs. A guideline scale has been adopted to guide the setting of costs.[7] 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. However, the guideline scale is not intended to replace the Court's ultimate discretion as to costs.

Costs in the Authority

[9] The Authority's costs determination noted that the Authority's investigation meeting covered three days, all with late finishes.[8] Therefore, applying the Authority's notional daily tariff, the starting point will be $11,500.

[10] In both the Court and the Authority, the defendants successfully argued that they raised their personal grievance within 90 days. I consider that there should be a deduction of 20 per cent from the starting point as a result.

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3 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [12]–[14].
4 At [19] and [43]–[47].
5 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 [4].
6 At [10].
7 "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.
8 *Yu v Urban Decor Ltd* [2021] NZERA 103 (Member Craig) at [17].

[11] Counsel for the plaintiff submit that the defendants unnecessarily prolonged the investigation meeting. However, I note that the Authority found in its determination on costs that the parties both "contributed unnecessarily to the length of the investigation meeting".[9] I accept the Authority's determination on this point and accordingly make no uplift or deduction on this ground.

[12] Counsel for the plaintiff also submit that the defendants turned down a Calderbank offer and that costs should be increased accordingly. In the Calderbank offer, the plaintiff offered the defendants $3,200 each. Given the way in which the law was understood at the time, it was not unreasonable to reject the Calderbank offer. Accordingly, this is not a case where there should be an uplift.

[13] Therefore, allowing for the 20 per cent decrease, I consider a contribution of $9,200 towards costs in respect of the Authority proceedings is appropriate.

In the Court

Starting point

[14] As indicated in my minute of 22 June 2021, Category 2B applies to these proceedings for costs purposes. The plaintiffs have provided a schedule of claimed costs. However, there is some disagreement about some of the items in that schedule.

[15] The plaintiff seeks 0.6 day's costs for filing a memorandum opposing the defendants' application for security for costs. The defendants submitted that their application for security for costs was not unreasonable. However, the application was ultimately withdrawn. I consider that 0.6 day's costs for filing the memorandum is fair in the circumstances.

[16] The plaintiff seeks scale costs of two days for preparing for, and appearing at, directions conferences. The directions conferences primarily dealt with problems with the defendants' statement of defence and with their application for security for costs. The amount claimed is high given the relative simplicity of these proceedings; however, given the defects within the defendants' statement of defence and their

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9 At [21].

withdrawn security for costs application, I consider that the claimed sum is not unreasonable.

[17] The plaintiff seeks three days' preparation time for drafting submissions. This is unnecessarily high. Under item 46, a successful party is entitled to two days' costs for preparing for a hearing. This hearing would have been heard in person and was set down to be heard in person. However, due to a lockdown it became clear that an in-person hearing was not going to be possible. Therefore, on 18 August 2021, I issued a minute proposing a number of ways to progress the matter. One of the options was to deal with the matter on the papers. Both parties agreed to that proposition by email. As a result of this context, item 46, which allows two days for preparing for a hearing, is clearly the most relevant as the plaintiff's written submissions were part of its preparation for the hearing.

[18] The plaintiff seeks costs of one day for its reply submissions. This seems unreasonably long given the context. If the in-person hearing had gone ahead, written reply submissions would not have been necessary because each party would have been able to respond to the other party's submissions in their oral submissions. Although the case was set down for a one-day hearing, it would likely have only lasted half a day. Therefore, I find that the plaintiff is entitled to costs for this step but only 0.5 day.

[19] The plaintiff seeks costs for its supplementary submissions in respect of Chief Judge Inglis's decision in *Mikes Transport Warehouse Ltd v Vermuelen*.[10] That decision was released on 17 November 2021, which was after the parties had already filed their written submissions. In *Mikes Transport*, Chief Judge Inglis took a different approach to resignations made in the heat of the moment from cases which had been relied on in the Authority's determination.[11] *Mikes Transport* necessarily affected the parties' positions. In light of that fact, I considered it to be in the interests of justice to receive further submissions. I ultimately agreed with the approach taken in *Mike's Transport*. It was unexpected and even unfortunate that further submissions were

[10] *Mikes Transport Warehouse Ltd v Vermuelen* [2021] NZEmpC 197, [2021] ERNZ 1129.
[11] At [33]–[44]; and *Yu v Urban Decor Ltd,* above n 1, at [57].

required, and considering the overall justice of the situation, I find that the parties should bear their own costs in relation to the additional submissions.

[20] The plaintiff seeks costs for its reply submissions to the defendants' supplementary submissions in respect of *Mikes Transport.* The plaintiff submits that the defendants raised the new issue of constructive dismissal in their supplementary submissions; however, that only occurred because the decision in *Mikes Transport* called into question the case that they had successfully argued in the Authority. No doubt the defendants would have argued their case in the Authority differently in light of *Mikes Transport.* However, as they unsuccessfully raised a new constructive dismissal claim in their submissions, it was fair for the plaintiff to respond. Given the overall complexity of that claim in light of the procedural and evidential issues it raised, I consider that scale costs of one day as sought by the plaintiff is reasonable.

[21] Overall, this amounts to scale costs at 10.1 days. This means that the starting point for costs in the Court is $24,139.[12]

Reductions and increases

[22] Counsel for the plaintiff submit that costs should be increased because of the defendants' conduct in failing to file compliant statements of defence and filing a security for costs application which was without merit. However, I find that the scale costs claimed by the plaintiff already include the defendants' conduct as a factor. As I have already noted, the amount claimed in relation to the directions conferences was high but reasonable given the defendants' conduct. Therefore, no further increase is necessary.

[23] Ms Moncur submits that the defendants were successful in respect of the 90-day trial provision and that they should be entitled to a reduction as a result. I agree. As with the Authority costs, I conclude that there should be a 20 per cent reduction on this ground.

[12] 10.1 x $2,390 = $24,139.

[24] I also note Ms Moncur's submission that this challenge was not complicated and that the plaintiff's costs are grossly exaggerated. I agree that this matter should not have been complicated; however, the actions of the parties and their representatives led to this matter becoming much more complicated and drawn out than it needed to be. Unfortunately, this has led to costs increasing. On that note, however, it is disappointing that counsel for the plaintiff have not provided any evidence of their actual costs. In their submissions, they state: "We certify that Urban Decor's actual costs in both the ERA and this Court exceeds the costs claimed for these respective proceedings."

[25] The Court of Appeal held in *Binnie v Pacific Health Ltd* that the first step in deciding costs is to assess whether the costs actually incurred by the plaintiff were reasonably incurred.[13] I noted recently in *New Zealand Post Primary Teachers' Association v Board of Trustees for Rodney College* that it is difficult to assess whether costs have been reasonably incurred without information about what costs were incurred.[14] Although counsel for the plaintiffs have certified that Urban Decor's actual costs exceed those claimed, they do not provide any indication to the Court of how much their actual costs exceed those claimed. I consider that a further discount of 10 per cent is appropriate in light of this fact.

[26] Applying the cumulative 30 per cent discount to the starting point of $24,139 set out above, I reach a total sum of $16,897.30.

Totality

[27] If no further adjustments are made, this would lead to total costs of $26,301.74.[15] Ms Moncur submits that the claimed costs would place an unfair burden on the defendants. She noted that both defendants are low-income workers who have been suffering financial hardship. Further, she noted that the defendants have been paying their previous advocate his legal fee of $6,000 by instalments.

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13 *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

14 *New Zealand Post Primary Teachers' Association v Board of Trustees for Rodney College* [2022] NZEmpC 195.

15 $9200 + $16,897.30 + $204.44 = $26,301.74

[28] Ms Moncur has not provided any affidavit evidence of the defendants' financial capacity; however, her description of their circumstances and the facts of this case strongly indicate that they will struggle to pay any large sum of costs. If the defendants are paying a legal fee of $6,000 by instalments, that indicates they will likely struggle to pay a much larger sum of $26,301.74.

[29] An award of costs should be neither illusory nor oppressive. Any inability to pay without undue hardship is a relevant consideration for the Court in exercising its equity and good conscience jurisdiction.[16] Without affidavit evidence it is not appropriate to heavily reduce the costs claimed, but I consider that a reduction should be made. Overall, I consider that in light of the defendants' circumstances, costs of $12,000 plus disbursements for the Court and $9,000 for the Authority are appropriate.

Result

[30] Therefore, the defendants are to pay the plaintiff the sum of $9,000 as a contribution to its costs in the Authority and $12,000 as a contribution to its costs in the Court, plus $204.44 for the disbursements incurred – a total of 21,204.44.

[31] It is appropriate that this be split equally between Ms Yu and Ms Jin.

[32] Accordingly, Ms Jin and Ms Yu are each ordered to pay the plaintiff the amount of $10,602.22 as a contribution to its costs.

[33] It may be that arrangements should be made for payment by instalments, but I will leave that to the parties to agree between themselves.

Kathryn Beck
Judge

Judgment signed at 12.45 pm on 7 November 2022

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16 *Shepherd v Scan Audio New Zealand Ltd* [1999] 2 ERNZ 374 (EmpC) at 379–380.