**IN THE EMPLOYMENT COURT OF NEW ZEALAND**
**WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA**
**TE WHANGANUI-A-TARA**

**[2022] NZEmpC 88**
**EMPC 309/2021**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER | of an application for costs |
| BETWEEN | ABC<br>Plaintiff |
| AND | DEF<br>Defendant |

Hearing: (on the papers)

Appearances: ABC, in person
S Hornsby-Geluk and B Locke, counsel for defendant

Judgment: 24 May 2022

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**COSTS JUDGMENT OF JUDGE B A CORKILL**

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## Introduction

[1] This judgment resolves a costs application following a substantive judgment of 25 November 2021 in which I concluded that a direction to mediate had been contained in a determination issued by the Employment Relations Authority, but as it related to a matter of procedure, the challenge was statute barred.[1]

[2] I also held that if the challenge had been regarded as justiciable, it would not have been impracticable or inappropriate to make a direction that the parties mediate.

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1 *ABC v DEF* [2021] NZEmpC 208 at [38].

[3] I reserved costs and directed the parties to discuss this topic in the first instance.

## Application for leave to appeal

[4] ABC subsequently applied to the Court of Appeal for leave to appeal. In a judgment issued on 28 April 2022, the Court of Appeal declined the application for leave.[2]

[5] The Court of Appeal held that interpretation issues which ABC wished to advance potentially qualified as questions of law, but those questions were plainly not seriously arguable.[3] A direction to attend mediation could not be anything other than procedural in nature. Such a direction would not affect substantive rights or impact on a determination of the claim. If mediation does not resolve the dispute, the claim simply proceeds, with all substantive rights being preserved.[4]

[6] The Court of Appeal went on to rule that because a direction to mediate was procedural in nature, s 179(5) of the Employment Relations Act 2000 (the Act) applied and this Court had been correct in concluding it did not have jurisdiction to consider ABC's challenge.[5]

[7] The Court of Appeal also endorsed this Court's observations as to the importance of mediation.[6]

[8] Because the respondent had not sought costs and its opposition to an extension of time to bring the application for leave by ABC had been unsuccessful, no award of costs was made.[7]

## The application for costs in this Court

[9] DEF sought costs, the parties having been unable to resolve this issue directly.

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2 *ABC v DEF* [2022] NZCA 148.
3 At [18].
4 At [19].
5 At [20].
6 At [21], citing *ABC v DEF,* above n 1, at [56]–[59].
7 At [24].

[10] Mx Hornsby-Geluk, counsel for the successful party, DEF, submitted that there had been several interlocutory applications, all of which required attendances. She said these were an application by the defendant for non-publication orders which had been unsuccessfully opposed by the plaintiff; and an application by the plaintiff that the Court invite two interveners to appear, and an application for urgency, both of which were successfully opposed by the defendant.

[11] The defendant's scale assessment on a 2B basis totalled $25,095. Actual costs, including disbursements and GST, were $35,706.18.

[12] In a further memorandum filed after the Court of Appeal's judgment had been issued, Mx Hornsby-Geluk emphasised that the case should not be regarded as being a test case, as had been contended. In declining ABC's application for leave, the Court of Appeal had made it clear the questions of law placed before that Court, based on this Court's judgment, were not seriously arguable.[8]

[13] In her initial response to the application for costs, ABC submitted that costs should lie where they fell. She argued that the matter was a test case which justified this approach. She said that her wish to test the direction to attend medication had been genuine and had been brought to protect her rights. She said the substantive arguments had been comprehensive, and that existing case law had not been entirely clear.[9]

[14] ABC went on to submit that a requirement to pay approximately $25,000 would result in undue hardship, providing information to support this submission.

[15] Finally, she argued that the Court should apply its equity and good conscience jurisdiction. She said that it was unreasonable for the defendant to have voluntarily incurred approximately $35,000 in costs to defend a challenge to a direction to mediation, that it could have agreed that attending mediation would be impracticable or inappropriate, that it could have made a Calderbank offer or otherwise engaged in

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8 *ABC v DEF,* above n 2, at [18].
9 Submissions of the Plaintiff, 13 January 2022, at [9].

without prejudice discussions, and that it could have agreed to have attended mediation services via Zoom. None of these steps had been taken.

[16] In her subsequent memorandum after the Court of Appeal's judgment was issued, ABC re-emphasised that the appeal had been a test case so that costs should therefore lie where they fell. ABC submitted that the case had been novel and concerned the practice or procedure of the Authority. Finally, she submitted that although the Court of Appeal did not consider that there was a seriously arguable question of law, that was a finding made for the purposes of an appeal to that Court and was not therefore a relevant consideration.

[17] ABC also pointed out that she had received a "fee waiver at the Court of Appeal on the grounds of public interest".

[18] She also said the Court of Appeal had considered there should be no award of costs on either application; however, as mentioned earlier, DEF had not sought costs, and its opposition to an extension of time to bring the leave application had been unsuccessful.

## Principles

[19] The starting point for any consideration as to costs is cl 19 of Sch 3 to the Act. It confers a broad discretion on the Court. A Guideline Scale has been adopted to guide the fixing of costs.[10] 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.

## Analysis

[20] I begin by dealing with the quantum of costs claimed by DEF.

[21] I consider that all the items claimed by way of DEF's scale assessment are appropriate, except for three, on which I comment as follows:

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

(a) The second claim under Item 28 of the scale, filing opposition to interlocutory application for urgency, was only partially successful. As a result of that application being brought, the proceeding was dealt with promptly. I reduce the amount claimed of 0.6 of a day to 0.3, and I disallow the second Item 34, obtaining judgment without appearance for an order of urgency.

(b) A claim is made also under Item 34 for obtaining judgment without an appearance on an intervener issue. The issue was dealt with on the papers and does not warrant the claim of 0.3 of a day under Item 34.

(c) Under Item 36, preparation of briefs, two days are claimed. In my view, the extent of the evidence justifies this claim being reduced to one day.

[22] These modifications result in a scale assessment of $20,554.

[23] Actual costs incurred by DEF were $30,590 plus GST (excluding disbursements). The scale assessment is approximately two-thirds of this sum.

[24] Accordingly, I consider $20,500 is an appropriate starting point.

[25] Next, I deal with the question of whether this was a test case, as ABC submits. The Court may, in the exercise of its discretion, allow costs to lie where they fall if a proceeding is properly characterised as being a test case.[11]

[26] It is also well established that recognition of a case as a test case is not decisive of a proper application for costs. It is a discretionary element that may be outweighed by other elements.[12]

[27] In this instance, two aspects of the challenge were routine, and one was not.

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11 *NZ Labourers etc IUOW v Fletcher Challenge Ltd* (1990) ERNZ Sel Cas 644 (LC) at 659; *Blue Water Hotel Ltd v VBS* [2019] NZEmpC 24, [2019] ERNZ 40 at [38]–[39].

12 *Service & Food Workers Union v Vice-Chancellor of the University of Otago (No 2)* [2003] 2 ERNZ 707 (EmpC) at [18].

[28] The question of whether the Authority's direction to attend mediation was contained in a determination is one which has been considered on many occasions. The question of whether the direction was procedural in nature for the purposes of s 179(5) of the Act also involved a regular and relatively straightforward assessment.

[29] The alternate question of whether mediation should have been directed involved consideration of the provisions of s 159 in particular circumstances, including the extent to which a without prejudice privilege might be misused. It was a more unusual issue.

[30] However, I do not conclude that the case thereby became a test case. The point may have significance in other proceedings, but it does not warrant a conclusion that the challenge was so novel and important that the Court should conclude that costs should lie where they fall.

[31] Next, ABC raised a concern as to the significant costs sought by the successful defendant who she argues should have adopted a pragmatic approach, rather than an adversarial approach which now sees her accountable, potentially, for a significant liability.

[32] I make two points. First, although, as ABC submitted, DEF incurred a total of $35,706.18 in resisting the challenge, that sum includes disbursements and GST. I regard the scale as providing a satisfactory mechanism for assessing a contribution to fair and reasonable costs. By that means I have determined that the appropriate starting point is in fact $20,500.

[33] Secondly, although under reg 68 of the Employment Court Regulations 2000, the Court has a discretion to consider the conduct of a party tending to increase or contain costs, I am not persuaded the discretion should be exercised in this case. ABC has submitted that DEF could have made a Calderbank offer, engaged in without prejudice discussions, or agreed to attend mediation via Zoom. However, these considerations go both ways. There is no evidence that either party raised any of these possibilities, or declined to adopt them. In those circumstances, it is not appropriate to conclude that DEF's decision to exercise its statutory right to defend the challenge

is a conduct issue. Indeed, as Mx Hornsby-Geluk put it, the defendant wished to attend mediation as directed. It could not be blamed for holding this view, given the importance attributed to this process under the Act.

[34] Next, I deal with two issues raised by ABC, that she was genuine when bringing the proceeding, and that her ability to pay costs should be a relevant consideration. These factors are inter-connected.

[35] In developing her submission that the bringing of the proceedings was a genuine step, ABC implied that her position was affected by a medical condition. I referred to this issue in my substantive judgment, noting that leave to produce medical evidence had not been sought.[13]

[36] The issue potentially has relevance now, however, because ABC has produced a medical certificate issued in January of this year, stating that she was unfit to work more than 30 hours per week until further notice. I accept this limitation may have impacted on her income-producing activities, although how long the restriction continued, or whether it continues, is unclear.

[37] Other information is produced indicating that ABC carries certain liabilities, does not have savings, and suffered a decrease in revenue which required her to apply for a wage subsidy.

[38] I must also take into account her statement that she operates on a contingency basis which provides her with a "fluctuating income". Limited information is provided as to the mix of cases that produce income as against those which do not. There is an inference that some of her work may not produce income, but the Court does not know the extent of this. ABC's decision to operate her practice in this way is a matter for her. She is entitled to organise her affairs in this way. But in and of itself, it is not a reason for relieving her of a costs burden.

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[13] *ABC v DEF*, above n 1, at [34].

[39] The following observation in *Scarborough v Micron Security Produces Ltd* is relevant:[14]

> There may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

[40] In summary, there is no bright line approach to the exercise of the Court's discretion in respect of ability to pay. Even if there are circumstances which may justify a departure from the usual approach to costs, there are other factors which need to be balanced, which include the interests of the other party and the broader public interest.[15]

[41] Taking the relevant principles into account, I find that there is a degree of impecuniosity which the Court should properly acknowledge in the exercise of its discretion as to costs.

## Result

[42] Having regard to ability to pay factors, I consider the starting point figure should be reduced by approximately one-third. A fair and reasonable contribution by ABC to the costs incurred by DEF is accordingly $13,500. I direct payment of this sum.

[43] There will be no order for costs in respect of the costs application.

B A Corkill
Judge

Judgment signed at 11.05 am on 24 May 2022

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[14] *Scarborough v Micron Security Produces Ltd* [2015] NZEmpC 105, [2015] ERNZ 812 at [38].

[15] *Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13, [2020] ERNZ 20 at [14]–[15]; and *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196 at [22]. .