IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 210
EMPC 418/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	MARGARET ROBERTSON Plaintiff
AND	IDEA SERVICES LIMITED Defendant

Hearing: On the papers

Appearances: L Anderson, advocate for plaintiff
G Ballara, counsel for defendant

Judgment: 23 November 2023

COSTS JUDGMENT OF JUDGE K G SMITH

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[1] IDEA Services Ltd successfully defended the claim by Margaret Robertson in which she alleged that her dismissal was unjustified.[1]

[2] Costs were reserved. The parties have been unable to reach agreement about costs and IDEA Services now seeks an order.

[3] IDEA Services' claim incorporates attendances in the Employment Relations Authority and this Court. For attendances in the Authority the claim is for $15,000. For attendances before the Court the claim is $35,000.

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1 *Robertson v IDEA Services Ltd* [2023] NZEmpC 145.

[4] Both amounts represent an uplift from what might have been expected by applying the Authority's daily tariff approach and the Court's Guideline Scale respectively.[2]

[5] Mr Ballara submitted that in the Authority the hearing time for the investigation was 1.25 days and, if the tariff was applied, the costs order would amount to $8,000. He did not explain that arithmetic even though costs in the Authority are often pro-rated to reflect part days. The calculation of costs in the Court under the Guideline Scale and, using 2B for each step, produced a sum of $22,705.

[6] IDEA Services sought an uplift because it offered to settle before the Authority investigation meeting which, if accepted, would have avoided incurring further expense. That offer was made without prejudice save as to costs (a Calderbank offer).

[7] IDEA Services' actual costs to be represented in the Authority and Court exceeded the amounts claimed.

Ms Robertson's response to costs

[8] Ms Robertson's response to the claim was that costs should not be awarded for the Authority investigation and that the amount claimed for Court costs should be reduced. She submitted that:

(a) IDEA Services could not pursue costs of the Authority investigation meeting because it deliberately omitted filing submissions about them even though they were timetabled;

(b) that omission before the Authority meant there were no "parasitic costs" that would either fall away or remain for the Court's consideration, there was therefore no legal basis on which to reopen the costs issue in the Authority;

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2 "Practice Note 2: Costs in the Employment Relations Authority" <www.era.govt.nz> at [4]; and "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

(c) the references by IDEA Services to being able to claim costs in the Authority by relying on *Hayashi v SkyCity Management Ltd* were misplaced;[3]

(d) the settlement offer should not be considered because it was made when the matter was before the Authority not the Court;

(e) the settlement offer was not a real attempt to resolve the problem;

(f) she made her own settlement offer which was rejected and that offer needed to be considered; and

(g) steps claimed by IDEA Services under the Guideline Scale overstated the actual work required necessitating an adjustment downwards.

[9] At the end of Mr Anderson's submissions, in a brief paragraph, a statement was made that Ms Robertson was not in a healthy financial position. The Court was asked to take her situation into account.

Analysis

[10] The appropriate place to begin this assessment is the submission about Ms Robertson's finances. No evidence was provided about them to even begin an assessment of the relevance of her financial position to the costs claim. Even if that information had been provided, it is unlikely that costs would have been declined or reduced, because that would deprive the successful defendant of an opportunity to at least attempt to defray some of the cost it incurred.[4]

[11] Turning to the claims, the claim for costs in the Court proceeding will be dealt with first followed by the one relating to the Authority investigation before considering whether any uplift is justified.

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3 *Hayashi v SkyCity Management Ltd* [2018] NZEmpC 14, [2018] ERNZ 27.

4 *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196 at [15]-[23].

Costs in the Court

[12] The starting point is cl 19(1) of sch 3 to the Employment Relations Act 2000 (the Act). The Court is empowered to order any party to a proceeding to pay any other party such costs and expenses as are considered to be reasonable.

[13] The power conferred by cl 19 is supplemented by reg 68 of the Employment Court Regulations 2000. It provides that in fixing costs the Court may have regard to any conduct of the parties tending to increase or contain costs.

[14] A costs award is discretionary. The discretion must, however, be exercised on a principled basis and in the interests of justice. The primary principle to apply in exercising the discretion is that costs follow the event; that means the unsuccessful party should ordinarily be ordered to make a reasonable contribution to the costs incurred by the successful party.[5]

[15] The Court's discretion is assisted by the Guideline Scale. That Scale is intended to support, so far as is possible, the policy objectives that determining costs should be predictable, expeditious and consistent. The Guideline is an aid to exercising the discretion but does not replace it.

[16] At a directions conference, by agreement, this proceeding was provisionally allocated to Category 2, Band B, of the Guideline.

[17] Mr Anderson criticised the steps claimed by IDEA Services in its calculation of the amount payable under the Guideline. Those criticisms took issue with IDEA Services' claim for preparing the common bundle of documents and argued that some of the other steps claimed did not require the amount of time allocated to them. For example, he submitted that it did not take 0.4 of a day to prepare for the first directions conference. The upshot of this submission was that the amount claimed should reduce by 2.6 days. If the submission is accepted Ms Robertson's liability would be $16,491.

[18] I do not accept Mr Anderson's criticisms of the costs application. IDEA Services claimed for each of the steps taken by the parties during the litigation without any adjustment up or down. The effect of Mr Anderson's submission is to invite a

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5 See *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

review of the time actually taken by IDEA Services' counsel as if that adjustment ought to be made merely because Mr Anderson's own attendances were less intensive. How much time Mr Anderson took in addressing the work referred to in each step does not provide assistance in this exercise.[6]

[19] For completeness, I am satisfied it is appropriate to allow the claimed step for the bundle of documents, because of Mr Ballara's submission that while it was prepared by Mr Anderson's office significant attendances were required to address its content.

[20] I am not persuaded that adjustments should be made to the amount claimed. The amount payable under the Guideline Scale, if awarded, is therefore $22,705.

Costs in the Authority

[21] This subject was addressed in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* and *Judea Tavern Ltd v Jesson*. The references to *Hayashi* do not alter the analysis in either of the earlier decisions and takes the assessment of costs no further.[7] It follows that IDEA Services is entitled in this proceeding to claim costs arising from the Authority investigation unless there is a compelling reason not to award them, or to reduce the amount that might otherwise have been payable.

[22] I do not accept Mr Anderson's submission that a costs order for the Authority investigation is precluded merely because IDEA Services did not file submissions in that jurisdiction. There are two problems with the submission. First, missing the timetabled date is not equivalent to the Authority deciding not to award costs; the subject remained alive. Second, this proceeding was a full rehearing of the matter before the Authority and that necessarily involved considering costs.[8]

[23] Turning to quantum Mr Ballara did not explain why, since the investigation took one and a quarter days, the Authority would exercise its discretion to allocate two entire days if it had fixed costs.

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6 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [50].

7 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC); and *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120, [2017] ERNZ 726.

8 *Maheta v Skybus NZ Ltd* [2022] NZCA 516, [2022] ERNZ 1005.

[24] Making an adjustment so that the tariff was applied for 1.25 days produces a potential costs order of $5,375.[9]

An uplift?

[25] That brings the assessment to the Calderbank offers. Plainly, the offer by Ms Robertson is not relevant.

[26] IDEA Services' success means it is prima face entitled to an award of costs. The issue is whether the offer made justifies an uplift of $9,625 for costs in the Authority and $12,295 for those in the Court.[10]

[27] On 26 January 2022, IDEA Services proposed to settle Ms Robertson's personal grievance by paying her $500 in full and final settlement. The proposal was open for acceptance until 2 February 2022.

[28] The letter did not describe how or why IDEA Services chose the amount offered beyond implicitly expressing confidence in its case.

[29] Mr Anderson's submissions invited the Court to put aside the Calderbank offer by referring to it as derisory. This was a way of describing the unrealistic prospects for such a low offer being accepted and the apparent dismissiveness in making it of the strength of Ms Robertson's case.

[30] Mr Ballara's submissions took a broad approach to the claim for an uplift. IDEA Services' position was that the Calderbank offer meant it was entitled to seek an uplift from the amount of costs that otherwise would be ordered.[11]

[31] Mr Ballara's submissions draw heavily on *Bluestar Print Group (NZ) Ltd v Mitchell*, where the Court of Appeal cautioned that a "steely" approach is required in dealing with Calderbank offers in this Court.[12] In *Bluestar*, the Court was referring to a similar observation about a "steely" approach made in *Health Waikato v Elmsly*.[13]

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9 $4,500 plus 0.25 of $3,500 equals $5,375.
10 $15,000 less $5,375 equals $9,625. $35,000 less $22,705 equals $12,295.
11 Employment Court Regulations 2000, reg 6. The same position might be reached if High Court Rules 2016, r 14.6(3)(b)(v) was applied.
12 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.
13 *Elmsly*, above n 6, at [53].

[32] What needs to be borne in mind is the context in which the Court of Appeal's observations in *Bluestar* were made. The Court was considering submissions that a different approach should be taken to Calderbank offers in employment cases and that consideration should also be given to the fact that an employee in pursuing a claim may be seeking vindication.[14] The Court held:[15]

> …It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors. …

[33] The Court referred to the importance of Calderbank offers being emphasised by reg 68(1).

[34] Aside from referring to a "steely" approach, *Bluestar* does not offer guidance about how a Court is to assess whether the offer was reasonable. However, guidance from the High Court exists, which suggests that reasonableness should be assessed at the time the offer is made.[16] Other factors include:[17]

(a) the size of the offer relative to the actual costs of counsel;

(b) the amount of the claim;

(c) the reasonable expectations of the party that refuses the offer;

(d) the amount of preparation for trial already undertaken;

(e) whether the proceeding concerns an uncertain area of law;

(f) whether the parties were in a position to assess the merits when the offer was received;

(g) the information available to the party who receives the offer and the extent to which they can assess the offer;

(h) the timing of the offer;

(i) the conduct of the offeror.

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14 *Bluestar*, above n 12, at [20].
15 At [20].
16 *Samson v Mourant* [2016] NZHC 1119 at [44]; *Weaver v HML Nominees* [2016] NZHC 473 at [30]
17 *Weaver*, above n 16, at [30] (footnotes omitted).

[35] IDEA Services is able to say that it would have avoided the costs of litigation because it succeeded. Such an observation does not address a more fundamental question about whether the offer was reasonable at the time it was made.

[36] Offering $500 without explaining why that amount was reasonable in the circumstances as they were then known, reduces the offer to merely being dismissive of Ms Robertson's case. I am not persuaded that the offer was reasonable in the sense referred to in *Bluestar* and it should not be the foundation for an uplift in costs.

[37] Even if that assessment is wrong, no explanation was provided to justify the uplift claimed. I would not have made an order lifting costs in the Authority by nearly 200 per cent and Court costs by about 54 per cent.

Conclusion

[38] Ms Robertson is to pay costs to IDEA Services of $5,375 for the Authority investigation and $22,705 for the proceeding before the Court.

K G Smith
Judge

Judgment signed at 9.40 am on 23 November 2023