IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2023] NZEmpC 71
EMPC 73/2022

IN THE MATTER OF	an application for a judicial review
AND IN THE MATTER	of an application for costs
BETWEEN	ADRIAANUS WILFRED STRAAYER Plaintiff
AND	EMPLOYMENT RELATIONS AUTHORITY First Defendant
AND	WORKSAFE NEW ZEALAND Second Defendant

Hearing: On the papers

Appearances: Plaintiff in person
Appearance for first defendant, excused by leave
G Cain and K Alexander, counsel for second defendant

Judgment: 3 May 2023

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This costs judgment relates to a judicial review proceeding brought by Mr Adriaanus Straayer, in which he alleged that in making two decisions, the Employment Relations Authority breached principles of natural justice.[1]

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[1] The two decisions Mr Straayer identified for review were conclusions of the Authority on discovery and legal representation issues relating to an upcoming investigation: see *Straayer v Employment Relations Authority* [2022] NZEmpC 184 at [80].

[2] His former employer, WorkSafe New Zealand (WorkSafe) applied to strike out the proceeding.

[3] It was ultimately agreed that the application would be heard in two stages. The current cost issues arise in relation to a judgment which related to the first stage only.[2]

[4] It required consideration of ss 184(1A) and 194 of the Employment Relations Act 2000 (the Act). I held that Mr Straayer's review must be regarded as having been brought under s 194, and because of the effect of s 194(2), the criteria of s 184(1A) had to be met. Those criteria were not satisfied because there had not been a determination of the kind described in the subsection. Thus, there was no reasonably arguable cause of action in Mr Straayer's statement of claim, which was struck out.

[5] I reserved costs, inviting the parties to discuss these directly in the first instance. I indicated my provisional view was that these should be resolved on a Category 2, Band B basis.

[6] Subsequently, WorkSafe filed an application for costs, confirming that an attempt had been made to reach agreement as to costs, but this had not proved possible.

[7] Costs were sought on a 2B basis for the various steps involved in the proceeding, except for an interlocutory judgment of 19 July 2022 which involved a challenge to objection to disclosure, the details of which I will discuss later.[3] The total amount sought was $18,462.75.

[8] Mr Straayer, in his submission opposing the costs application, raised a number of points.

[9] In summary, he asserted that although a starting principle is that costs will generally be awarded to the "successful" party, the Court has a discretion to award costs based on its Guideline Scale, and can decide not to award costs at all.

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2 *Straayer v Employment Relations Authority* [2022] NZEmpC 184 (*Substantive Judgment*).
3 *Straayer v Employment Relations Authority* [2022] NZEmpC 128 (*Disclosure Judgment*).

[10] He said that one reason for concluding that an award of costs would not be justified related to the fact that the Court of Appeal may conclude that there had been a mistake in law because the Authority had taken no active part in the judicial review proceeding in this Court.[4] He said that a third party was about to file a proceeding in that Court which would have implications for this proceeding. He also requested that a decision on costs be reserved until the appellate issues to which he had referred had been determined.

[11] Mr Straayer also submitted that in essence the costs claim was one brought on behalf of the Crown and not WorkSafe, since, he submitted, WorkSafe was not authorised to retain such costs. Accordingly, it was submitted that any cost award could not be offset against WorkSafe's actual legal costs.

[12] Mr Straayer advanced detailed quantum submissions.

[13] Mr Straayer also argued that his ability to pay costs was a relevant consideration, and for this reason costs should lie where they fall. Mr Straayer submitted that he had partially succeeded in regard to a disclosure challenge which was dealt with in an interlocutory judgment. He said that WorkSafe's position that costs should lie where they fall in connection with that judgment was an insufficient recognition of his success, because his challenge had been partially allowed.

[14] WorkSafe resisted these submissions, asserting that costs should follow the event, and that the Court's Guideline Scale should be utilised to settle the appropriate quantum.

[15] Both parties elaborated on these points. I will refer to their submissions, as is appropriate, below.

Legal principles

[16] The starting point for the assessment of costs is cl 19 of sch 3 of the Act which provides:

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[4] I discussed this point in a recent judgment dealing with Mr Straayer's application for stay of costs issues: *Straayer v Employment Relations Authority* [2023] NZEmpC 40 [*Stay of Costs Judgment*].

> **19 Power to award costs**
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> (1) The court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable.
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> (2) The court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[17] Also relevant is reg 68 of the Employment Court Regulations 2000, which provides that, in the exercise of its discretion, the Court may have regard to "any conduct of the parties tending to increase or contain costs".

[18] The principles as to costs are well established, as set out in several well-known Court of Appeal judgments.[5]

[19] In 2016, the Court introduced its Practice Directions, which established a Guideline Scale as to Costs.[6] The scale is not intended to replace the Court's ultimate discretion under the statute as to whether to make an award of costs, and if so, against whom and how much. It is a factor in the exercise of the Court's discretion.

[20] I proceed on the basis of these general principles, referring to other authorities where relevant.

Analysis

Was WorkSafe the successful party?

[21] Mr Straayer argued that the "success" achieved by WorkSafe in obtaining an order of strike-out was "based on a procedural issue". I infer that he wishes the Court to consider that the underlying concerns he raised had substance, but the Court was not able to consider their merits because of procedural limitations.

[22] The substantive judgment resolved an interpretation issue concerning the provisions governing the Court's judicial review jurisdiction under the Act. For the reasons given in that judgment, the jurisdictional thresholds of the applicable judicial

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5 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48]; *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14]; and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [17].

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

review provisions could not be cleared and the proceedings were struck out.[7] Whether that may be regarded as a procedural circumstance or a substantive one, the fact is if the Court does not have jurisdiction, it is not permitted to assess any perceived merits. The Court did not purport to do so. This consideration has to be placed to one side.

[23] I conclude that in this case costs should follow the event and that, subject to the points I am about to refer to, they should be assessed under the Guideline Scale.

[24] This is not a case where the Court should exercise its costs discretion to the point of directing that costs lie where they fall: the circumstances do not justify such an approach.

Mistakes in law?

[25] As discussed in the stay of costs judgment, Mr Straayer believes there was a mistake in law as to the conduct of proceedings in the substantive determination. He says this is because the Authority did not file a statement of defence in respect of his claim and did not participate in the judicial review proceeding. He wishes to rely on a proceeding which will test whether the Authority was required to do so, which he says is to be brought by a third party in the Court of Appeal. To date, no such proceeding has been brought.

[26] Nor has Mr Straayer chosen to seek leave to appeal the Court's judgment on this point.

[27] In those circumstances, I previously concluded that there was no basis for a stay.[8] In the absence of either Mr Straayer or the third party bringing an appropriate proceeding in the Court of Appeal, there is no basis for me to comment further on whether there was, as he asserts, a mistake in law as to the procedure adopted.

Who is the current recipient of costs?

[28] Mr Straayer argued that should the Court award costs, these would not be received by WorkSafe, but "the Crown". He said this was because WorkSafe does not

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7 *Substantive Judgment*, above n 2, at [96]–[98].
8 *Stay of Costs Judgment*, above n 4, at [4]–[5].

have an appropriation or financial authorisation from the government to retain and use funds to reimburse its legal costs.

[29] Mr Cain, counsel for WorkSafe, disagreed with this submission. He said no appropriation is required, because WorkSafe is a Crown entity, and not a government department or ministry. He said:

a) As a Crown entity, WorkSafe is legally distinct from the Crown, as is evident from s 6 of the WorkSafe New Zealand Act 2013, and s 15(b) of the Crown Entities Act 2004. WorkSafe is primarily funded by levies, in accordance with Part 5, Subpart 1 of the Health and Safety at Work Act 2015, and not by an appropriation.

b) Mr Straayer had brought civil proceedings against WorkSafe as a body corporate and there was no basis for the assertion that costs from a civil proceeding would, in those circumstances, be paid to the Crown, which is a distinct legal person.

[30] In light of these legal propositions, I am not satisfied there is a relevant issue as to whether WorkSafe does, or does not, hold an appropriation. In any event, if the Court orders costs to be paid, the issue of entitlement will be a matter between WorkSafe and the Crown if need be.

Should costs be awarded in respect of the interlocutory judgment?

[31] As already mentioned, WorkSafe did not claim costs for the interlocutory judgment which dealt with an objection to disclosure.[9] Mr Cain submitted this is because the Court decided the issue, in part, in Mr Straayer's favour. He noted that Mr Straayer is self-represented and is thus not entitled to seek costs in relation to the matter, and moreover, he was not wholly successful in any event.

[32] Mr Straayer submitted that the Court's Guideline Scale as to Costs is that only, and that the Court has a wide discretion. As a matter of equity and good conscience,

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9 *Disclosure Judgment,* above n 3.

he said he should be entitled to credit for the effort and skills he brought to bear in obtaining a partially successful outcome on the disclosure challenge.

[33] The position concerning payment of costs to litigants in person was the subject of detailed analysis by the Supreme Court in *McGuire v Secretary for Justice*.[10] It concluded that the "primary rule" is that a litigant in person is not entitled to costs, although a successful litigant in person may recover disbursements.[11] The Supreme Court said that any movement away from this longstanding proposition would need to be the subject of reform.[12] In the meantime, these rules should continue to apply.

[34] That all said, it acknowledged that the Court of Appeal in *Re Collier (A Bankrupt)* had said that there may be "exceptional cases" which justify a departure from the rule.[13]

[35] I observe that it may be possible to consider such a departure in this Court, in light of the Court's ability to consider any conduct of the parties tending to increase or contain costs, as referred to in reg 68 of the Employment Court Regulations 2000.

[36] However, I am not satisfied that the circumstances dealt with by the Court in the disclosure judgment demonstrated an "exceptional case", such as would justify an allowance in Mr Straayer's favour due to the outcome of the challenge. Nor are any of the factors listed in reg 68 present that could, or should, be taken into account.

[37] Finally, no claim for disbursements has been raised by Mr Straayer in connection with that judgment.

Are there quantum issues?

[38] Mr Straayer raises issues as to the scale of costs sought by WorkSafe, which are described in the schedule annexed to this judgment. On this point he is on stronger ground.

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10 *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335.
11 At [55].
12 At [88].
13 *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA) at p 441–442.

[39] First, he notes that WorkSafe has claimed costs for three directions conferences. He says it would be more appropriate, given the restricted manner in which the proceeding was able to be resolved, for there to be an allowance for one only.

[40] I agree that in all the circumstances of the case, it is fair to restrict the allowance to one directions conference only, which results in a deduction of $956.

[41] Second, Mr Straayer points out that a claim is made for $2,390, being the preparation of submissions on the issue of the case potentially being stated to the Court of Appeal, and/or considered by a full Court. A submission on that topic was filed at the request of the Court. Both possibilities – referral to the Court of Appeal, and consideration of a natural justice issue by a full Court – were canvassed. However, it was then agreed that the strike-out application should be dealt with in two parts by a Judge alone. As indicated earlier, WorkSafe succeeded at the first stage.[14] I do not think preparation of memoranda on this topic can properly be regarded as relating to an issue for which Mr Straayer should be liable in costs. In the circumstances, I disallow this amount.

[42] Finally, costs are claimed for a second representative at the hearing. Mr Straayer suggests this level of support was unnecessary, given that he himself was self-represented with no legal training. In response, Mr Cain submitted the case was neither ordinary nor straightforward. There was a multiplicity of issues, involving complex areas of legislation and case law. There were also three volumes of documents, and an extensive bundle of authorities.

[43] There is some force in Mr Straayer's assertion. It was appropriate for WorkSafe to involve second counsel in preparation for the hearing, but, in the circumstances, I am not persuaded that an award should be made for the appearance of second counsel at the hearing. The sum claimed, $896.25, is accordingly disallowed.

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14 On 10 May 2022: see *Substantive Judgment*, above n 2.

[44] As a result, the 2B claim for costs should be reduced to $14,220.50.

Ability to pay?

[45] In Mr Straayer's submissions, he argued that were a costs order to be made against him, he would suffer financial hardship since he had not been in paid employment since October 2018.

[46] I subsequently issued a minute indicating that the authorities were clear that where ability to pay may be in question, the issue should be assessed by reference to the whole financial position of the party concerned; *Metallic Sweeping (1998) Ltd v Ford* discusses this requirement.[15] The Court indicated that this should include not only income and outgoings, but also assets and liabilities.

[47] I indicated that if Mr Straayer wished the Court to consider such a submission in detail, he would need to file an affidavit summarising his financial circumstances.

[48] Mr Straayer filed a submission in which he repeated a number of the points that he had already covered, as discussed earlier in this judgment.

[49] He then referred to his financial position. He stated that he did not believe it was equitable for him to have to share highly confidential and private financial information with WorkSafe, with whom he had been engaged in litigation for some time. He stated that sharing such information would provide WorkSafe with a "prejudicial and unfair advantage in future litigation".

[50] He went on to state that he was prepared only to disclose information which related to his income. He said he had been unable to obtain paid employment since leaving WorkSafe in October 2018, apart from approximately $5,000 (before tax) received earlier this year for consultancy work. He also said he had received Government Superannuation from January 2022. He submitted that had his employment not been terminated by WorkSafe, his earnings over the last four years would have been in the order of $450,000 (after tax).

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15 *Metallic Sweeping (1998) Ltd v Ford* [2010] NZEmpC 129, [2010] ERNZ 433 at [53]–[54].

[51] No verified information as to his expenditure, or as to his asset and liability position was provided.

[52] The cases are clear that full financial disclosure is required. For example, in *Bishop v Bennet*, Judge Couch stated:[16]

> [29] A factor which must be considered in the overall exercise of my discretion to award costs is the ability of the plaintiffs to pay. The established principle is that a party ought not to be ordered to pay costs to the extent that doing so would cause undue hardship. What this principle allows for is that payment of any substantial sum will cause a measure of hardship to some litigants, particularly individuals. That is to be expected and is considered to be an acceptable consequence of unsuccessfully engaging in litigation. It also recognises that the primary focus of an award of costs should be on compensation of the successful party. It is only when payment of an award which achieves the purpose of justly compensating the successful party would cause a degree of hardship which is excessive or disproportionate that the interests of the unsuccessful party must be recognised by reducing the award which would otherwise be appropriate.
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> [30] The starting point is that a party is presumed to be able to pay any award of costs the Court might make and it is for that party to raise any issue of hardship. When it is raised, a claim that undue hardship would result must be supported by acceptable and sufficient evidence. Assessment of the ability to pay requires consideration of the total financial position of the party concerned including both assets and liabilities and income and necessary expenditure.

[53] Despite being given the opportunity to provide the necessary information, Mr Straayer has chosen not to do so. Information has been provided as to his income position, but no information has been provided as to necessary expenditure or as to his asset and liability position.

[54] In the absence of any explanation as to how WorkSafe, if appraised of this information, could use it to Mr Straayer's disadvantage, I am not satisfied that this is a legitimate reason for not providing the necessary information.

[55] In these circumstances, I am not persuaded that the payment of costs, fixed according to standard principles, would cause Mr Straayer a degree of hardship so excessive or disproportionate that it would be just and equitable to reduce the award of costs which would otherwise be payable.

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16 *Bishop v Bennet* [2012] NZEmpC 5 at [29]–[30].

Result

[56] I conclude that Mr Straayer should pay a contribution to WorkSafe's costs of $14,220.50.

[57] Mr Straayer invited the Court to stay any order of costs until such time as the Court of Appeal may consider the issues raised in a proceeding which he says a third party may bring. I have already considered the issue of stay and am not satisfied that the position is any different now from the position outlined in the stay judgment.[17]

[58] For the avoidance of doubt, I make no order of costs with regard to the costs issues considered in this judgment.

B A Corkill
Judge

Judgment signed at 4.30 pm on 3 May 2023

[17] *Stay of Costs Judgment,* above n 4.

Schedule 1

Item	Step	Daily rate	Days	Amount	Notes
4	Commencement of defence to other proceeding by defendant	$2,390	2	$4,780	Statement of Defence to application for judicial review
11	Preparation for first directions conference	$2,390	0.4	$956	Preparation for teleconference on 29 April
12	Filing memorandum for first or subsequent directions conference	$2,390	0.4	$956	Memorandum to the Court in advance of first teleconference (29 April)
13	Appearance at first or subsequent directions conference	$2,390	0.2	$478	Appearance at teleconference on 29 April
13	Appearance at first or subsequent directions conference	$2,390	0.2	$478	Appearance at teleconference on 24 May 2022
13	Appearance at first or subsequent directions conference	$2,390	0.2	$478	Appearance at teleconference on 31 May 2022
28	Filing interlocutory application	$2,390	0.6	$1,434	Strikeout application
30	Preparation of (interlocutory) written submissions	$2,390	1.0	$2,390	Submissions on the issue of stating case to Court of Appeal/removal to Full Court
30	Preparation of (interlocutory) written submissions	$2,390	1	$2,390	Submissions in relation to strikeout application
31	Preparation for bundle for hearing	$2,390	0.6	$1,434	Bundle for hearing
32	Appearance at hearing of defended application for sole or principal representative	$2,390	0.75	$1,792.50	Hearing until approximately 3pm – therefore three quarters of a day
33	Second and subsequent representative if allowed by court	$2,390	0.375	$896.25	Hearing until approximately 3pm – therefore three quarters of a day
Subtotal **Less**		**$2,390**	**7.725**	**$18,462.75** **$4,242.25**	
Total				**$14,220.50**	