IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2024] NZEmpC 221
EMPC 361/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	TOTAL PROPERTY SERVICES (CANTERBURY) LIMITED Plaintiff
AND	CREST COMMERCIAL CLEANING LIMITED Defendant

EMPC 154/2022

AND IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CREST COMMERCIAL CLEANING LIMITED Plaintiff
AND	TOTAL PROPERTY SERVICES (CANTERBURY) LIMITED Defendant

Hearing: On the papers

Appearances: P McBride, counsel for Total Property Services (Canterbury) Ltd
C McGuinness and N Platje, counsel for Crest Commercial Cleaning Ltd

Judgment: 20 November 2024

COSTS JUDGMENT OF JUDGE K G SMITH

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[1] Total Property Services (Canterbury) Ltd and Crest Commercial Cleaning Ltd are competitors in the cleaning industry. The litigation to which this costs application relates had its origins in the changeover of a contract to clean a high school in Christchurch. In August 2019, Total lost the contract that it previously held to clean the school and it was awarded, instead, to Crest.

[2] The school's decision to change cleaning contractors had a consequence for both companies and certain potentially affected employees. All of Total's employees who were engaged to work on the school site enjoyed the right, under pt 6A of the Employment Relations Act 2000 (the Act), to elect to transfer from being employees of Total to become employees of Crest.

[3] The companies could not agree about what information the Act required Total to supply to Crest for those employees who intended to transfer their employment. The disagreement resulted in an investigation by the Employment Relations Authority. In the Authority, Crest sought a compliance order against Total and penalties for an alleged failure to comply with the Act.

[4] The Authority's determination addressed the nature and extent of the information Total was required to supply to satisfy pt 6A.[1] It held that Total eventually supplied sufficient information to Crest to meet its statutory obligation. However, it was not satisfied with the timeliness of Total's response and decided that the company's tardiness warranted a modest penalty. Total was ordered to pay a penalty of $1,000 to the Crown.

[5] Subsequently, the Authority ordered Total to pay costs of the investigation meeting.[2]

The challenges

[6] Total elected to challenge the determination. It sought to overturn the penalty and set aside certain paragraphs in the determination it considered gave rise to a breach

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1 *Crest Commercial Cleaning Ltd v Total Property Services (Canterbury) Ltd* [2021] NZERA 402 (Member Beck).

2 *Crest Commercial Cleaning Ltd v Total Property Services (Canterbury) Ltd* [2021] NZERA 481 (Member Beck).

of natural justice.[3] Subsequently, Total amended its claim to include a challenge to the Authority's cost determination.

[7] Crest did not challenge the determination within the time provided by the Act.[4] Belatedly, after becoming aware of Total's challenge, Crest applied for and was granted leave to extend the time to file its own challenge.[5]

[8] Crest's challenge looked to establish that Total breached pt 6A. As the company had done in the Authority, it sought a compliance order and penalties. The amount claimed for each established penalty was $20,000. Crest asked for any penalty to be payable to it.

Outcome of the challenges

[9] Judgment was issued on 22 December 2023.[6] Findings were made about the paragraphs in the determination Total considered to breach natural justice. Part 6A was analysed to decide what employment-related information Total was required to supply to Crest. While a technical breach was established no penalty was imposed.

[10] Costs related to the proceedings were reserved. In the judgment a preliminary view was expressed that the proceedings were a test case and costs might lie where they fall.[7] The parties were, however, provided with an opportunity to file memoranda if costs were to be pursued.

Costs application by Total

[11] Total has applied for costs. The company considered that it was the successful party, having achieved a correction to the paragraphs from the determination it was concerned about and because the penalty was set aside without any other penalty being imposed. Total claimed costs associated with its challenge equivalent to 13.55 days

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3 Relating to a website search conducted by the Authority and to criticisms of Total's managing director.
4 By s 179(2) of the Employment Relations Act 2000.
5 *Crest Commercial Cleaning Ltd v Total Property Services (Canterbury) Ltd* [2022] NZEmpC 85.
6 *Total Property Services (Canterbury) Ltd v Crest Commercial Cleaning Ltd* [2023] NZEmpC 237, [2023] ERNZ 1086.
7 At [148].

under the Court's Guideline Scale amounting to $32,384.50.[8] It sought an uplift to 16.93 days and an award of $40,462.70.

[12] In addition, Total considered it successfully resisted Crest's separate challenge and claimed costs arising from doing so. Counsel's calculation was for five days under the scale. If granted, that would be $11,950. Total sought an uplift that would raise the number of days of its claim to 6.25 or $14,937.50.

[13] All of Total's claims were calculated on the basis that they would be awarded in accordance with Category 2 Band B. Disbursements of $1,218.43 were also claimed.

[14] Based on the claim that it was the successful party in the Court, Total considered that it should also be regarded as the successful party in the Authority and was therefore entitled to costs in that jurisdiction.[9] Total sought costs in the Authority, to be fixed in the range of $8,500 to $10,000 plus disbursements.

[15] The full amount sought by Total was approximately $65,000 plus disbursements.

[16] Total did not accept that characterising these proceedings as a test case was appropriate.

Crest's position

[17] Crest opposed Total's application, describing the judgment as being "essentially a draw". Its main submission was that all costs should lie where they fall with four exceptions. The company sought costs arising from:

(a) its successful application to extend time to file a challenge to the determination;

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8 "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

9 See *Maheta v Skybus NZ Ltd (formerly Airbus Express Ltd)* [2022] NZCA 516, [2022] ERNZ 1005 at [11]–[12]: A consequence of the judgment setting aside the Authority's determination was that the costs order it made fell away. Costs are generally parasitic on the substantive determination to which they relate.

(b) responding to the new issue in Total's closing submissions about its standing to be a party;

(c) the costs application; and

(d) one jurisdictional determination of the Authority.[10]

[18] The total amount sought was $8,170.

Principles to apply

[19] The starting point for an assessment of costs is cl 19(1) of sch 3 to the Act. Under that clause the Court may make an order that any party to a proceeding pay to any other party to it such costs and expenses as are considered reasonable. The power conferred by cl 19(1) is supplemented by reg 68 of the Employment Court Regulations 2000. The regulation provides that, in fixing costs, the Court may have regard to any conduct of the parties tending to increase or contain costs.

[20] A costs award is discretionary. That discretion must be exercised on a principled basis and in accordance with the interests of justice. The primary principle is that costs follow the event. That means ordinarily a successful party is entitled to a reasonable contribution to costs from the unsuccessful party.[11]

[21] Since 2016 the way the Court exercises its discretion has been assisted by a Guideline Scale, which has already been mentioned. That scale supports, so far as is possible, the policy objective that determining costs should be predictable, expeditious and consistent. The scale is not, however, a replacement for the discretion.

[22] At a reasonably early stage, following a conference with counsel, these proceedings were allocated on a preliminary basis to Category 2 of the Court's Guideline Scale. This dispute is about whether costs should be awarded at all and, if they should be, in favour of which party. The parties did not seek to revisit the cost category or disagree in any material way over the steps taken by reference to the scale.

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10 *Crest Commercial Cleaning Ltd v Total Property Services (Canterbury) Ltd* [2020] NZERA 439 (Member Doyle).

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

Analysis

[23] The issues are:

(a) Was this a test case?

(b) Should costs be awarded anyway?

A test case?

[24] Mr McBride, counsel for Total, characterised Crest's involvement in the litigation from its inception until its conclusion as not really about the parameters of pt 6A and the obligations imposed by it. The argument was that Crest really wanted to impose a penalty on a competitor.

[25] The submission was derived from the fact that, when Crest lodged its claim in the Authority, it sought a compliance order and penalties and the intention to pursue them was repeated when it sought an extension of time to challenge the determination. The same remedies were again claimed in the subsequent challenge. Aside from the pleadings in the Authority and Court, Mr McBride referred to several instances where he considered Crest seemed to concentrate on penalties being imposed. One of them was in a preliminary determination from the Authority which established its jurisdiction to impose a penalty for a breach of s 69OEA of the Act and that Crest had standing to apply for a penalty.[12] Another of those instances was the evidence from Crest's witness, Ms Kelliher, who instructed counsel then acting for the company to seek a compliance order and penalties when Total did not supply the information Crest wanted.[13]

[26] To further support this contention about the reason for Crest's involvement, Mr McBride submitted that the scope of Total's challenge was sufficient to allow an analysis of pt 6A. On this basis, Crest's challenge was unnecessary if its purpose was really to interpret pt 6A.

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12 *Crest Commercial Cleaning*, above n 10.

13 At that time not Mr McGuinness or Mr Platje.

[27] As an alternative submission, Mr McBride argued that, even if the Court accepted the litigation was a test case, it would still be appropriate to award costs to Total.[14] Again, the submission drew heavily on the underlying purpose attributed to Crest for taking action against Total.

[28] In responding, Mr McGuinness characterised Total's application for costs as portraying a jaundiced view of Crest's motivation not supported by the evidence. He submitted that Crest's involvement in the litigation was always about clarifying what is required by pt 6A. Crest's position was that both parties had benefited from the Court's decision and this was a test case.[15]

[29] Mr McGuinness emphasised that the test case nature of the proceedings was a primary feature of the application made by Crest for an extension of time. In that application, Crest's Managing Director expressed concern about the ambit of Total's challenge being insufficient, because it could limit the Court in making findings that might have wider application and benefit to the sector in which these companies compete. That was a reference to Total's challenge not seeking a full rehearing of the Authority's determination but, instead, concentrating on discrete parts of it.

[30] Some weight was added to that observation by a reference to Ms Kelliher's evidence touching on industry problems in applying pt 6A. Mr McGuinness referred to her job as including responsibilities for compliance with pt 6A, in an industry where cleaning contracts are routinely won and lost. Her evidence included encountering reasonably common inconsistencies, misapprehensions or errors in interpreting what was required.

[31] These submissions did not shrink from acknowledging that penalties were sought, but the point was to emphasise that they were not the driving force behind Crest's involvement in the litigation.

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[14] By reference to *Maritime Union of New Zealand Inc v TLNZ Ltd* [2008] ERNZ 91 (EmpC); and *OCS Ltd v Service & Food Workers Union Nga Ringa Tota Inc* EmpC Wellington WC15A/06 WRC 9/06, 15 December 2006.

[15] Citing *New Zealand Tramways Union (Wellington Branch) v Wellington City Transport, (t/a Stagecoach New Zealand)* [2002] 2 ERNZ 435 (EmpC) at [74].

[32] In Mr McGuinness' submission, even the question of an imposition of a potential penalty might be seen as a test case. While clarification of pt 6A was required, the test nature of that aspect of the litigation was, he submitted, associated with whether any penalty ought to be imposed in these circumstances.

[33] There is no definitive statement about what amounts to a test case in this jurisdiction. In *New Zealand Labourers IOUW v Fletcher Challenge Ltd* the (then) Labour Court described a test case in general terms.[16] The Court observed that, in a sense, every case which is novel might be described as a test. The Court went on to hold that, in another sense of the term, a test case is one of a kind which frequently comes before the Court where, although decided between the parties, is agreed or is intended to affect not only them but others in similar circumstances. The Court commented that a test case might arise if it was about the practice or procedure of the Court or some generalised ruling on a subject matter involving or affecting many parties.[17]

[34] *Blue Water Hotel Ltd v VBS* is a more recent example of a test case.[18] In the substantive judgment, the Court considered whether s 114(6) of the Act created an absolute deadline for advancing a personal grievance claim or if ss 219 or 221 could be relied on to extend time. In the subsequent costs judgment some of the factors relied on by the full Court to conclude it was a test case were that the legal issue was significant, the issue had not been authoritatively addressed before, and the findings would be likely to apply to other proceedings.[19]

[35] I agree with Mr McGuinness that this litigation can best be characterised as a test case. Total's case was that it had followed industry practice in providing information to Crest and that what it supplied satisfied the Act. Crest looked for far more information than it received.

[36] Mr McBride set out to establish that the industry practice Total relied on was appropriate and consistent with the Act. His submissions, for example, put forward

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16 *NZ Labourers IOUW v Fletcher Challenge Ltd* (1990) ERNZ Sel Cas 644, [1990] 1 NZILR 557 (LC).
17 At 659.
18 *Blue Water Hotel Ltd v VBS* [2018] NZEmpC 128, [2018] ERNZ 374.
19 *Blue Water Hotel Ltd v VBS* [2019] NZEmpC 24, [2019] ERNZ 40 at [38].

the proposition that the purpose of pt 6A was the preservation of transferring employee's current terms and conditions of employment. If accepted that meant the transferred information only needed to be sufficient to establish them immediately before the transfer of the commercial undertaking. His submissions covered in detail the interrelationships between the sections in pt 6A.

[37] Conversely, Mr McGuinness took a more expansive view of the interpretation of pt 6A and what information needed to be supplied. In doing so, the purpose of pt 6A was emphasised, a broad reading of "individualised employee information" was encouraged, and particular weight was placed on that term's definition in s 69OB(1)(a)(iv). The breadth of that section, which incorporated certain statutory requirements for record keeping, was said to support the position being taken by Crest.

[38] In the presentation of their submissions, counsel agreed that there had been no earlier decision on this point. The reference to industry practice, which Total supported and Crest rejected, was a clear indication that the case involved more than a dispute between two arms-length competitors. The disagreement between them was indicative of more widespread uncertainty and disagreement in this industry.

[39] I do not accept Mr McBride's suggestion that the purpose of the litigation from Crest's perspective was to inflict a financial burden on Total. Certainly, penalties were a live subject. They did not, however, dominate the proceedings which were mostly confined to considering what material was supplied and, when that was analysed, whether the Act was satisfied.

[40] The emphasis on penalties adopted by Total is an over-reading of the claims and the litigation.

[41] I am satisfied that it is appropriate to characterise this case as a test one.

Should costs be awarded anyway?

[42] Mr McBride is correct that costs might still be ordered in a test case. In making submissions that they should be awarded in this case, he pointed to the correction of passages in the determination, the penalty being set aside and Crest's lack of success

in obtaining any other penalty. Based on those results, Total's challenge was described as successful and Crest's challenge as entirely unsuccessful.

[43] Mr McBride also referred to several steps in the lead up to and during the hearing to support Total being awarded costs, or a potential global uplift from his calculation of them under the scale. Crest was criticised for:

(a) declining to advance an agreed statement of facts;

(b) not signing a notice to admit facts;

(c) obtaining a last-minute adjournment;

(d) indicating it might call an expert witness and then not doing that;

(e) extensive, and by implication, unnecessary cross-examination which lengthened the hearing; and

(f) Total having to address a post-hearing issue as to Crest's standing to pursue a challenge.

[44] Mr McGuiness did not accept that the criticisms were accurate or could support the costs claims. He dealt with the first two points raised by Mr McBride together. He accepted that the parties were unable to agree on a statement of facts, but submitted that while Crest rejected the draft provided by Total it had provided on for that company to consider. The response to the criticism about not signing the notice to admit facts was that, while the rule allowed for costs to be awarded, it only applied where the party declining to sign did so without justification.[20] Mr McGuinness described Total's draft notice as being "difficult to parse", going beyond the scope of the rule where it included references to matters that Crest considered it could not admit or deny or were otherwise irrelevant.

[45] The adjournment was described as unfortunate, but was caused by illness as explained in a medical certificate. As to the next two criticisms, Mr McGuinness

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[20] High Court Rules 2016, r 14.6(3)(b)(iii).

submitted that each party has a discretion to determine how to conduct its case including what witnesses it would call and the cross-examination was not inappropriate. As a comparison he referred to Crest's witness being cross-examined about matters which might equally be criticised as lengthening the hearing.

[46] Mr McGuinness rejected Total's last criticism, about the post-hearing issue of Crest's standing to pursue a challenge. He did so on the basis that it was raised by Total, without warning and during closing submissions. The subsequent necessity for a further round of submissions was therefore attributable to Total and not to Crest.

[47] I am not persuaded that it is appropriate to approach this costs exercise by looking at both challenges in the narrow way invited by Mr McBride's submissions. Further, while the penalty was set aside there was still a finding that a breach occurred and the natural justice point was not, in any real sense, contested by Crest.

[48] The other factors referred to by Mr McBride do not justify an award of costs let alone an uplift in them. The parties being unable to reach agreement about a statement of facts to be used in the hearing is not material. The notice to admit facts was not ignored. It was the subject of a detailed response explaining why it could not be answered. Even a cursory examination of the draft supports the position taken by Crest in declining to sign it.

[49] The adjournment point could not, in my view, support a claim for costs where leading counsel was unable to appear through illness. The implication in the submission that junior counsel should nevertheless have carried on is not attractive.

[50] I agree with Mr McGuinness that nothing turns on how the parties conducted the case. Indicating an expert witness might be called was no more than an aspect of case management and the fact that one was not relied on is neither here nor there. In my view, the cross-examination by both parties attempted to be focussed and could not be properly described as unreasonably extensive or unnecessary. The cross-examination therefore has no bearing on costs.

[51] As Mr McGuinness submitted, Total raised an issue about Crest's standing during closing submissions. While unsuccessful, it could not be said that Total's

argument was devoid of merit. An opportunity to provide written submissions to deal with the issue was necessary but that was at least partly because the hearing had taken longer than anticipated. In those circumstances, I am not attracted to either party being awarded costs arising from raising or responding to the submission.

[52] The remaining issue to specifically address is costs arising from Crest applying for an extension of time. Crest applied for costs associated with that application because it was granted. Total considered it should be awarded costs, having been involved in an application justified only on the basis of a change of heart by Crest.

[53] There are cases where the Court has accepted than an extension of time may have cost consequences for the party that succeeded. In this case, however, I am not satisfied that it would be appropriate to award costs to either party arising from the application. That is because of the linked nature of the challenges which are so intertwined that they should not be separated for cost purposes even in the limited way both parties put forward.

Conclusion

[54] Given my conclusion that these proceedings were a test case, and inextricably linked together, I am not persuaded that it would be appropriate to order costs in the Court. For the same reasons it would not be appropriate to order costs for the Authority proceeding.

[55] Costs in the Court and the Authority lie where they fall.

K G Smith
Judge

Judgment signed at 3.45 pm on 20 November 2024