IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 26
EMPC 212/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	DARREN PYNE Plaintiff
AND	INVACARE NEW ZEALAND LIMITED Defendant

Hearing: On the papers

Appearances: P Pa'u, advocate for plaintiff
E Butcher and C Joy, counsel for defendant

Judgment: 23 February 2024

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

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[1] This judgment deals with an application for costs following the Court's decision of 25 October 2023, setting aside a substantive determination of the Employment Relations Authority.[1] I encouraged the parties to agree costs but indicated that I would receive memoranda if agreement did not prove possible. While the parties sought to resolve costs, they have been unable to do so. This judgment deals with the issue.

[2] At an initial case management conference it was agreed that the proceedings appropriately sat within category 2B of the Court's Guideline Scale for costs

1 *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 179.

purposes.[2] The plaintiff initially calculated scale costs, plus an allowance for costs not provided for in the scale, at a figure of $40,630. The defendant's calculation of scale costs was considerably lower, at $26,768. The defendant submitted that its contribution to costs ought to be reduced having regard to a number of factors. In a reply memorandum, the plaintiff advised that an order of costs in the sum of $26,768 would be acceptable, together with disbursements.

[3] The Court has a broad discretion as to costs.[3] While guidelines have been developed to assist in approaching the calculation of costs,[4] the Court must reach an assessment of a fair and reasonable contribution to costs in a particular case.

[4] At this point it is convenient to deal with a submission advanced on behalf of the defendant, that the High Court Rules 2016 relating to costs are engaged by virtue of reg 6(2)(a)(ii) of the Employment Court Regulations 2000. I do not accept that is so.

[5] While it is correct that that High Court Rules incorporate provisions relating to costs, it does not follow that those provisions apply in this Court. Regulation 6 provides that:

> **6 Procedure**
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> (1) Every matter that comes before the court must be disposed of as nearly as may be in accordance with these regulations.
>
> (2) If any case arises for which no form of procedure has been provided by the Act or these regulations …, the court must, subject to section 212(2) of the Act, dispose of the case—
>
> (a) as nearly as may be practicable in accordance with—
>
> (i) …
>
> (ii) the provisions of the High Court Rules 2016 affecting any similar case; or
>
> …

[6] The wording of reg 6(2)(a)(ii) is clear: where any case arises in which there is no form of *procedure* under the Employment Relations Act 2000 or the Regulations,

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

3 Employment Relations Act 2000, sch 3 cl 19; and Employment Court Regulations 2000, reg 68.

4 "Employment Court of New Zealand Practice Directions", above n 2.

the Court *must* dispose of the case as nearly as may be practicable in accordance with the provisions of the High Court Rules affecting any similar case. If there is no procedural lacuna reg 6(2) is not engaged.[5] As Judge Shaw pointed out in *Lloyd v Museum of New Zealand Te Papa Tongarewa*, reg 6(2) is "designed to facilitate the passage of cases through the Court in cases where the legislation is silent as to procedure" and does not confer jurisdiction.[6] I respectfully agree with those observations.

[7] It is probably unsurprising that reg 6(2) is confined to procedure rather than extending to substantive matters, reflecting that this is a specialist Court operating in a specialist area of the law, under legislation that sets out a number of objectives which are of particular relevance to the exercise of the Court's powers but which may not be engaged in a court of general jurisdiction. While this Court may from time to time draw assistance from principles and practices developed in the High Court, including as to costs quantification, the core assessment will be directed at what is relevant to the exercise of the discretion in this jurisdiction, consistently with the underlying purposes and objectives of the empowering legislation.

[8] The short point is that costs in this Court are clearly discretionary and there is no procedural lacuna in the Act or Regulations which would otherwise engage the High Court Rules. Further, the provisions in the High Court Rules relating to costs which counsel referred to are not procedural, and so would not be engaged in any event.

[9] The following steps referred to in the Guideline Scale were taken in this case (noting the associated time allocation provided for in the Scale):

- Commencement of proceeding by way of challenge (2 days)
- Preparation for first directions conference (0.4 days)
- Filing memorandum for directions conferences (2 x 0.4 days)
- Appearance at directions conferences (2 x 0.2 days)

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5 See *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 12, [2017] ERNZ 51 at [18].
6 *Lloyd v Museum of New Zealand Te Papa Tongarewa* [2002] 1 ERNZ 744 (EmpC) at [19].

- Preparation of briefs of evidence (2 days)

- Preparation of documentation (2 days)

- Preparation for hearing (2 days)

- Appearance at hearing (time occupied by the hearing measured in quarter days) (1 day 10 July; 0.25 day 11 July; 0.75 day 19 July; 0.5 day 20 July = 2.5 days)

  = 12.1 days x $2,390 per day = $28,919.

[10] Originally costs on an interlocutory issue were sought. That appears to have been resolved, and accordingly no allowance needs to be made for them. It also appears from the plaintiff's reply memorandum that an initial claim in respect of the provision of further particulars is no longer advanced (and is not one I would have made an upwards adjustment for having regard to the circumstances in which they were given).

[11] I now turn to the factors which the defendant submits should lead to a reduction in the costs contribution it should be required to make. There are essentially two matters said to be relevant: a claim that the plaintiff unnecessarily increased the costs he incurred via inadequate pleadings and witness availability; and that he unreasonably declined an offer to settle made in advance of the hearing and made multiple unreasonable counteroffers that prevented further constructive settlement negotiations.

[12] I agree with Ms Butcher, counsel for the defendant, that a reduction ought to be made to reflect unnecessarily incurred costs in relation to the statement of claim, most notably attendance at a telephone conference which would otherwise not have been required.

[13] There were, as Ms Butcher points out, difficulties with two of the plaintiff's witnesses. One was summonsed but did not attend Court on the day he was to appear. A medical certificate was produced, confirming that he was unwell and unable to attend Court that day. While this led to some wasted time, which was unfortunate, there was a reasonable justification for it in the circumstances. I do not consider that

it is a cost reasonably visited on the plaintiff and make no adjustment for that. Another witness did not appear for reasons touched on in my substantive judgment.[7] I accept that time would have been wasted preparing for a witness who did not give evidence, while noting that hearing time was saved in terms of the examination-in-chief and cross-examination which would otherwise have taken place. On balance, and as the plaintiff accepts, it is appropriate to make a modest reduction in respect of this matter.

[14] The defendant further submits that its contribution to costs should be reduced to reflect the fact that its only witness (Mr Purtill) was based in the USA, travelled to New Zealand to give evidence, and that additional costs were incurred as a result of the adjournment to accommodate the plaintiff's witnesses. As the plaintiff's representative, Mr Pa'u, points out, other alternatives were available but were not pursued by the defendant and it was apparent that Mr Purtill was returning to New Zealand for other business in any event. The reconvened hearing dates accommodated his return. I am not satisfied that an adjustment is warranted in the particular circumstances.

[15] The defendant made a financial offer to settle the proceedings prior to the Court hearing. The defendant seeks to rely on the offer to substantially reduce its costs liability, citing the Court of Appeal's observations in *Bluestar Print Group (NZ) Ltd v Mitchell* that a "steely" approach to Calderbank offers is required in support.[8] While the "steely" approach observation is frequently referred to as a basis for submitting that the contribution to a successful party's costs should be substantially reduced, often to nil, the Court of Appeal's judgment should not be interpreted as requiring broad-brush 'steeliness' in the sense of rigidity. Rather the Court of Appeal made it clear that regard must be had to all of the circumstances.[9] All of this is underpinned by s 189 of the Employment Relations Act 2000, which confers jurisdiction on the Court to determine all matters (so including the exercise of discretionary powers to apportion costs as between parties) as in equity and good conscience it thinks fit; and s 3, which sets out a number of statutory objectives which the Court has regard to in exercising

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7 *Pyne v Invacare New Zealand Ltd*, above n 1, at [43].
8 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].
9 See, for example, at [19].

its jurisdiction, including (as the Supreme Court recently emphasised in *FMV v TZB*) to address the inherent imbalance of bargaining power in employment relationships.[10]

[16] A further point may be noted. Remedies in this jurisdiction are currently pitched at a level that mean it will not infrequently make little or no economic sense to pursue the rights conferred on employees under the Act;[11] and the Court of Appeal has emphasised the need for moderation in awards.[12] The impact of adopting a rigid approach to settlement offers at the front end of the litigation process in the face of moderation of awards at the back end is obvious. There is a broader value, including a social value, in minimising unnecessary impediments to parties using the statutory pathway to have their employment concerns determined by a specialist institution which has been specifically designed to do so; and to provide for the sanitising light of day in a range of disputes, not simply those involving large monetary sums.[13] That is likely to lift the expectations of participants in employment relationships generally – in other words, litigation can be more broadly beneficial.[14] I do not read the Court of Appeal's observations in *Bluestar* as cutting across any of this.

[17] The current application for costs does not turn on the above points. That is because I am not satisfied that the Calderbank offer affects the analysis. The defendant had offered a total of five months' lost wages, $18,500 by way of compensation under s 123(1)(c)(i) and $15,000 plus GST as a contribution to Mr Pyne's legal costs. The Court ordered six months' remuneration and $18,000 compensation. Based upon the quantum of those sums alone, the offer was not more beneficial. I put it to one side.

[18] In addition, the offer did not contain an acknowledgment of wrongdoing or an apology, a point that was of particular importance to Mr Pyne. The Court found that

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10 *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 at [1], [46] and [52]; and Employment Relations Act 2000, ss 3 and 189.

11 See *Henderson v Walker* [2019] NZHC 3020 at [17] where a similar point was made in relation to torts concerning dignity, where "damages are likely to be low and not representative of the legitimate personal importance of the claim to the plaintiff".

12 See *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [79]; and reaffirmed in *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [25].

13 This possibility was referred to by the Court of Appeal in *Burns v Attorney-General* [2002] 1 ERNZ 576 (CA) at [31]; and in *Bluestar*, above n 8, at [19].

14 See High Court Rules 2016, r 14.11(3) for an example of how "more beneficial" and larger "sum of money" are interchangeable concepts when it comes to considering Calderbank offers in the High Court.

the company had breached its obligation of good faith to Mr Pyne and ordered a penalty against it, coupled with a finding that Mr Pyne had not contributed to the situation giving rise to his grievance. In that light, refusal of the offer was not unreasonable.[15]

[19] For completeness, I would not have found the offer irrelevant to costs on the basis that it came at a late stage, after considerable costs had been incurred, as Mr Pa'u submitted. The offer came three months before the hearing. While I accept that costs would have been incurred by this time, the reality is that acceptance of the offer would have saved costs and the offer itself made provision for legal costs.[16]

[20] Accordingly, while I have considered the defendant's offer in this case, I do not propose to reduce the costs I would otherwise have awarded to the plaintiff having regard to it. That is because of the quantum of it, and the limited basis on which it was advanced in terms of the interests it was said to address.

[21] Standing back I consider that the figure referred to in the plaintiff's most recent memorandum on costs[17] represents a fair and reasonable contribution to his costs. The plaintiff is also entitled to the claimed disbursements, being the filing fee and hearing fee.

[22] The defendant is accordingly ordered to pay to the plaintiff the sum of $26,768.00 by way of contribution to costs and the sum of $955.76 by way of disbursements within 15 working days of the date of this judgment.

Christina Inglis
Chief Judge

Judgment signed at 2.00 pm on 23 February 2024

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15 *Lancom Technology Ltd v Forman* [2018] NZEmpC 30 at [48]–[52]. See *Xtreme Dining Ltd v Dewar* [2017] NZEmpC 10, [2017] ERNZ 26 at [28]: the correct question in the exercise of the Court's broad discretion is whether the plaintiff acted unreasonably in rejecting the offer.

16 The briefs of evidence, common bundle and submissions had all yet to be filed.

17 Dated 4 December 2023.