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Stevens v Hspag-Lloyd (NZ) Limited [2015] NZEmpC 137 (7 August 2015)

Last Updated: 15 August 2015

IN THE EMPLOYMENT COURT AUCKLAND

[\[2015\] NZEmpC 137](#)

ARC 87/13

IN THE MATTER OF a challenge to a determination
of the
Employment Relations
Authority

AND IN THE MATTER of an application for costs

BETWEEN ANGELIQUE STEVENS Plaintiff

AND HAPAG-LLOYD (NZ) LIMITED
Defendant

ARC 7/14

IN THE MATTER OF a challenge to a costs determination of the

Employment Relations Authority

AND BETWEEN HAPAG-LLOYD (NZ) LIMITED Plaintiff

AND ANGELIQUE STEVENS Defendant

Hearing: By submissions filed on 10 April, 13 and 21 May, and 29
July
2015

Appearances: E Hartdegen, counsel for Mrs Stevens
P Kiely and S Worthy, counsel for Hapag-Lloyd (NZ) Ltd

Judgment: 7 August 2015

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Hapag-Lloyd (NZ) Ltd (Hapag-Lloyd) has applied for costs following my earlier judgment¹ dismissing Mrs Stevens' challenge to a substantive determination

1 *Stevens v Hapag-Lloyd (NZ) Ltd* [\[2015\] NZEmpC 28](#).

of the Employment Relations Authority (the Authority) and upholding Hapag-Lloyd's challenge to the Authority's subsequent costs determination.² Hapag-Lloyd seeks a costs order in relation to these matters of \$60,000, together with a filing fee of \$204.44. Mrs Stevens seeks a substantially reduced order of costs, and an order that costs be repaid by monthly instalment.

Framework

[2] The starting point is cl 19 of sch 3 of the [Employment Relations Act 2000](#) (the Act). It confers a broad discretion as to costs, providing that:

(1) The court in any proceedings may order any party to pay to any other party such costs and expenses ... as the court thinks reasonable.

(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.

[3] Regulation 68(1) of the [Employment Court Regulations 2000](#) (the Regulations) also deals with costs. It provides that, in exercising the Court's discretion under the Act to make orders as to costs, the Court may have regard to "any conduct of the parties tending to increase or contain costs."

[4] The discretion to award costs, while broad, is to be exercised judicially and in accordance with principle. The primary principle is that costs follow the event.³ The usual starting point in ordinary cases is 66 per cent of actual and reasonable costs. From that starting point factors that justify either an increase or decrease are assessed.⁴ I approach the application for costs in this case on this basis.

Actual costs

[5] I accept, based on the material before the Court, that Hapag-Lloyd incurred actual costs of \$88,745.00 (excluding GST) on the two challenges. The actual costs

incurred by Hapag-Lloyd are supported by copies of invoices before the Court.

² *Stevens v Hapag-Lloyd (NZ) Ltd* [2014] NZERA Auckland 1.

³ *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [48].

⁴ *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [14].

Reasonable costs

[6] Mrs Hartdegen, counsel for Mrs Stevens, takes issue with the reasonableness of Hapag-Lloyd's costs, submitting that they are excessive and reflect unnecessary and unreasonable expenditure. She is critical of the fact that the details of counsels' attendances and charge-out rates have not been provided. However, as the Court of Appeal pointed out in *Binnie v Pacific Health Ltd*:⁵

Obviously this kind of information may help, and its absence may invite a degree of caution, but in the end the Court, when considering whether actual costs are reasonable, has to make a judgment, bearing in mind the proper interest of the losing party in the question.

[7] An assessment of reasonable costs ultimately depends on the particular features of the case before the Court, including the steps required at an interlocutory stage. That means that limited assistance can be derived from the quantum of costs ordered in other cases. Two interlocutory matters arose, each on Mrs Stevens' application. An application for leave to have evidence taken by the Registrar was dealt with on an opposed basis. In the event, and following a relatively brief telephone hearing, an order was made enabling a witness to give their evidence in advance of the hearing. Mrs Stevens also advanced a successful application to file a statement of defence out of time in relation to the costs challenge. Hapag-Lloyd took a neutral position on the application and so could not reasonably have incurred any significant cost on it. The attendance of counsel was also required at two telephone conferences. Each of these telephone conferences was brief.

[8] Disclosure issues also arose, at the plaintiff's instigation. While these issues were able to be resolved between counsel, I accept that some additional costs were incurred. In addition, comprehensive and helpful written submissions were prepared traversing all matters in relation to the two challenges before the Court. Following the hearing a memorandum was filed on behalf of Mrs Stevens in relation to remedies. This reasonably required a response, although the issues raised were able

to be dealt with by way of a brief memorandum.

⁵ At [27].

[9] I accept Mr Kiely's submission that the personalised allegations advanced against Mr Carter by Mrs Stevens, and the nature of the allegations made in relation to the company, raised reputational interests which required a comprehensive response. The company was also concerned about the impact of an adverse judgment. This concern was reasonable in the circumstances having regard to the potential broader impact of any decision.

[10] The costs that might reasonably be expected on a first instance hearing will seldom be necessary, or reasonable, on a de novo challenge. That is because evidence and submissions will already have been prepared for the Authority's investigation. In the present case it is apparent that the matters were thoroughly dealt with as the company incurred costs of over \$30,000 in that forum. While I accept that some further time and effort was required to respond to the matters raised by Mrs Stevens on her challenge and on the company's costs challenge, including in relation to the preparation of witness briefs, I do not consider that substantial additional costs would reasonably have been incurred in respect of these attendances.

[11] The hearing ultimately consumed five and a half days. Split hearing time was required, which would have increased costs.

[12] It is apparent that the costs of two counsel have been included in the costs claimed as reasonable by Hapag-Lloyd. The level of resources applied in a particular case is a matter for each party. However, it is not a choice that is automatically visited on the unsuccessful litigant. The Court will need to be satisfied that the nature and circumstances of the case were such that the services of two counsel were reasonably necessary for the presentation of the case. The hearing occupied several days but did not involve overly complex legal or factual issues. The volume of materials was manageable for one counsel. While second counsel took an active role in the hearing, including examining witnesses, that factor alone would not justify the costs associated with an additional appearance. I do not accept that the appearance at hearing of two counsel was reasonably required in this case. My assessment of reasonable costs accordingly excludes the costs associated with second counsel's appearances.

[13] Having regard to the foregoing factors, I consider that reasonable costs in responding to Mrs Stevens' claim and in prosecuting Hapag-Lloyd's costs challenge, each on a de novo basis, would be around \$60,000 (excluding GST). My assessment has been informed by my own knowledge of the case, the nature and scope of the matters at issue and the steps taken in the proceedings.

[14] I adopt a starting point of around \$40,000, being 66 per cent of assessed reasonable costs. By way of cross-check I have considered the sorts of costs that might be awarded under the High Court scale, allowing for the particular attributes of this litigation. This would lead to a broadly comparable figure.

Uplifting factors

[15] Mr Kiely submits that an uplift from the starting point is justified having regard to the conduct of Mrs Stevens' case. In particular it is said that the hearing time was increased by unnecessary and repetitive cross-examination; that hopeless submissions were advanced (including in relation to the Forced Labour Convention); and that time was unnecessarily consumed with witnesses called on behalf of Mrs Stevens whose evidence was of limited assistance. A settlement offer made in advance of the Authority's investigation meeting is also said to be a factor justifying an increase in costs.

Conduct of Mrs Stevens' case

[16] I accept that there were aspects of the conduct of Mrs Stevens' case which unnecessarily increased the time required for hearing. However, there is a need to avoid double accounting. I have already taken these costs into account in assessing reasonable costs. I do not consider that an uplift is warranted in the circumstances.

Relevance of settlement offer made in advance of Authority investigation but not renewed

[17] Hapag-Lloyd seeks to rely on a settlement offer made on a 'without prejudice save as to costs' basis. The offer was made (and rejected) in advance of the Authority's investigation meeting, but was not renewed prior to the hearing in this Court.

[18] Following the filing of the parties' costs memoranda, I drew counsels' attention to two judgments: *Kaipara v Carter Holt Harvey Ltd*, in which it was held that if a Calderbank offer made before an Authority investigation is not renewed it becomes irrelevant as an uplifting factor;⁶ and a judgment of the High Court to contrary effect.⁷ *Kaipara* has recently been followed in *O'Connor v University of Auckland Students' Assoc Inc*.⁸ Counsel were invited to file further submissions, and took up the opportunity to do so.

[19] I agree with counsel for the defendant that the point is answered by the Court of Appeal's judgment in *Bluestar Print Group (NZ) Ltd v Mitchell*.⁹ There the appellant had made an offer to settle, on a 'without prejudice save as to costs' basis, prior to the Authority's investigation. The offer was ignored. The Authority dismissed the respondent's grievance and Mr Mitchell pursued a challenge in the Employment Court. Although Mr Mitchell's challenge was partially successful, he received less than he would have received under the earlier offer. The Employment Court declined to take the offer into account, on the basis that there were reputational

interests at stake that made it reasonable to reject it. The Court of Appeal upheld the appeal, holding that the offer should have been taken into account and that the appellant ought not to be ordered to contribute to the respondent's costs. In doing so the Court of Appeal observed that:¹⁰

It is then necessary to take into account the Calderbank offer, which we accept was more than what he achieved in the Employment Court. *This is*

⁶ *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 92, [2012] ERNZ 395 at [12]–[28].

⁷ See *Tournament Parking Ltd v The Wellington Company Ltd* HC Wellington CIV-2009-485-2508, 19 October 2010 at [4].

⁸ *O'Connor v University of Auckland Students' Association Inc* [2014] NZEmpC 185 at [19(d)].

⁹ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

¹⁰ At [24], (emphasis added).

because the \$13,000 Printlink [Bluestar] offered for compensation and costs before the Employment Relations Authority investigation was more than the

\$11,000 the Employment Court later awarded under those heads. The normal effect of a Calderbank offer is that costs position is reversed. In this

case, the appellant did not seek costs, but rather contended that the costs order against the appellant should be reversed. We agree. *Bearing in mind the offer, the timing of the offer* and other factors relevant to the outcome of

the claim, *we are satisfied that there should have been no award of costs against the appellant in the Employment Court.*

[20] The Court of Appeal was primarily concerned with the correctness of the Employment Court's decision, which was to disregard the offer because the Court believed, incorrectly, that the offer did not address Mr Mitchell's reputational interests. Issues of the sort identified in *Kaipara* are not referred to in the judgment and are not directly addressed. However the timing of the offer (made prior to the Authority's investigation) is expressly referred to as a factor relevant to costs, along with the public policy considerations supporting a "steely approach" to unreasonably declined offers. It is evident that the offer was not renewed prior to the Employment Court hearing and was not expressly stated as having ongoing effect in the event of a challenge. These factors are features of the present case.

[21] It is clear, following *Bluestar*, that an offer of settlement made in advance of an Authority investigation may be relevant to an assessment of costs following a challenge in the Employment Court, even though it has not been renewed and is not expressly stated to have ongoing effect. Even if *Bluestar* is distinguishable, I would have taken the offer into account as an uplifting factor, for the reasons that follow.

[22] It is well established that the effect of an offer to settle is at the Court's discretion. Regulation 68 serves to reinforce the relevance of such offers to an assessment of costs by directing the Court to have regard to any conduct of a party that has tended to increase costs:

... including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.

[23] In the present case the offer was made at an early stage, and well before the hearing in this Court. The focus of reg 68 is on the settlement of the "matters at issue" rather than the particular proceeding before the Court. The matters at issue

between Mrs Stevens and Hapag-Lloyd remained live throughout the lifecycle of the litigation in the Authority and subsequently on Mrs Stevens' de novo challenge. Mrs Stevens was being invited to compromise her entire claim against Hapag-Lloyd, not a step in the resolution of that claim.

[24] There is both a public and a private interest in encouraging early offers of compromise in legal proceedings. The public interest lies in the prompt and economic disposal of litigation, and in discouraging wasteful and unreasonable behaviour by litigants.¹¹ There is also an interest in encouraging employers and employees to resolve matters at an early stage, and to give careful consideration at the outset to their prospects of success if they proceed down the litigation pathway. The statutory focus on alternative dispute resolution reflects this policy objective.

Allowing an offer made before an Authority's investigation meeting to have ongoing effect increases the potential adverse costs consequences for a declining party, and thereby increases the incentive for that party to give the offer careful consideration. That seems to me to be consistent with the underlying purposes of the relevant provisions, including reg 68.

[25] Although made in the context of matrimonial property proceedings, the Court of Appeal's observations in relation to settlement offers in *Moore v McNabb* are apt:¹²

[56] ... Costs can outstrip the value of the subject matter in dispute and for a losing party, the costs of losing a case can be ruinous. It follows that litigants should have some means of limiting their exposure to this risk. A claimant may avoid this risk by abstaining from taking legal proceedings; but a party who is sued has no such alternative. It follows that, in fairness, defendants must have the means of gaining some protection from costs by making offers to settle by in some way meeting the claim. Plaintiffs should also have protection where defendants decline reasonable settlement offers.

[57] Then there are the "public" aspects of litigation. If the parties resort to formal adjudication through state-supported litigation there is distinct public expenditure involved. It was therefore important, as Lord Woolf MR pointed out in *Access to Justice*, the Interim Report on the civil justice system in England and Wales, to have a policy "... to develop measures which will encourage reasonable and early settlement of proceedings". (Chapter 24, at para 1. See also *Final Report*, at chapter 11.)

¹¹ *Bluestar Print Group*, above n 9 at [18].

¹² *Moore v McNabb* (2005) 18 PRNZ 127 (CA), (emphasis added).

[58] In summary, *it is a requirement of fairness that litigants – particularly defendants - have some economic means of limiting their exposure to the risk of costs; and secondly the Court itself must ensure that a procedure of this character operates as an effective encouragement to settle.*

[59] As the Rules recognise, this is not the end of the matter, because the Court is not duty bound to give the defendant who is "successful" (in the sense of making an offer which beats the sum awarded) a costs order. This is because, as Lord Woolf MR explained in *Ford v GKR Construction Ltd* [1999] EWCA Civ 3030; [2000] 1 WLR 1397; [2000] 1 All ER 802:

[T]he normal cost consequence of failing to beat the sum paid in does not apply when it is unjust that it should do so. If a party has not enabled another party to properly assess whether or not to make an offer, or whether or not to accept an offer which is made, because of non-disclosure to the other party of material matters, or if a party comes to a decision which is different from that which would have

been reached if there had been proper disclosure, that is a material matter for a court to take into account in considering what orders it should make (P

[1403; P 810](#)).

[26] There may be some cases in which it would be unfair (for example because a new issue has emerged on a de novo challenge) to give full weight to an offer that has not been renewed before the Court-hearing stage of the litigation process. However, any such issues can be dealt with having regard to the particular circumstances of the case and in the Court's broad discretion.

[27] In the present case the offer was directed at resolving all matters between Mrs Stevens and Hapag-Lloyd arising out of her employment with the company. The letter made it clear that the offer would be relevant to costs. Mrs Stevens declined the offer, although she would have been much better off had she accepted it. I concluded, in the context of the challenge to the Authority's costs determination, that the offer had been unreasonably refused and that an uplift in costs in that forum was appropriate. On the de novo challenge there was no real shift in the scope of the issues or any other factors such that it would be unfair to penalise Mrs Stevens for declining the offer.

[28] I accept that the unreasonable refusal of the early offer of settlement has meant that Hapag-Lloyd has been obliged to incur significant costs in resisting a claim for relief that Mrs Stevens was not entitled to.

[29] Finally, I do not accept the submission that the fact that the offer was taken into consideration in determining an appropriate contribution to costs in the Authority renders it irrelevant for the purposes of determining costs in this Court. That is because they are directed at different sets of costs, both of which were incurred as a result of rejection of the settlement offer.

[30] Hapag-Lloyd Ltd does not seek full costs. Rather it seeks an uplift, to 80 per cent. I consider that an uplift to 80 per cent of reasonable costs is appropriate in the circumstances. This leads to a figure of \$48,000.

Ability to pay and access to justice

[31] It is submitted that the imposition of a substantial award of costs against Mrs Stevens would present real difficulties for her. Mrs Hartdegen mounts a parallel submission that an award of the quantum sought on behalf of Hapag-Lloyd raises access to justice issues.

[32] I have considered, but am not drawn to, Mrs Hartdegen's submission that an order of the magnitude at issue engages access to justice issues and ought not to be made on this basis. The principle does not have immediate application in this case because Mrs Stevens had her right to access the Court, and did so; and had earlier exercised her right to pursue a grievance in the Authority.

[33] Hapag-Lloyd accepts that an unsuccessful party's financial position can be taken into account in relation to setting an award for costs as part of the Court's broad discretion, and that there may be circumstances in which a reduction in a costs award may be appropriate. However, it is submitted that this is not such a case. In *Tomo v Checkmate Precision Cutting Tools Ltd* it was said that while ability to pay is a relevant factor in deciding costs it is not a trump card. The interests of both parties

must be weighed and broader public policy considerations taken into account.¹³ I

adopt the same approach in this case for the same reasons.

¹³ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [16].

[34] It is plain that Mrs Stevens is in a difficult financial position and that a significant award of costs would present challenges for her. I note that this was the position Mrs Stevens found herself in following her unsuccessful grievance in the Authority. There she successfully advanced a claim of financial hardship, persuading the Authority to radically reduce the award it would otherwise have made against her. While Mrs Stevens' claim in the Authority was dismissed, and a modest order of costs was made against her on the basis of financial hardship, she chose to pursue a challenge in this Court. While that is her right, it is a decision that carries risk. In this case the risk was realised, because she failed in her challenge, the Authority's costs award was overturned, and she now faces not only her own legal costs but a further contribution to Hapag-Lloyd's costs.

[35] A contribution to costs of \$23,100 is urged on behalf of Mrs Stevens. This would represent a substantial discount from the quantum of costs which would otherwise be imposed. I do not accept that reducing the order of costs in this case based on Mrs Stevens' financial circumstances would lead to a just result. Effectively it would mean that Hapag-Lloyd would be required to shoulder a substantial proportion of the litigation risk which Mrs Stevens herself decided to take, against the backdrop of an unsuccessful claim in the Authority, in the face of obvious difficulties and against the backdrop of a generous settlement offer. While Hapag-Lloyd may well have deeper pockets, and be in a better position to shoulder the costs burden, that does not in my view provide a principled basis for allocating costs.

[36] Assessment of undue financial hardship requires consideration of the total financial position of the party concerned, including both assets and liabilities and income and necessary expenditure.¹⁴ Mrs Stevens is in a better position than many litigants who come before the Court. Both she and her husband are currently working, with a combined monthly income of just over \$10,400 (net). They have substantial equity in their home (it appears of around \$430,000). They have a family, reasonably high outgoings and some other current liabilities (including costs in the Authority, which Mrs Stevens is taking steps to address), and potential

liabilities. While I am satisfied that payment of a costs award of \$48,000 would

¹⁴ *Bishop v Bennet* [2012] NZEmpC 5 at [30].

cause a measure of hardship to Mrs Stevens, I do not accept, based on the material before the Court, that it would cause undue financial hardship¹⁵ or that it would not be just to impose such an award.

[37] Having regard to all of the circumstances I consider that a costs award of

\$48,000 is appropriate.

Payment by instalments?

[38] Mrs Hartdegen submits that any order for costs should be combined with an order that it be paid by instalments at a rate of \$500 per month. Hapag-Lloyd is opposed to such an order. No authority was cited in support of, or against, the Court's power to make orders for instalment payments.

[39] It is apparent that the Court has occasionally been prepared to make an award of costs subject to payment by instalment over time.¹⁶

[40] Section 189(1) states that:

In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act ... as in equity and good conscience it thinks fit.

[41] Clause 19 of sch 3 of the Act is set out above, but repeated here for convenience. It provides that:

(1) The Court in any proceedings may order any party to pay to any other party such costs and expenses ... as the Court thinks reasonable.

(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.

[42] While it is arguable that the discretion is sufficiently broad to enable the

Court to impose conditions on the way in which an award of costs is to be met, I

15. *Merchant v Department of Corrections* [2009] ERNZ 108 (EmpC) at [32]; *Bishop*, above n 14, at [35].

have reservations about such an approach. While Parliament has conferred an express power to order payment by instalment in satisfaction of monies payable by an employer to an employee under a compliance order,¹⁷ no express provision has been made within cl 19 (or elsewhere in the Act) to enable the Court or the Authority to place such a condition on a costs award. Rather, the emphasis is on an order as to apportionment, and the ability to "vary" or "alter" such an order once made (rather than impose conditions on the way in which the costs order is to be satisfied). The mechanics of how an order is to be met seems to me to be distinct from the order

itself, and a matter of enforcement. Of course it remains open to a party in whose favour a costs order is made to agree to such an arrangement if it considers it to be a pragmatic way of recovering what is owed to it.

[43] Further, it seems to me that s 189 is of limited relevance to the analysis. Relevantly, the twin objectives contained within s 189 (being to support successful employment relationships and to promote good faith behaviour) are couched as the jurisdictional triggers. In the present case it is difficult to see how either objective is engaged in anything other than the broadest possible sense, given there is no ongoing employment relationship.

[44] I do not however need to resolve the issue of the Court's power to order payment of costs by instalment because I would not have been minded to make such an order in any event. Ordering repayments at the rate urged on me would result in monthly payments for a period of approximately eight years. Such a timeframe would not be just to Hapag-Lloyd and is not consistent with the interests of finality.

[45] Hapag-Lloyd claims, and is awarded, \$204.44 by way of disbursements. This relates to the filing fee on its successful challenge to costs, to which it is entitled.

Conclusion

[46] In the circumstances, I make the following orders:

17. See s 138(4A). See too the discussion in *Butterworth v TBA Communications Ltd* [2012] NZEmpC 24, [2012] ERNZ 30 at [22].

(a) Mrs Stevens is ordered to pay to Hapag-Lloyd a contribution of \$48,000 to its costs in defending her challenge and in successfully challenging the Authority's costs determination;

(b) Mrs Stevens is ordered to pay disbursements of \$204.44.

Christina Inglis

Judge

Judgment signed at 4 pm on 7 August 2015

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