IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 2
ARC 99/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	MAPU TOMO Plaintiff
AND	CHECKMATE PRECISION CUTTING TOOLS LIMITED Defendant

Hearing: On the papers filed on 15 and 31 October; 11 and 17 November 2014

Appearances: M Tomo, plaintiff in person
M Beech, counsel for defendant

Judgment: 8 January 2015

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The defendant has applied for costs following the adjournment and subsequent discontinuance of proceedings by the plaintiff, Mr Tomo. The proceedings have a lengthy and unenviable history.

[2] The application for costs engages two key factors – the way in which Mr Tomo pursued his claim (thereby increasing costs) and his constrained financial circumstances. There is an established practice in this Court of having regard to undue financial hardship in assessing costs. This is not altogether free from difficulty, including in terms of application. I return to this issue below.

[3] The starting point is cl 19(1) of sch 3 of the Employment Relations Act 2000 (the Act), which confers a broad discretion as to costs. It provides that:

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

[4] 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.

[5] 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. The usual starting point in ordinary cases is 66 percent of actual and reasonable costs. From that starting point factors that justify either an increase or decrease are assessed.[1]

[6] I accept, based on the material before the Court, that the defendant incurred actual costs of $4,072.50. I also accept that such costs were reasonable in the circumstances, including having regard to the way in which Mr Tomo conducted the proceedings. This leads to a starting point of $2,687.85.

[7] Mr Beech, counsel for the defendant, submits that indemnity costs are warranted on the basis that Mr Tomo took no proper steps to acquire representation or to prosecute his case, and that his conduct has delayed the proceedings causing the defendant to incur increased costs.

[8] I accept Mr Beech's submission that Mr Tomo's conduct has been extraordinarily languid. The most recent adjournment was required because he had failed to take steps to progress his claim. He has been warned on several occasions of the consequences of failing to diligently prosecute his case. By ignoring these warnings, the defendant has incurred unnecessary costs which are directly attributable to Mr Tomo's conduct.

[9] Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious. On balance, I am not persuaded that the conduct in this case falls into this category.

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1 *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

[10] The defendant submitted that Mr Tomo had failed to put before the Court sufficient material to justify any discount on the basis of undue financial hardship. That submission was based on the material Mr Tomo had at that stage filed, namely a handwritten note briefly setting out his position. This was later followed by documentation from the Ministry of Social Development, although not appended to an affidavit. Mr Tomo is now representing himself. I do not understand the defendant to be taking issue with the authenticity of the documentation relied on. Nor did the defendant take up the opportunity to respond to the most recent material filed.

[11] I accept, based on the material before the Court, that Mr Tomo is unemployed, has no assets, has debts owing and that he does not presently have the means to meet an award of costs against him.

[12] As I have said, this Court has a practice of having regard to a party's ability to pay when determining costs. It appears that the approach has its genesis in a judgment of the former Chief Judge in *New Zealand Air Line Pilots Assoc IUOW v Registrar of Unions*, decided under the Labour Relations Act 1987.[2] He articulated a number of principles applying to the Court's discretion to award costs, including that:[3]

> An award of costs should be neither illusory nor oppressive, and in the latter regard ability to pay without undue hardship is a relevant consideration.

[13] This Court's approach to financial circumstances can be contrasted with the approach adopted in other Courts. In the High Court, financial circumstances are seldom taken into account in assessing costs.[4] That means that an unsuccessful party's financial position comes into focus at the enforcement stage.

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2 *New Zealand Air Line Pilots' Assoc IUOW v Registrar of Unions* (1989) ERNZ Sel Cas 304 (LC).

3 At 308. This principle, among others, was restated by Court for the purposes of the Employment Contracts Act 1991 in *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38 (EmpC).

4 See for example *Parts & Services Ltd (No 2) v Brooks* HC Rotorua CIV-2005-463-461, 22 December 2005 at [13]. See also *Laws of New Zealand* Civil Procedure: High Court (online ed) at [24].

[14] In *Merchant v Chief Executive of the Department of Corrections*, Judge Couch said:[5]

> The established principle is that ability to pay should be taken into account if payment of the sum which is otherwise appropriate would cause undue hardship to the plaintiff. Assessment requires consideration of the total financial position of the plaintiff including both assets and liabilities and income and necessary expenditure.

[15] A perusal of the cases suggests that the interests of a successful litigant will largely be displaced where undue financial hardship is established. It further appears that the quantum ordered will be reduced to a point at which payment can be made without undue hardship being incurred, including to nil.[6] Other mechanisms have also been employed from time to time, including orders deferring payment until such time as the unsuccessful party obtains employment.[7] Payment of costs by instalment over time has also been ordered,[8] although the statutory basis for this is unclear. While there is specific legislative authority for the Court to order the payment of remedies awarded against an employer in instalments in certain circumstances,[9] there is no comparable provision in respect of costs.

[16] The approach to financial circumstances raises a number of issues, including the extent to which the opposing party's interests can be protected. While the approach to undue financial hardship in this jurisdiction is said to be based on the broad discretion conferred on the Court, supported by the statutory imperative that the Court exercise its powers consistently with equity and good conscience,[10] there is a risk that the countervailing interests of the successful party (who might also be financially stretched) and broader public policy considerations become marginalised. The principles of equity and good conscience must transcend the interests of simply one party. A broader approach is required.

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5 *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 (EmpC) at [29].

6 See *Prime Range Meats Ltd v McNaught* [2014] NZEmpC 179; *T & R Distributors Ltd v Grimes* EMC Christchurch CC9A/06, 23 November 2006; and *Koia v Attorney General (No 2)* [2004] 2 ERNZ 274 (EmpC).

7 See *Bay Milk Distributors Ltd v Jopson* [2010] NZEmpC 34.

8 See *Whelen v Hagley Community College Board of Trustees* EMC Christchurch CC2A/99, 14 May 1999.

9 Employment Relations Act 2000, s 123(2).

10 Section 189(1).

[17] It might be said that the comparative bargaining strength of the parties to an employment relationship is relevant to the approach to costs. This point was touched on by the High Court in *McGrath v Bank of New Zealand* (a case involving an employment relationship problem), with Greig J observing that:[11]

> While it is clear that there has been a change in the wording of the rule [HCR 46], I think that is more apparent than real. There always has been, and still remains, a judicial discretion which has been a very wide one and which allowed in appropriate cases a refusal of costs to a successful party. The principle under the old rule was what was more fair as between the parties … That, I think, is equally applicable under the new rule and ought to be the primary consideration in this case.
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> The second principle is that the considerations which are to be taken into account *in deciding what is more fair must be those which have a connection with the case…*
>
> These considerations include the way in which the case was presented in the pleadings and the course of the case itself; what were the issues between the parties and whether the hearing was lengthened or shortened by the conduct of the case on either side. *I think that, on the other hand, the financial position of the plaintiff and the relative position of the plaintiff and the defendant are not considerations which are connected with the case. An employee in a case against his employer will always be in a subordinate position and is likely to be less affluent than the employer. That would tend to mean that in every case there would be a preference towards the employee in the award of costs and that is not, in my opinion, either just or right.*

[18] Under what appears to be the current approach, an impecunious litigant can embark on lengthy, and doomed, proceedings free from the spectre of a significant, or any, costs liability. The issues this gives rise to may be said to be reinforced by the restrained approach to orders for security for costs adopted in a number of cases in this Court, requiring exceptional circumstances before such an order will be made.[12] This can be contrasted with the policy considerations identified by the Court of Appeal in relation to costs awards in *Victoria University of Wellington v Alton-Lee*, where it was said that:[13]

> … a monetary judgment will often be of little practical moment to a successful party unless the losing party is required to make a substantial contribution to the costs of obtaining it. Further, *litigation is expensive, time-consuming and distracting and the requirement that a losing party not only pays his or her costs but also makes a subsequent contribution to those*

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11 *McGrath v Bank of New Zealand* (1988) 1 PRNZ 257 (HC) at 258-259 (emphasis added).

12 See *Young v Bay of Plenty District Health Board* [2011] NZEmpC 89 at [13]; and *Kaipara v Carter Holt Harvey Ltd* [2011] NZEmpC 132 at [20]-[24].

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

> *of the successful party undoubtedly acts as a disincentive to unmeritorious claims or defences.*

[19] It could also be argued that the approach to undue financial hardship sits uncomfortably with the approach to be taken to Calderbank offers. Regulation 68 expressly provides that in exercising its discretion to make orders as to costs, the Court may have regard to any offer made by either party a reasonable time before hearing to settle all or some of the matters at issue. In *Bluestar Print Group (NZ) Ltd v Mitchell* the Court of Appeal referred to this as a clear indicator of the relevance of Calderbank offers to costs in the context of proceedings in this Court.[14] It held that the approach set out in the High Court Rules to such offers (namely rr 14.10 and 14.11) was to apply.

[20] The Court of Appeal expressly rejected a submission advanced by Mr Churchman QC, acting as amicus, that a different approach was warranted in the employment context having regard to the nature of employment relationships.[15] This raises a question: if the employment context does not warrant a different approach to Calderbank offers in this Court, what is the basis for applying a different approach to financial hardship? And while there is an express reference to the relevance of Calderbank offers in reg 68, and conduct tending to increase costs, there is a notable absence of reference to the relevance or otherwise of an unsuccessful party's financial position in either the Regulations or the Act.

[21] Finally, there may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

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[14] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [17].
[15] At [20].

[22] There may be circumstances in which a reduced, or no, costs order is appropriate. However, the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account. While Mr Tomo asks that the Court's discretion be exercised in his favour having regard to his personal circumstances, there are a number of factors that do not assist him – most particularly the aggravating features of the way in which his claim was pursued and the unnecessary costs incurred by the defendant as a result.

[23] I do not consider it to be in the overall interests of justice to make no order for costs, or a reduced order for costs, in the circumstances. The defendant ought to have the advantage of a costs order in its favour. I am satisfied that it is just that the plaintiff pay a contribution to the defendant's costs, and that an uplift is warranted having regard to the unnecessary costs the defendant was put to. In the circumstances the plaintiff is ordered to pay the defendant the sum of $3,000.

Christina Inglis
Judge

Judgment signed at 1.25 pm on 8 January 2015