IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2017] NZEmpC 10
EMPC 73/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	XTREME DINING LIMITED TRADING AS THINK STEEL Plaintiff
AND	LEIGHTON DEWAR Defendant

Hearing: (on the papers by submissions filed on 21 and 24 November 2016 and 7 February 2017)

Court: Chief Judge G L Colgan
Judge B A Corkill
Judge K G Smith

Appearances: T McGinn, counsel for the plaintiff
A Lodge, counsel for the defendant

Judgment: 14 February 2017

COSTS JUDGMENT OF THE FULL COURT

Introduction

[1] Mr Leighton Dewar seeks an order for costs, having successfully resisted a challenge as to remedies only which was brought by Xtreme Dining Limited trading as Think Steel (Think Steel).

[2] Think Steel properly acknowledges Mr Dewar's entitlement to costs, but the parties have been unable to agree on the appropriate amount.

[3] By way of background, the Employment Relations Authority (the Authority) determined that Mr Dewar was unjustifiably dismissed after Think Steel concluded he was involved in an incident of theft of petrol by use of a company fuel card, and may have been involved in 27 other similar incidents.[1] It held that the employment investigation was deficient in several respects, so that a fair and reasonable employer could not have decided at the time the dismissal occurred that there had been serious misconduct by Mr Dewar.

[4] The Authority ordered Think Steel to pay Mr Dewar $2,709.08 gross for reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000 (the Act); and that a further sum of $12,000 should be paid as compensation under s 123(1)(c)(i) of the Act, subject to an assessment of contributory fault; that assessment reduced the compensatory award to $10,000.

[5] Multiple grounds of challenge to the remedies imposed by the Authority were advanced. This meant that there had to be a consideration of each individual remedy awarded by the Authority, followed by a consideration of its findings as to contributory fault. Ultimately, the Court concluded that Mr Dewar should receive payment in the same amounts as had been fixed by the Authority, although the Court's reasoning as to contributory fault differed from that of the Authority.

[6] There were two particularly important issues in the case, not only for the parties but more broadly. These included the extent of mitigating obligations on a dismissed employee; and whether s 124 of the Act allows the Authority to apply what was described as a 100 per cent reduction of remedies. That was why the challenge was argued before a full Court, which resulted in a comprehensive consideration of these and other topics. Accordingly, it is appropriate to characterise the proceeding as a test case.

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1 *Dewar v Xtreme Dining Ltd t/a Think Steel* [2016] NZERA Christchurch 19.

Submissions for Mr Dewar

[7] Counsel for Mr Dewar, Ms Lodge, submitted that an assessment of costs under the Court's Guidelines Scale of Costs on a Category 2, Band B basis, produced a total of $20,627.50, exclusive of GST and disbursements.

[8] Ms Lodge also referred to a Calderbank offer which Mr Dewar advanced on 17 May 2016. He said he would settle the matter on these terms:

a) Compensation for hurt and humiliation amounting to $9,500 under s 123(1)(c)(i) of the Act;

b) Compensation for lost wages amounting to $2,709.08 under s 123(1)(b) of the Act; and

c) A contribution to costs incurred with regard to the Authority's investigation meeting, in the sum of $3,500 plus GST, and reimbursement of a filing fee of $71.56.

[9] This offer was declined.

[10] Counsel advised that actual costs incurred by Mr Dewar after the date of that offer were $25,580.30 which included GST. Ms Lodge submitted that, as a result of the Calderbank offer, these costs should be reimbursed in full.

[11] It was also submitted that Mr Dewar's conduct in the proceeding had been exemplary, and that he had been entirely successful in both the Authority and the Court.

[12] With regard to costs in the Authority, the Court was advised that this liability had previously been agreed between the parties; Think Steel would contribute to Mr Dewar's costs in the sum of $3,500 plus GST, and would reimburse $71.56 in respect of a filing fee paid to the Authority. This sum had not been paid to date, and an order was accordingly sought for $4,096.56.

Submissions for Think Steel

[13] Turning to the submissions made for Think Steel, Mr McGinn first submitted that the scale calculation had been undertaken incorrectly because it included reference to an item for preparation of a list of issues, memorandum of agreed facts and preparation of the Court's bundle which had been undertaken by the plaintiff not the defendant. Accordingly, he said the 2B assessment should total $18,397.

[14] Mr McGinn went on to argue that the scale should not be utilised, in any event, because rather than amounting to 66 per cent of Mr Dewar's actual costs which is the underlying presumption of the scale, the scale calculation amounted to 81 per cent of those costs. Accordingly, Mr McGinn submitted that the Court should proceed by taking Mr Dewar's actual costs, and adopt a starting point which was two-thirds of those: $15,107.55. He also argued that GST should not be awarded, having regard to observations made in *Wills v Goodman Fielder New Zealand Ltd*,[2] where it was held in this Court that costs should be GST neutral in accordance with the position in the High Court as to scale costs; the Court also observed that any circumstances which might otherwise have justified the inclusion of GST in an assessment of costs could be ameliorated by the Court exercising its discretion to increase its eventual award beyond the standard 66 per cent starting point.[3]

[15] Mr McGinn said that the use of the scale was inappropriate for further reasons. He said Mr Dewar had filed his evidence late so that an application for leave was required; that he applied to have evidence taken at a distance, which was unnecessary and had required the filing of a memorandum for Think Steel; that cross-examination was unduly lengthy because of extended answers from Mr Dewar; and that in closing a claim for increased awards and lost remuneration had been made which was ill-conceived because there was no cross-challenge as to remedies.

[16] He submitted that for all those reasons the scale should not be used, and that the Court should award approximately 66 per cent of Mr Dewar's actual costs, being $15,000.

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2 *Wills v Goodman Fielder New Zealand Ltd* [2015] NZEmpC 30 at [23].
3 At [23].

[17] Turning to the issue of the Calderbank offer, Mr McGinn submitted that the offer to settle was only $500 below the sum which had been awarded by the Authority; a two per cent compromise. He also said that by the date of the offer, Think Steel had incurred costs and disbursements in excess of $2,000. He submitted that it could not be said Think Steel acted unreasonably in rejecting the offer made, given the modest degree of compromise contained in the offer and the importance of the issues at stake.

[18] Finally, it was submitted that Mr Dewar's financial position, and the difficulties he was experiencing in paying his own costs, related in part to the extent of costs he incurred with regard to the Authority's investigation. It would accordingly be inappropriate to take into account difficulties in paying those costs, when determining the appropriate amount of costs in the Court.

[19] Mr McGinn accepted that the Court should confirm the agreed costs in respect of the Authority's investigation meeting, as described earlier.

Principles

[20] The starting point for the assessment of costs is cl 19 of Sch 3 of the Act. It confers a broad discretion by providing:

> (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.

[21] Regulation 68(1) of the Employment Court Regulations 2000 (the Regulations) also deals with costs. The Regulation is important in this case because 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, including any offer made by either party to the other, a reasonable time for the hearing, to settle all or some of the matters at issue between the parties …

[22] The discretion to award costs must be exercised judicially, and in accordance with principle.

[23] It is well established that the primary principle is that costs follow the event.[4] That means that a successful party will usually be entitled to a contribution to that party's reasonable costs or that partial success in the case should be reflected in a deduction from costs that would otherwise be awarded against that party. Where the fixing of costs proceeds by considering an applicant's actual cost liability, a starting point at 66 per cent of costs reasonably incurred has generally been regarded as helpful in ordinary cases, but careful attention must be given to factors said to justify an increase or a decrease.[5]

[24] In a 2004 judgment, *Health Waikato Ltd v Elmsley*, the Court of Appeal referred to the position as to costs which pertained at the time and observed that although it would be open to the Employment Court to choose to adopt the High Court approach as to costs, it had not done so and that it was perfectly entitled to follow its existing practice.[6]

[25] More recently, in October 2015, the Judges of this Court adopted a scale of costs that would guide them in making cost orders pursuant to the discretion described in cl 19 of Sch 3. This followed a consultative process involving employment law practitioners and various organisations, and was to be trialled in the period 1 January 2016 to 31 December 2016 (now extended to 31 December 2017). The Practice Direction emphasised that the Guideline Scale was intended to support, as far as possible, the policy objective that the determination of costs be predictable, expeditious and consistent; but it was 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. The Guideline Scale would be a factor in the exercise of that discretion.

[26] Consistent with those objectives, an applicant for costs may not need to disclose his, her or its actual costs, with the consequence that these could be set with

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4 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
5 *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
6 *Health Waikato Ltd v Elmsley* [2004] 1 ERNZ 172 (CA) at [51].

regard to the scale. That said, there may be cases where it is important to know what the actual costs were. In the present case, counsel for Mr Dewar provided that information when making his application for costs, and both parties made submissions about that information which we will need to consider shortly.

[27] A brief comment should be made regarding the approach to an offer made on a Calderbank basis. Express reference to such a possibility is contained in reg 68, as already noted. The relevance of Calderbank offers could hardly be clearer, as noted by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell*.[7] The same Court also observed that the public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs;[8] and it has been observed more than once by that Court that a "steely" approach is required.[9]

[28] Mr McGinn submitted that in respect of the Calderbank offer made in this case, the issue was whether Think Steel had acted unreasonably in rejecting it. We agree that in the exercise of the broad discretion under reg 68, that is the correct question having regard to the fact that a plaintiff rejected a defendant's offer. It is an issue to be assessed on the basis of the circumstances which existed at the time of the rejection and not against the subsequent result. A range of factors may need to be considered such as the amount of the claim, the reasonable expectations of the party that refused the offer, whether the proceeding concerned an uncertain area of law and whether the parties were in a position to assess the merits when the offer was received. Such considerations as these will arise from a consideration of the conduct of the parties which tended to increase or contain costs, as required by reg 68.

[29] We approach the assessment of costs in this case with regard to the foregoing principles.

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7 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [17].

8 At [18].

9 *Health Waikato Ltd v Elmsley*, above n 6 at [53] and *Bluestar Print Group (NZ) Ltd v Mitchell*, above n 7 at [20].

Discussion

[30] We begin by considering Mr McGinn's submission as to whether the 2B scale assessment, advanced on behalf of Mr Dewar, was correctly calculated.

[31] We accept the submission that Item 38 should not apply, for the reason Mr McGinn gave: the plaintiff undertook the relevant step, not the defendant. Removing that item results in a figure of $18,397.[10]

[32] We have cross-checked the scale figure against the information provided in respect of Mr Dewar's costs. The scale is predicated on the basis of a 66 per cent contribution to what would normally be considered reasonable costs. We accept Mr McGinn's submission that the use of the scale in this case would lead to a significantly higher than usual starting point for the assessment of costs. In these unusual circumstances, we favour an approach that requires an assessment which is based on Mr Dewar's actual costs.

[33] We are satisfied that Mr Dewar's total costs of $22,650 (exclusive of GST) were reasonably incurred, especially when compared with a scale assessment.

[34] The key question is what proportion of those costs should be awarded. A 66 per cent starting point is $14,949 (exclusive of GST).

[35] We turn next to the effect of the Calderbank offer. By the time of the offer, the factual issues were clear, because the parties had already participated in a hearing about them. Think Steel was well placed to make a realistic assessment as to its prospects of success.

[36] A key submission for the company related to the contention that the Act permits the Authority and the Court to award nil remedies; and that this case was one where such an approach should be adopted.

[37] Although there was a legitimate basis for advancing such a submission in law, it was very optimistic to assume that the facts of this case could lead to such an

[10] With reference to Items 2, 11-13, 36, 39 and 40; a total of 8.25 days at $2,230 per day.

outcome. So much should have been evident, since Think Steel was well placed to assess the merits realistically. This did not occur. The offer was declined and the challenge proceeded. The declinature of the offer led to unnecessary time and expense being expended in resisting the challenge.

[38] Mr Dewar then had to meet the cost of arguing multiple issues, two at least of which were very significant. These circumstances justify an increased contribution to his costs.

[39] Although we note the difficulties experienced by Mr Dewar in meeting his financial obligations, those principally relate to the Authority's investigation meeting; we are not persuaded that this factor should result in a yet further uplift.

[40] We have considered the submission made by Mr McGinn as to whether there should be a discount because of the procedural issues to which he referred; we do not think these are of such significance as to result in a reduction of the costs contribution.

[41] Standing back, we have concluded that Think Steel should contribute to 80 per cent of Mr Dewar's actual costs, being $18,120, exclusive of GST.

[42] We consider next the topic of GST. The Court of Appeal recently considered this issue in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC.*[11] The Court was required to fix costs for the purposes of an appeal. It took the opportunity to end what it described as "the uncertainty that has existed for many years over GST on costs and disbursements", by laying down principles which would apply to costs awards under the High Court Rules, and in appeals.[12] Although this Court is not bound by the conclusions reached on that occasion since the Court of Appeal was not considering the costs regime of the Act, it is helpful to consider the observations which were made.

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11 *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 27 NZTC 22-058.

12 At [5].

[43] The Court of Appeal considered the position with regard to scale costs, increased costs, and indemnity costs. Of those categories, the second should be considered, given the conclusions we have reached.

[44] Of this category, the Court of Appeal stated that in exercising its overriding jurisdiction as to costs, the Court could take into account the costs actually incurred by the successful party, including, where applicable, the GST component of those costs.[13]

[45] We conclude that this approach should be adopted by the Court when exercising its discretion under reg 68. This is because we do not think there is any logical reason for Mr Dewar, who we are advised is not GST registered, should be liable for a GST sum that he cannot recover, but which he would recover if he was GST registered. Accordingly, in the exercise of the Court's discretion we conclude that GST calculated with reference to the assessed contribution to costs, $18,120, should be awarded, which is $2,718.[14]

[46] Mr Dewar has also been invoiced for disbursements. We do not consider it appropriate to include the amount incurred for copying, postage and forms of $36.50; but it is appropriate that he be reimbursed for expenses paid to the library of the New Zealand Law Society, in the total of $96.60, given the extent of legal research which was understandably undertaken on his behalf for the purposes of this test case.

[47] Finally, the parties are agreed that costs incurred in the Authority, $4,025, and the filing fee disbursement of $71.56, should be paid by Think Steel. An order will be made in these terms, by consent.

Conclusion

[48] Think Steel is to pay Mr Dewar costs and disbursements as follows:

a) Costs with regard to this proceeding, including GST,

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13 At [11].

14 Mr Dewar's full GST liability was greater, but he is to be reimbursed in respect of that proportion which applies to the costs contribution fixed by the Court.

		in the sum of:	$20,838
	b)	Disbursements with regard to the challenge:	$96.60
	c)	Agreed contribution to costs incurred in the Authority, including GST:	$4,025
	d)	Agreed reimbursement of the filing fee in the Authority:	$71.56

[49] The total liability is accordingly $25,031.16

B A Corkill
Judge
(for the full Court)

Judgment signed at 2.20 pm on 14 February 2017