IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 120
EMPC 299/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	JUDEA TAVERN LIMITED Plaintiff
AND	PATRICIA JESSON Defendant

Hearing: By memoranda of submissions filed on 7 and 19 July 2017

Appearances: K Single, advocate for plaintiff
D Vinnicombe, advocate for defendant

Judgment: 3 October 2017

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The defendant has applied for costs against the plaintiff, following an unsuccessful challenge[1] to a determination of the Employment Relations Authority.[2]

[2] The defendant seeks an award of $7,500 (plus GST) in respect of her costs on the plaintiff's challenge; $4,500 (plus GST) by way of contribution to costs in the Authority; and costs of $1,500 (plus GST) for attendance at an unsuccessful mediation. Mr Single, advocate for the plaintiff, accepts that costs should follow the event. However, he submits that the costs sought by the defendant are excessive and are not otherwise justified. In this regard it is said that an award of $4,500 (including GST) would be appropriate.

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1 *Judea Tavern Ltd v Jesson* [2017] NZEmpC 82.
2 *Jesson v Judea Tavern Ltd* [2016] NZERA Auckland 351.

Costs on the challenge

[3] During the course of a telephone directions conference it was agreed that costs in these proceedings would be calculated applying Category 1B of the Court's pilot guideline scale, absent good reason not to do so.[3]

[4] The quantum sought by the defendant falls well within the amount that would follow an application of scale costs. I accept that the sum sought by the defendant represents an appropriate contribution to her costs in the circumstances.

GST – Court costs

[5] The defendant has couched her claim for costs as a quantum "plus GST". It is well settled that GST has no role in awards of costs. By that I mean that such awards simply do not engage the Goods and Services Tax Act 1989. As a result there is no GST component for which the successful party needs to account to the Commissioner of Inland Revenue and, conversely, no GST component which the losing party can claim back from the Commissioner of Inland Revenue.

[6] Costs awards are often referred to as "GST neutral". The use of the word "neutral" may give rise to a degree of confusion in that it might be taken to imply that the GST regime is engaged in some sort of limited, albeit cross-cancelling, way. That is not the case. The GST regime is directed at imposing a tax on the supply of goods and services. As the Court of Appeal recently observed in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC*, when considering the issue of the relevance of GST to costs awards: "… the losing party is not paying for a service provided to it by the successful party or its lawyers."[4] It follows that the GST regime is not engaged at all.

[7] Unlike in the GST treatment of the costs award itself, where GST does potentially have a role to play is in establishing the quantum of the costs to be

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3 Employment Court of New Zealand Practice Directions "Costs - Guideline Scale" at 18; <www.employmentcourt.govt.nz/legislation-and-rules >.

4 *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 23 PRNZ 260.

awarded. In *Knapp v Locktite Aluminium Specialities Ltd* I attempted to set out some examples highlighting the impact of litigation expenses on a non-GST registered party versus the same quantum of litigation expenses on a GST registered party.[5] I later observed (in *Ritchies Transport Holdings Ltd v Merennage*) that it was unclear as to whether or not the introduction of a guideline costs scale in this Court would put the issue of an uplift in an award to compensate the successful, but GST unregistered, litigant to rest.[6] I went on to observe that, unlike the position in other courts, in this Court a significant proportion of litigants (employees) are unregistered for GST. As a result, adopting a blanket approach of failing to take into account the GST registration status of a successful party when considering an uplift to a costs award would have the effect of financially disadvantaging a substantial proportion of litigants in this jurisdiction, namely where the successful litigant is an employee.

[8] Since that time, the Court of Appeal has delivered its decision in *Event Management*, clarifying the position in relation to GST in the High Court.[7] The judgment was subsequently referred to by a full Court in *Xtreme Dining Ltd v Dewar*,[8] although the Court declined to express a view (because it did not need to do so) in relation to the extent to which the issue of GST may, or may not, impact on scale costs in this Court.

[9] It seems to me that the Court of Appeal's judgment clarifies two issues of particular importance. The first was the confirmation that the purpose of scale costs is to:[9]

> … [represent] a *reasonable contribution* to the costs actually and reasonably incurred. Importantly, the assessment of what constitutes a reasonable contribution does not depend on the actual costs incurred by the successful party. This distinguishes scale costs from other types of costs awards.

[10] It follows that the purpose of the scale (or daily rate) is to provide a clearly established measure of what is objectively considered a reasonable quantum of contribution to the actual costs of a successful party, regardless of what the actual

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5 *Knapp v Locktite Aluminium Specialities Ltd* [2015] NZEmpC 124.
6 *Ritchies Transport Holdings Ltd v Merennage* [2016] NZEmpC 22, [2016] ERNZ 107.
7 *Event Management*, above n 4.
8 *Xtreme Dining Ltd v Dewar* [2017] NZEmpC 10.
9 *Event Management*, above n 4, at [9] (footnotes omitted).

costs of that successful party were. This is, of course, subject to the Court's overriding discretion to uplift or reduce an award based on circumstances peculiar to the particular case before it.

[11] The second is the Court of Appeal's observation that:

> [11] *The Court has an overriding discretion in making costs awards. That includes a power to order increased costs. In so ordering, the court uplifts from scale*, rather than awarding a percentage of the actual costs incurred; but *it may take into account the costs actually incurred by the successful party, including, where applicable, the GST component of those costs*.
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> [12] *If the successful party is not able to recover GST, it should inform the Court, so the Court has the opportunity to take this into account*. Otherwise, the Court will follow its usual practice of awarding increased costs on the basis that the successful party is GST-registered and able to recover GST.
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> (footnotes omitted, emphasis added)

[12] It follows that the GST registration status of the successful party is a material factor in determining whether or not an uplift is appropriate, whether from scale or otherwise. All of this leads me to the conclusion that, as the defendant is not able to recover GST, it is appropriate to take this into account and uplift to reflect that. That means the defendant is entitled to the sum of $7,500 plus an uplift of $1,125 in respect of the plaintiff's costs on her challenge.

Costs in the Authority

[13] The defendant seeks a contribution to costs in the Authority, such costs not having been fixed in that forum.

Can the Court order costs in the Authority?

[14] An issue arises as to whether the Court may order costs in such circumstances. In *Eniata v AMCOR Packaging (New Zealand) Ltd* it was said that:[10]

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[10] *Eniata v AMCOR Packaging (New Zealand) Ltd* EmpC Auckland AC19A/02, 24 May 2002 at [2].

> … This Court cannot determine costs in the Employment Relations Authority at first instance. The statutory provision for doing so empowers the Authority alone to make orders for costs. Whilst the position is different where there is a challenge to the Authority's decision on costs, no decision has yet been made in this case in that forum. It is for the Employment Relations Authority to itself determine what costs, if any, Mr Eniata should be called upon to pay to AMCOR.

[15] A different view was subsequently adopted in *Good Health Wanganui v Burberry*, where Judge Shaw made the point that while it would be open to the Court to remit costs back to the Authority for determination she did not consider it reasonable to put the parties to the trouble and expense of a separate application in that forum.[11] Rather, she considered that the Court could deal with costs under its broad discretionary powers conferred by cl 19 of sch 3 to the Act.[12]

[16] The unsettled nature of the issue was revisited by a full Court in *PBO v Da Cruz*.[13] There the Court observed that:

> [12] Clause 19 of Schedule 3 confers wide discretionary powers on the Court to award costs.
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> **19. Power to award costs**
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> (1) The Court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the Court thinks reasonable.
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> (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.
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> [13] We find that the words "in any proceedings" refers to proceedings in both the Authority and the Court. If an award of costs by the Authority is challenged or is relevant to a challenge, it is open to the Court to adjust the Authority's costs award if the outcome of the substantive case in the Court warrants that.
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> [14] The question … about the extent of the Court's powers to make an award of costs in relation to Authority investigation meetings has been considered by the Court in a number of different contexts including where:

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11 *Good Health Wanganui v Burberry* EmpC Wellington WC2/03, 12 February 2003 at [7].

12 At [7].

13 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC), (2006) 7 NZELC 98,128, (2005) 3 NZELR 1.

- A substantive determination is made by the Authority and is challenged de novo by one of the parties before the Authority makes any order as to costs: Can the Court make an order that encompasses the costs in the Authority?

- A de novo challenge against an Authority determination, which includes an award of costs by the Authority succeeds: Can the Court make an award of to cover the successful challenger's costs in the Authority?

- Where there has been a direct challenge to the costs determination as in this case.

> [15] There are arguably conflicting decisions of the Court on these issues and we take this opportunity to settle the question of the Court's powers in relation to both this case and the other scenarios we have listed.

[17] The full Court's judgment has since been interpreted as holding that this Court is empowered under cl 19 of sch 3 to make an award of costs for proceedings in the Authority in circumstances where costs have been reserved but not determined in that forum.[14] It is not entirely clear to me that the full Court did in fact settle the point. Paragraph [13] of the *Da Cruz* judgment appears to be predicated on a costs decision having been issued in the Authority, and the first bullet pointed question posed at [14] is not otherwise expressly dealt with in the Court's subsequent analysis.

[18] I deal with the issue on the following basis. Costs in the Authority have not been dealt with. They arise for determination having regard to the outcome of the substantive case in the Court. It makes little sense to require the parties to incur the additional expense and delay of returning to the Authority. The Court has a broad discretion to fix costs in proceedings and I consider it appropriate to determine a reasonable contribution to costs in the Authority in the present case, following the plaintiff's unsuccessful challenge.

The daily rate

[19] The defendant seeks an application of the current generally applied daily rate in the Authority (namely $4,500, plus GST). The plaintiff's representative submits

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[14] *Gaut v BP Oil New Zealand Ltd* [2011] NZEmpC 111 at [25] referring to *Da Cruz*, above n 13 at [13] in support.

that this is at odds with a previous indication, contained in a letter dated 19 October 2016, that the defendant would be content with the sum of $3,500. It appears that this indication was given in an effort to agree costs, which did not prove possible. An indication of the sort given in the present case does not amount to a binding agreement. It is appropriate that the defendant recover the applicable daily rate.

GST – Authority costs

[20] I consider an uplift to reflect the fact that the defendant is unable to recover GST is appropriate for the reasons set out above. I see no reason in principle to adopt a different approach to the GST issue in the Authority as opposed to the Court.

Mediation costs

[21] The defendant seeks an additional amount to reflect the costs said to have been associated with attending an unsuccessful mediation. Assuming that such costs are available in principle (although there is conflicting authority on this point),[15] I am not satisfied that an adequate basis has been made out for such an award in the present case. Mere assertions as to a party's motivations in relation to attendance at mediation do not suffice.

Disbursements

[22] The defendant seeks disbursements totalling $800. The Court may order disbursements where it is satisfied that they were necessarily incurred in the proceedings and are reasonable in amount. I am not satisfied on either score.

[23] The claimed disbursements relate to travel and accommodation to attend the Authority's investigation meeting and subsequent Court hearing in Tauranga. It is unclear why a case such as this required the involvement of an out of town advocate

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[15] See, for example, *Jinkinson v Oceana Gold (NZ) Ltd* [2011] NZEmpC 2; *RHB Chartered Accountants Ltd v Rawcliffe* [2012] NZEmpC 31, [2012] ERNZ 51. Compare *Naturex Ltd v Rogers* [2011] NZEmpC 9, (2011) 8 NZELR 251; *Quan Enterprises Ltd v Fair* [2012] NZEmpC 62.

and why the costs incurred by the defendant in deciding to instruct a representative from outside Tauranga should be visited on the plaintiff.

[24] I decline to order any disbursements in the defendant's favour.

Result

[25] The plaintiff is accordingly ordered to pay to the defendant the following sums:

(a) $8,625 by way of costs contribution in the Court on the challenge; and

(b) $5,175 by way of costs contribution in the Authority.

[26] The amounts ordered against the plaintiff must be paid to the defendant within 21 days of the date of this judgment.

Christina Inglis
Chief Judge

Judgment signed at 1 pm on 3 October 2017