

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 185
ARC 90/13**

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

AND IN THE MATTER of an application for costs

BETWEEN TOM O'CONNOR
Plaintiff

AND AUCKLAND UNIVERSITY
STUDENTS' ASSOCIATION
INCORPORATED
Defendant

Hearing: (by memoranda filed on 28 August and 3 September 2014)

Counsel: G Pollak, counsel for the plaintiff
B Scotland, counsel for the defendant

Judgment: 2 October 2014

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This costs judgment follows the Court's substantive decision of 8 August 2014.¹ The Court was required to resolve Mr O'Connor's claim that he was unjustifiably dismissed without notice from his employment. This followed a lengthy disciplinary process concerning seven allegations which centred on whether appropriate financial information had been provided by Mr O'Connor to the Executive of the Auckland University Students' Association Incorporated (AUSA), whether its financial affairs had been properly maintained, and whether there had been compliance with AUSA's tendering policy and recruitment policy.

¹ *O'Connor v Auckland University Students' Assoc Inc* [2014] NZEmpC 143 [Substantive judgment].

[2] The proceeding was a challenge to a determination of the Employment Relations Authority (the Authority).² The Authority had dismissed Mr O'Connor's claim.

[3] My conclusion was that the decision to dismiss Mr O'Connor was one which a fair and reasonable employer could have made in all the circumstances at the time. I found that the serious misconduct decision was appropriate, and that there were no significant procedural defects.³ The dismissal was held to be justifiable.

[4] The Authority awarded the defendant costs in the sum of \$10,000.⁴ That determination was not challenged.

[5] It is also relevant to mention that the defendant made a Calderbank offer to the plaintiff to settle matters prior to the Authority investigation meeting, which was rejected.

[6] The final preliminary matter is that the Court issued a judgment on an interlocutory application for security for costs.⁵ The Court ordered that Mr O'Connor pay security for costs in the sum of \$15,000. The Court also made an order staying the enforcement of the Authority's costs order until further order of the Court. Costs in respect of the interlocutory application itself were reserved.

Defendant's application for costs

[7] Counsel for AUSA submitted that the defendant incurred a total liability for costs in the sum of \$36,782.32 including disbursements and GST; included in that figure was the sum of \$1,686 for air travel and accommodation since counsel was from out of Auckland. It was submitted that two-thirds of the total sum is \$24,521.55, but AUSA seeks a contribution towards its costs of \$22,000 which takes into account the following facts:

- a) That a Calderbank offer (that is, without prejudice save as to costs) was rejected.

² *O'Connor v Auckland University Students' Assoc Inc* [2013] NZERA Auckland 484.

³ Substantive judgment, above n 1, at [197].

⁴ *O'Connor v Auckland University Students' Assoc Inc* [2014] NZERA Auckland 34.

⁵ *Auckland University Students' Assoc Inc v O'Connor* [2014] NZEmpC 82.

- b) That while Mr O'Connor is now in paid employment, he spent a considerable period of time out of employment.
- c) That counsel from outside of Auckland was engaged by the defendant, the costs of which are not generally able to be claimed, as are some of the administrative costs.

[8] It was submitted that the amount sought was reasonable and consistent with the Court's observations in the interlocutory judgment, where when assessing the appropriate sum for security for costs it held that in respect of a four-day case under sch 3 to the High Court Rules, a successful party could expect an order for costs in the sum of \$22,000.⁶

[9] An order was sought that the sum paid into Court as security for costs, \$15,000, be paid to the defendant together with accrued interest as partial satisfaction of any costs awarded.

Plaintiff's response

[10] It was submitted AUSA was only partially successful with regard to the interlocutory application in that \$20,000 had been sought as security for costs, but only \$15,000 was ultimately directed to be paid to into Court.

[11] It was submitted there was nothing extraordinary in the conduct of the case, and it was accepted that the parties had cooperated with all timetabling requirements being met.

[12] The sum incurred for costs by AUSA was, it was submitted, significantly greater than Mr O'Connor's costs by almost 50 per cent. Counsel for the plaintiff could not point to any aspect of the defendant's costs as evidenced by its invoices that was unreasonable, except for the disbursements for out-of-town counsel.

[13] The main submission made for Mr O'Connor related to his financial circumstances, about which evidence was given during the Court hearing. It was submitted:

⁶ At [24].

- a) He was out of work for most of one year.
- b) He attempted to obtain employment but was unsuccessful.
- c) He moved to Australia.
- d) He had to sell his house.
- e) He and his wife lived off their equity following the house sale.
- f) He has suffered detrimentally as a result of the dismissal.

[14] It was submitted that with regard to the circumstances reviewed by the Court, Mr O'Connor had the interests of AUSA at heart and his misconduct could not be characterised as "the usual sort of employment misconduct that comes before the Employment Relations Authority or the Employment Court".

[15] It was therefore submitted in summary:

- a) Costs normally follow the event.
- b) However the plaintiff is in a precarious financial position and his evidence was not challenged or questioned in that regard.
- c) The successful defendant is entitled to "some costs".
- d) The Court has considerable discretion, and the practice of ordering a payment of two-thirds of a succeeding party's reasonable costs is not always ordered. It was submitted this was a situation where the Court should not proceed on that basis.

[16] It was also noted that a payment is due to the Ministry of Justice in respect of a hearing fee, in the sum of \$1,001.76.

Discussion

[17] As both counsel correctly pointed out, the Court should proceed by deciding whether the actual costs were reasonably incurred, with an adjustment to be made if they were not. Then it is necessary to appraise all relevant factors and to determine

what is reasonable for the unsuccessful party to contribute. A starting point of two-thirds is generally regarded as helpful in ordinary cases. However, careful attention must be given to factors said to justify an increase or a decrease.⁷

[18] Counsel for AUSA has responsibly acknowledged that costs incurred by out-of-town counsel being engaged cannot be claimed. Making an adjustment to the invoiced sum by excluding disbursements relating to flights, accommodation and meals, the costs of AUSA are approximately \$35,300 including GST. I conclude that the two-thirds figure of \$23,500 is a reasonable starting point.

[19] There are then four particular factors which should be considered:

- a) The first relates to Mr O'Connor's financial circumstances which can be relevant to a costs assessment.⁸ Mr O'Connor's unchallenged evidence was that he was unable to obtain employment for a significant period of time, and ultimately decided he had to move to Australia. In this process his capital has been eroded. For a person of Mr O'Connor's age, his financial circumstances are far from positive. I also take into account the obligation that Mr O'Connor now has to pay the costs arising from the Authority's investigation meeting. Hardship is established on the evidence. This factor justifies a decrease in the assessment.
- b) I also take into account the assessment made by this Court when fixing security for costs, although the assessed sum was on the basis of an anticipated four-day hearing, when in fact the hearing occupied three days.
- c) I also note the submission made that Mr O'Connor's costs were considerably less than those of AUSA. Without having a breakdown of Mr O'Connor's costs, I can only take that factor into account in a general way.

⁷ *Binnie v Pacific Health Ltd* [2002] 1 ERNZ (CA) 438 at [14].

⁸ *Walker v ProCare Health Ltd* [2012] NZEmpC 186 at [32].

- d) Counsel for the defendant submitted that a Calderbank offer which was advanced prior to the Authority investigation meeting should be considered. However such an offer, if made before an Authority investigation and not “remade” prior to a Court proceeding, is ineffectual for costs purposes in this Court.⁹ Accordingly, this factor cannot be considered in the present context.

[20] Balancing all factors, I consider an appropriate order for costs is determined by allowing AUSA to be paid the balance of the amount paid for security for costs, after payment of the outstanding hearing fee.

[21] Accordingly, I order:

- a) The sum of \$15,000 and accrued interest currently held by the Court is to be applied as follows:
- \$1,001.76 shall be paid to the Ministry of Justice in respect of the outstanding hearing fee.
 - The balance of \$13,998.24, plus accrued interest on the sum of \$15,000, shall be paid directly by the Registrar to AUSA as its Court awarded costs with regard to this proceeding.
- c) The order of stay of execution of the Authority’s order of costs is now discharged.

B A Corkill
Judge

Judgment signed at 9.30am on 2 October 2014

⁹ *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 92, [2012] ERNZ 395 at [12]-[28].