IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 98
ARC 22/11

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	PREMIER EVENTS GROUP LIMITED First Plaintiff
AND	BA PARTNERS LIMITED (IN LIQUIDATION AND RECEIVERSHIP) Second Plaintiff
AND	MALCOLM JAMES BEATTIE First Defendant
AND	ANTHONY JOSEPH REGAN Second Defendant
AND	PATRICIA PANAPA Third Defendant
AND BETWEEN	MALCOLM JAMES BEATTIE First Plaintiff
AND	ANTHONY JOSEPH REGAN Second Plaintiff
AND	PATRICIA PANAPA Third Plaintiff
AND	PREMIER EVENTS GROUP LIMITED First Defendant
AND	BA PARTNERS LIMITED (IN LIQUIDATION AND RECEIVERSHIP) Second Defendant

Hearing:	by memoranda of submissions filed on 20 February, 17 and 31 March, 16, 22 and 28 April and 1, 8, 12 and 15 May, 2 and 12 June 2015
Appearances:	A Lloyd, counsel for Premier Events Group Limited J Eichelbaum, counsel for Malcolm James Beattie, Anthony Joseph Regan and Patricia Panapa D Neutze, counsel for BA Partners Limited (in liquidation and receivership)
Judgment:	24 June 2015

INTERIM COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] Malcolm Beattie, Anthony Regan and Patricia Panapa seek orders for costs arising out of their successful claims and/or defences of claims against them as determined by the judgment of the Court issued on 17 December 2014[1] and as recalled and reissued under the Court's supplementary judgment issued on 9 February 2015.[2]

[2] As this judgment was about to issue, Mr Regan applied to the Court for costs to be awarded to him against persons who were not parties to the litigation, what might be described as Robert Gill's personal and family corporate entities. Although pointing out to counsel for Mr Regan that cl 19 of sch 3 to the Employment Relations Act 2000 (the Act) only empowers the Court to award costs against parties to litigation, I nevertheless allowed BA Partners Limited (in liquidation and receivership) (BAPL) to be heard in opposition to Mr Regan's application in an effort to deal with all costs questions, in respect of those affected causes of action, compendiously. BAPL's entitlement to respond was, however, overtaken by Mr Eichelbaum's notification on 12 May of Mr Regan's abandonment of that application having considered the non-justiciability point that I had formerly raised. In any event BAPL made no submissions on costs.

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[1] *Premier Events Group Ltd v Beattie* [2014] NZEmpC 231.
[2] *Premier Events Group Ltd v Beattie* [2015] NZEmpC 9 (supplementary judgment).

[3] Nevertheless, in his final submissions in reply filed on 12 June 2015, Mr Regan appeared to revive his costs claim, although this time against Premier Events Group Limited (PEGL). This is on the basis of what Mr Eichelbaum described as the commonality of ownership of both BAPL and PEGL.

[4] Counsel relied on a number of High Court precedents to submit that the High Court can make personal orders against the liquidators of a company. Mr Eichelbaum acknowledged that what he describes as an "anomalous provision in the Employment Court Regulations prevents recovery against the proprietor or receivers or liquidators that ordinarily would be recoverable …". Counsel submitted, nevertheless, that a general costs jurisdiction is sufficiently broad to make PEGL liable for the costs award in Mr Regan's favour, citing *Bradley v Put* where Tipping J said:[3]

> The power to make costs orders is a general power under the Rules and I think there is jurisdiction on the costs front either to exonerate one of several joint parties from costs or to order costs between joint parties inter se.

[5] Mr Eichelbaum presses the point that both PEGL and BAPL are 80 per cent owned by the Robert Gill Family Trust.

[6] For several reasons I have decided not to take this belated step urged on the Court by Mr Eichelbaum. Submissions in reply should be strictly that; and it would extend further an already attenuated conclusion of the proceedings by now hearing from PEGL on the question. That is especially because Mr Regan has already taken the opportunity to seek to join a non-party but has abandoned that application. Finally, cl 19 of sch 3 to the Employment Relations Act 2000 (the Act) makes it very clear that the Court is empowered to make awards of costs only against parties to litigation. That is not the same situation as may apply in the High Court. I understood Mr Eichelbaum to acknowledge the force of this provision when he earlier applied to join another party to the proceedings for the purposes of costs but, as I have already mentioned, abandoned that application. For these reasons, I do not propose to order that any costs that may be payable to Mr Regan, be paid by PEGL and have, therefore, not needed to hear from the corporate parties on this issue.

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[3] *Bradley v Put* (1994) 8 PRNZ 194 at 195.

[7] Ms Panapa successfully defended PEGL's claims against her. Mr Regan successfully defended BAPL's claims against him. Mr Beattie succeeded in his claim against PEGL for unlawful salary deductions. PEGL has, however, been successful in its claims for breach of contract against Mr Beattie, although damages have yet to be considered and assessed on that claim. In that latter regard, the Court has now decided not to stay sealing of a certificate of judgment in favour of Mr Beattie against PEGL, but has allowed PEGL's request to stay the balance of the proceedings in this court.[4]

[8] The individual parties (Messrs Beattie and Regan and Ms Panapa) have exercised the leave to seek costs that was reserved to them at the conclusion of that judgment.

[9] Mr Eichelbaum, counsel for the individual parties, filed his first memorandum on costs on 20 February 2015. This brief memorandum was responded to by a Minute of the Court issued on the same day, indicating that the Court proposed to deal with costs compendiously. That was in view of Mr Eichelbaum's advice to the Court on 20 February 2015 that:

> … PEGL does not intend to continue this proceeding with respect to the first defendant to the second (quantum) stage and may apply for a stay of the proceeding (presumably, as relates to the first defendant only, as the proceeding is at an end as regards the second and third defendants).

[10] The court invited submissions from PEGL and BAPL on how costs should be dealt with. No submissions were received from the corporate parties within the 21 days allowed to them to do so, which expired on 13 March 2015. Accordingly, on 17 March 2015 Mr Eichelbaum, on behalf of the individual parties, invited the Court to make an 'unless' order; that is, unless the corporate parties complied with the Court's directions by 5 pm on 18 March 2015, the Court should make orders for costs on an application to be filed by the individual parties by 25 March 2015.

[11] On 17 March 2015 at para 4 of a Minute issued to the parties on that day, the Court indicated that the contents of Mr Eichelbaum's memorandum of 20 February 2015 were insufficient for the Court to justly determine costs in its established

[4] *Premier Events Group Ltd v Beattie(No 6)* [2015] NZEmpC 63 (stay judgment).

manner of doing so. The court indicated that counsel would need to provide more information to the Court and allowed the individual parties the period of 14 days to file and serve any further memorandum and/or evidence on questions of costs, with the corporate parties having the period of 14 days thereafter to respond. That further information was provided in a memorandum to the Court filed on 31 March 2015.

[12] A preliminary question arises, whether the Court now needs to determine whether to make orders as to costs in litigation that is not yet complete. Although it is true, as Mr Eichelbaum points out, that no appeals have been lodged against the Court's judgment of 17 December 2014, and that the time for doing so has expired, the question of what damages may be payable by Mr Beattie to PEGL remains outstanding. I have recently directed that this question now be stayed.

[13] As matters stand at present, PEGL has succeeded on liability in one of its breach of contract claims against Mr Beattie, and so may be entitled to a contribution to its costs, the amount of which may be affected by the amount of damages that may be awarded to it. In these circumstances, I further reserve my decision on costs in respect of PEGL's claims against Mr Beattie, but emphasise that this is only in respect of these causes of action against him. I will now determine costs on Mr Beattie's successful claim for reimbursement of unpaid remuneration. That is because, as I have indicated in Interlocutory Judgment (No 6),[5] remuneration recovery is a discrete issue that should be concluded now. I simply note that, contrary to Mr Eichelbaum's initial assertion, PEGL does not appear to have given up its pursuit of damages against Mr Beattie (in which case it might have been appropriate to have determined costs on those causes of action). PEGL's claim for damages may still proceed, albeit after a delay because of the stay of them ordered.

[14] As to whether Mr Beattie is entitled to have sealed a certificate of judgment in respect of his successful claim for unpaid remuneration, without costs thereon having been set, Mr Eichelbaum relies for his submission that this is possible, upon the judgment of the High Court in *Wilson v Selwyn District Council*.[6] In that case

[5] At [48].
[6] *Wilson v Selwyn District Council* (2004) 17 PRNZ 461.

the Court's order was sealed after an application for costs had been lodged and, perhaps also without notice to the party seeking costs.

[15] The question on which the judgment turned is set out at [9] as follows:

> The question raised by Mr Fowler's submission is whether the Court is functus officio on the question of costs where the appellant has not sought costs in the notice of appeal or asked for costs in the course of argument. There appears to be no authority bearing directly on the point.

[16] Fogarty J concluded:[7]

> Hearing an application for costs by either the respondent or the applicant when the main judgment is silent on costs does not amount to varying or altering a judgment already given and thus undermine the principle of the need for finality of litigation. I consider that there ought to be the basic reciprocity of ability of appellants or parties served including respondents to apply for costs.

[17] Mr Eichelbaum submits that the judgment in *Wilson* has been followed in a number of other High Court cases including *RFD Finance Ltd v SoL Management Ltd (in liq),*[8] *Director of Proceedings v Nelson*,[9] *Sao Paulo Alpargatas SA v But Fashion Solutions*,[10] *O'Connell v Gemmell Contracting Ltd*,[11] and *Tweeddale* v *Pearson.*[12] I understood counsel for PEGL to agree with that submission and I do so too. I conclude, therefore, that it is open to the Court to determine costs on part of a proceeding but reserve them in relation to other parts. That is why this is an interim costs judgment.

[18] The starting point for determining whether costs are payable and, if so, the amount of them, is cl 19 of sch 3 to the Act. That gives the Employment Court a very broad discretion as follows:

> (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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[7] At [14].
[8] *RFD Finance Ltd v SoL Management Ltd (in liq)* [2014] NZHC 2983.
[9] *Director of Proceedings v Nelson* [2014] NZHRRT 33 (Costs).
[10] *Sao Paulo Alpargatas SA v But Fashion Solutions* [2013] NZHC 602.
[11] *O'Connell v Gemmell Contracting Ltd* (also cited as *Re O'Connell, ex parte Gemmell Contracting Ltd*) HC Christchurch CIV 2010-409-748, 3 November 2010.
[12] *Tweeddale v Pearson* [2010] NZWHT Wellington 4.

> (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.

[19] Authoritative case law on these questions says that a reasonable contribution to costs reasonably incurred, must be the method by which the Court determines these issues.[13] In the circumstances of these cases, however, that must necessarily be adjusted to represent a reasonable contribution to reasonable notional costs that would and should have been incurred, as will be explained. There must also be a realistic manifestation of proportionality between, on the one hand, the nature of the claim and the result, and, on the other, the costs incurred in achieving that. It must also be remembered that this judgment does not decide all questions of costs between Mr Beattie and PEGL on the common law breach of contract claims between these parties.

[20] I deal first with the different situations of Mr Regan and Ms Panapa. Both have been completely successful in their proceedings and are clearly entitled to costs now. The difficulty of that exercise is that all individual parties were represented by the same solicitors and counsel, and combined bills of (collectively very substantial) costs for their legal representation were all sent to Mr Beattie.[14] Those bills contain no breakdown costs as between the individual parties, and it is not known how, if at all, there may have been an adjustment between them in paying those legal costs.

[21] In these circumstances, I consider that the most expeditious and just approach to determining costs in favour of Mr Regan and Ms Panapa is to decide what would be a reasonable contribution to legal costs and disbursements reasonably incurred in their representation on those now concluded causes of action.

[22] First, in the claim brought against Mr Regan by BAPL, I propose to deal with this question on the basis that it could have been determined by the Employment Relations Authority in an action for overpaid remuneration and, on a challenge, by this court independently of the other causes of action involving Ms Panapa and Mr

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[13] See *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48]; *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14]; *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [17].

[14] A total amount of $573,744.96.

Beattie. There were preliminary arguments requiring decision over BAPL's liability in law as a company in receivership and liquidation. There were also arguments advanced by BAPL that Mr Regan's payment to himself of amounts owed to him as an employee, was a breach of his employment agreement. Indeed, that was the cause of action by which the issue came before the Court. In that sense, the proceeding was not a simple wages claim, albeit for what was, by any account, a modest amount of remuneration.

[23] In all the circumstances, I have determined that a reasonable contribution to Mr Regan's legal costs in respect of his defence of PEGL's claims against him to be $15,000. If there are any disbursements paid by Mr Regan that are attributable directly to BAPL's claims against him, or if there is a proportion of any disbursements generally in the litigation which are attributable to Mr Regan's defence, then these are to be fixed by the Registrar and, together with the contribution towards his costs of $15,000, to be paid by BAPL to Mr Regan.

[24] Next is the claim by Ms Panapa. That is in a different category to Mr Regan's in the sense that the proceedings against her (in which she was successful) were brought by PEGL and were very closely associated with the claims against Mr Beattie by their common former employer. Unlike Messrs Beattie and Regan, Ms Panapa was only a defendant. On the other hand, as the Court's principal judgment notes, there was little, if any, evidence called specifically against her or in defence of Ms Panapa's position: her counsel relied principally (and successfully) on his contention that PEGL had failed to prove its claims against her. Ms Panapa's costs of defending successfully PEGL's claims are even more inextricably linked to those of Mr Beattie than of Mr Regan and have not, even now, been identified sufficiently separately in the submissions made to the Court.

[25] In his submissions in reply, filed on 12 June 2015, Mr Eichelbaum claims, for Ms Panapa, either the sum of $123.575.76 (being 80 per cent of what counsel submits were her actual costs) or $101,949.99 (being 66 per cent of that estimate). This is said to be the equivalent of costs for 3.5 days of the hearing.

[26] Quite apart from the inaptness of such submissions being made strictly in reply, these quantifications do not assist the Court, at least sufficiently, to determine what should be a reasonable contribution to Ms Panapa's costs reasonably incurred. In truth, I doubt whether much additional cost was incurred by Ms Panapa over and above those for Mr Beattie. But I acknowledge that there was some, but not to the extent claimed by Mr Eichelbaum. Therefore, I adopt the same methodology to their assessment as I did for Mr Regan.

[27] In all these circumstances, I assess that a reasonable contribution towards Ms Panapa's costs to be paid by PEGL is the sum of $10,000. The same direction concerning disbursements as I have just made in respect of Mr Regan's claim will apply also to Ms Panapa's.

[28] Penultimately, I consider the question of costs on Mr Beattie's successful claim against PEGL for under-payment of salary as breach of contract.

[29] In this regard, also, the global nature of legal fees charged to Mr Beattie (including those charged in respect of representing Mr Regan and Ms Panapa also) poses difficulties for assessing what should be a reasonable contribution to reasonable costs in relation to Mr Beattie's successful claim against PEGL. In this case, also, the relevant circumstances combine to cause me to adopt a 'notional reasonable fee' basis.

[30] As in Mr Regan's case, this could have been dealt with as an 'arrears of remuneration' claim by the Authority and, on a challenge by hearing de novo in this court. The proceeding was less complex than Mr Regan's in the sense that, unlike the latter's, there was no claim that Mr Beattie had breached his contract of employment by pocketing unilaterally the remuneration he considered he was owed. In this case, it was simply deducted by PEGL in breach of contract and Mr Beattie has been declared entitled to recover the difference between what he should have been paid and was paid together with interest on that sum. As in Mr Regan's case, also, it is a relatively modest amount that Mr Beattie has recovered, even including the interest on it that has accumulated since those sums became payable.

[31] In all these circumstances, I consider that a reasonable contribution to a reasonable fee for this successful cause of action is the sum of $10,000, which PEGL is directed to pay to Mr Beattie. As in the cases of Mr Regan and Ms Panapa, also, if there are disbursements which are linked identifiably to Mr Beattie's costs on this cause of action, he is entitled to reimbursement of these, to be settled by the Registrar.

[32] Finally, I address the question of costs to which Mr Beattie may be entitled in respect of those causes of action brought by PEGL against him on which it failed. Whether Mr Beattie is entitled to a contribution to his costs of successfully defending those causes of action and, if so, how much, is linked inextricably to the question of costs on the unconcluded cause or causes of action in which PEGL was successful against Mr Beattie and which have now been stayed. I consider that whether Mr Beattie is entitled to an order in this regard and, if so, how much, should be dealt with at the same time as the question of costs is determined in respect of those causes of action in which PEGL was successful against him.

[33] There are a number of potential permutations depending on the result. Mr Beattie may be entitled to costs on all of the causes of action brought against him. PEGL may be entitled to costs irrespective of whether it recovers damages against Mr Beattie but the amount of an order may depend on the amount of any damages ordered. Orders for costs may be offset against each other or separate orders may be made in favour of each successful party. There may be other outcomes. It is not appropriate to speculate about these and premature to decide costs on those causes of action that have been dismissed.

[34] For these reasons, I further reserve Mr Beattie's claims for costs in respect of those causes of action brought against him by PEGL which he defended successfully on questions of liability.

Summary of judgment

[35] PEGL is to pay a contribution to Mr Beattie's costs of $10,000.

[36] PEGL is to pay a contribution towards Ms Panapa's costs of $10,000.

[37] BAPL is to pay a contribution towards Mr Regan's costs of $15,000.

[38] Other issues of costs between Mr Beattie and PEGL are further reserved.

[39] Disbursements related to the causes of action for which costs have been awarded are to be fixed by the Registrar.

GL Colgan
Chief Judge

Judgment signed at 10.30 am on Wednesday 24 June 2015