IN THE EMPLOYMENT COURT
WELLINGTON

[2015] NZEmpC 13
WRC 12/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SAI SYSTEMS LIMITED Plaintiff
AND	GRAEME BIRD Defendant

Hearing: (by way of submissions dated 1 December 2014 and 23, 30 January 2015)

Counsel: B Buckett, counsel for the plaintiff
T Kennedy, counsel for the defendant

Judgment: 10 February 2015

COSTS JUDGMENT OF JUDGE A D FORD

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[1] Ms Kennedy, counsel for Mr Bird, seeks an order for costs against Sai Systems Ltd (Sai) in respect of an unsuccessful challenge by Sai to a determination of the Employment Relations Authority (the Authority).[1] The Authority had declined an application by Sai, which is the respondent in the proceedings before the Authority, to join another party as a second respondent to the proceedings.

[2] My judgment rejecting the challenge was dated 22 September 2014.[2] On 12 December 2014, I issued a supplementary judgment confirming that Mr Bird, as the successful party to the interlocutory joinder application, was entitled to have costs fixed now in relation to the proceedings in this Court without waiting for the

1 *Bird v Sai Systems Ltd* [2014] NZERA Wellington 27.
2 *Sai Systems Ltd v Bird* [2014] EmpC 177.

Authority to complete its investigation into the substantive employment problem which is re-scheduled to continue on 27 March 2015.[3]

[3] There was no dispute as to the relevant principles applicable to costs awards in this jurisdiction. They are well established.[4] The Court first looks to determine what would be reasonable costs for the successful party in conducting the particular litigation in question and then decides what, in all the circumstances, would be a reasonable contribution for the unsuccessful party to make towards those costs.

[4] Normally a 66 per cent contribution is regarded as fair and reasonable but that percentage contribution may need to be adjusted upwards or downwards depending upon the circumstances. Although the Court has a broad discretion, that discretion must be exercised in accordance with established principles.

[5] The application for joinder was relatively straightforward. The Authority disposed of it in a commendably brief oral determination. The Authority reaffirmed the general rule that it was for the applicant (Mr Bird) to decide who he would sue and it noted that Mr Bird did not agree to the proposed second respondent (his former employer "Seaclean") being joined as a party. The Authority also ruled that it lacked jurisdiction to award the type of indemnity relief sought by Sai against Seaclean.

[6] In this Court, the challenge should also have been straightforward because it was dealt with on the papers without a formal hearing. Both parties, however, filed comprehensive submissions which, apart from dealing with all the relevant legal issues, also raised other rather obtuse arguments which it was necessary for the Court to have to deal with in its judgment. The task of the Court is to make an assessment of what in all the circumstances could be regarded as reasonable costs for the successful party to have incurred.

[7] In her initial submissions dated 1 December 2014, Ms Kennedy, counsel for the defendant, stated that fees for time recorded in respect of the challenge amounted to $7,700. Counsel noted that the accepted starting point of 66 per cent of that figure

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3 *Sai Systems Ltd v Bird* [2014] EmpC 228.

4 *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).

would amount to $5,083 but she sought an uplift in that figure to $6,500 plus GST on account of a Calderbank offer. In the final paragraph of her submissions, however, the figure is stated as $6,000 plus GST.

[8] In her submissions in response counsel for Sai, Ms Buckett, pointed out that the time-recording information produced by Ms Kennedy contained several references to attendances before the Authority and she argued that in those circumstances the time-recording information supplied "should be given negligible attention" in determining costs in this Court. Ms Buckett submitted that the costs incurred by Mr Bird were "over and above what could be considered reasonable for what was a simple interlocutory matter".

[9] Ms Buckett made the point that the Calderbank offer related to the substantive matter which is still before the Authority. I accept that submission. Ms Buckett submitted that $5,000, exclusive of GST, would be a reasonable starting point for costs. She then went on to state:

> 27. It is submitted that from a starting point of $5,000, factoring in a decrease for the Defendant's unnecessary complication of proceedings with irrelevant jurisdictional matters, a contribution of 33 percent should be considered appropriate, meaning a contribution of $1,667 towards the Defendant's costs is suitable.

[10] In her submissions in reply, Ms Kennedy accepted that a small reduction in the claim needed to be made on account of attendances before the Authority which were “inadvertently” included in the Court’s costs claim. She still, however, claimed an award of $6,000 plus GST for the interlocutory challenge.

[11] I appreciate that there is some divergence of views in this Court about the appropriateness of including GST in any costs award.[5] Ms Kennedy sought to rely on the recent judgment in *Booth* but Ms Buckett submitted that the Court should adopt what she referred to as “the historical approach of this Court” which, as counsel put it, “has been to exclude GST from costs awards, in keeping with the High Court’s general approach of GST neutrality.”

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5 *Air New Zealand Ltd v Kerr* [2013] NZEmpC 237 at [36]-[37]; *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [49]-[52].

[12] Under the Goods and Services Tax Act 1985, GST must be imposed by a registered person in the course or furtherance of a taxable activity carried out by that person.

[13] The task of this Court in relation to costs awards is to make an assessment of the amount which it is appropriate for the losing party to contribute towards the successful party's reasonable costs. In the circumstances, I query whether it is an appropriate exercise for this Court to effectively impose GST on the lump sum figure it eventually decides upon.

[14] Therefore, I have a preference for the High Court GST-neutral approach although I see no reason why this Court, in the exercise of its discretion, cannot take the GST component into account in a general way in the award-making process if it deems it appropriate and just.

[15] Taking all of the above matters into account, I award costs in favour of Mr Bird in the sum of $3,750.

[16] Ms Kennedy seeks an additional amount on account of time spent in preparing and filing her costs submissions. I accept that this request is appropriate although I make some allowance for the fact that her submissions dealt with the Calderbank offer which was not a relevant issue. I allow an additional $750 on this account making a total costs award in favour of Mr Bird against Sai in the sum of $4,500.

A D Ford
Judge

Judgment signed at 2.30 pm on 10 February 2015