IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 3
ARC 21/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	DARRYL FLETCHER Plaintiff
AND	SHARP TUDHOPE LAWYERS Defendant

Hearing: On the papers filed on 17 October and 22 November 2014

Appearances: D Fletcher, plaintiff in person
P A Caisley, counsel for defendant

Judgment: 8 January 2015

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] I struck out the plaintiff's statement of claim by way of judgment dated 26 September 2014, and dismissed the plaintiff's application to strike out the defendant's statement of defence.[1] At the conclusion of my judgment I made timetabling orders for the exchange of submissions in the event that costs could not be agreed between the parties. Agreement has not proved possible and submissions have now been filed.

[2] Clause 19(1) of Sch 3 to the Employment Relations Act 2000 (the Act) confers a broad discretion as to costs. It provides that:

> (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.

[1] *Fletcher v Sharp Tudhope Lawyers* [2014] NZEmpC 182.

[3] The discretion to award costs, while broad, is to be exercised in accordance with principle. The primary principle is that costs follow the event.[2] The usual starting point is 66 percent of actual and reasonable costs. From that starting point factors that justify either an increase or decrease are assessed.[3]

[4] Mr Caisley, counsel for the defendant, submits that costs of at least $8,808.50 were incurred in these proceedings. Mr Fletcher takes issue with this quantum and observes that no invoices have been provided in support. He submits that costs should lie where they fall or, if not, that modest costs should be awarded. In this regard Mr Fletcher submits that the defendant has raised a number of matters in its costs submissions which are irrelevant, misleading, punitive, and aimed at discrediting him.

[5] I start with a consideration of the actual costs incurred by the defendant. The Court of Appeal has made it clear that it is not mandatory for counsel to provide details of time involved and charge out rates when seeking costs. In *Binnie v Pacific Health Ltd* it observed that:[4]

> Obviously this kind of information may help, and its absence may invite a degree of caution, but in the end the Court, when considering whether actual costs are reasonable, has to make a judgment, bearing in mind the proper interest of the losing party in the question.

[6] While copies of the invoices have not been provided, a breakdown of the attendances has been. The attendances included preparation of a statement of defence to Mr Fletcher's statement of claim, a notice of opposition to his subsequent application to strike out its statement of defence, an application to strike out Mr Fletcher's statement of claim, preparation of memoranda and attendance at two telephone conferences, preparation of submissions for hearing, and an appearance at the hearing.

[7] Based on the material before the Court and my own knowledge of the case, I have no difficulty in accepting that the defendant incurred actual costs in excess of

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[2] *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [35]; *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
[3] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
[4] At [27].

$8,808.50 (excl GST and disbursements). I also accept, having regard to the nature of the proceedings and the steps that were required to respond to them, that costs of that quantum were reasonable. This leads to a starting point of $5,813.61.

[8] Mr Fletcher submits that if costs are to be awarded, they should be calculated according to scale costs in the High Court Rules. While reference to the High Court Rules costs schedule can be useful by way of analogy, it is not directly applicable in this jurisdiction. In any event, it is noteworthy that applying the High Court Rules costs schedule would result in higher costs than those being sought on behalf of the defendant.[5]

[9] Mr Caisley submits that an uplift is warranted. He relies on three factors in support:

- the fact that the plaintiff was put on notice at an early stage of recent full Court authority that supported the defendant's position;
- the refusal of a settlement offer; and
- the plaintiff's conduct in these proceedings.

[10] These factors overlap to a significant degree.

[11] The plaintiff's challenge was struck out on jurisdictional grounds, having particular regard to the application of s 179(5) of the Act. The scope and application of that provision has been the focus of recent full Court attention in *H v A Ltd*.[6] That authority, which was of direct relevance to the plaintiff's challenge, was drawn to the parties' attention during an initial telephone conference. Section 179(5), as interpreted by the full Court, plainly presented difficulties for the arguments that the plaintiff was wishing to pursue. Ultimately, the plaintiff's challenge was struck out on the basis that it could not succeed, having regard to the scope of s 179(5). That ought to have been clear to the plaintiff. It is well established that pursuing a

[5] Adopting Category 2 of the High Court Rules costs schedule as appropriate having regard to the level of skill and experience required.
[6] *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38.

hopeless line of argument in the face of clear authority may sound in increased costs.[7]

[12] The defendant made an offer to settle the proceedings by way of letter dated 22 July 2014. Specific reference was made to *H v A Ltd* and the difficulties the judgment presented for the plaintiff's claim. A copy of the judgment, together with another recent judgment of the Court in relation to s 179(5) of the Act, was provided. The offer was made on the basis that the defendant would not seek costs if the plaintiff agreed to discontinue the proceedings. In doing so the defendant made it clear that it would draw the offer to the Court's attention in the event that his claim failed. Mr Fletcher did not accept the offer. The defendant submits that this was unreasonable and ought to sound in an increase in costs.[8]

[13] I agree that it was unreasonable for Mr Fletcher to decline the offer in the circumstances. As I have already observed, concerns relating to the rejection of the offer are echoed in the defendant's submission that there ought to be an increase in costs because Mr Fletcher sought to pursue a claim that lacked merit. These matters warrant an uplift. It would, of course, be inappropriate to double-account for the plaintiff's failure to accept the hurdles he confronted in opposing the defendant's strike out application.

[14] The defendant also sought an uplift having regard to the plaintiff's conduct in these proceedings. Particular examples included Mr Fletcher's refusal to serve a copy of the pleadings, his extensive correspondence in relation to his expressed intention to cross-examine deponents, an alleged refusal to attend mediation or a judicial settlement conference on normal terms, filing an application to strike out the defendant's statement of defence, pursuing an allegation of conflict of interest, and his insistence on a hearing in person.

[15] I accept that some uplift is justified having regard to the conduct of the proceedings. However, the costs associated with the service issue would have been minor, as would have any costs incurred by the defendant in dealing with concerns

[7] See for example *Hamon v Coromandel Independent Living Trust* [2014] NZEmpC 108 at [6].
[8] Consistently with cases such as *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].

that Mr Fletcher raised about attending mediation, even if such costs were otherwise relevant to the costs calculus. As Mr Fletcher points out, while attendance at a judicial settlement conference was mooted during the course of a telephone conference, it was not an option that gained any traction. Because of the basis on which the hearing proceeded,[9] issues relating to cross-examination did not need to be dealt with and were effectively put to one side. Mr Fletcher expressed a preference to be heard in person on the application but was willing to attend by way of video link. He did not insist on an oral hearing and no uplift is warranted on this basis.

[16] Mr Fletcher submits that he is in a difficult financial position. Mr Caisley refutes this submission, referring to insurance cover that the plaintiff appears to have had during the course of his time with the defendant. Mr Fletcher takes exception to the defendant's reliance on this information, which it is said was gained by virtue of its relationship with him. He submits that it amounts to an attempt by the defendant to financially profit from the injury he suffers from.

[17] There is authority for the proposition that an unsuccessful party's financial position may be taken into account in setting costs as part of the Court's discretion, although the approach is not without difficulty for the reasons set out in *Tomo v Checkmate Precision Cutting Tools Ltd*.[10] In *Metallic Sweeping (1998) Ltd v Ford*, Judge Couch observed that:[11]

> [52] It is a well established principle applicable to the award of costs in the Court that they should be limited by the ability of the party concerned to pay without undue hardship. …
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> [53] Where the ability to pay is in question, it must be assessed by reference to the whole financial position of the party concerned. This should include not only income and outgoings but also assets and liabilities.

[18] In *Gates v Air New Zealand Ltd* it was said that:[12]

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[9] It was agreed that the defendant's strike out application, and the plaintiff's strike out application, would be dealt with as preliminary issues. That is because if the plaintiff's strike out application was dismissed, and the defendant's strike out application was granted, the plaintiff's claim would be at an end. This is what occurred.

[10] *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.

[11] *Metallic Sweeping (1998) Ltd v Ford* [2010] NZEmpC 129, [2010] ERNZ 433.

[12] *Gates v Air New Zealand Ltd* [2010] NZEmpC 26 at [21].

> The established principle is that a party ought not to be ordered to pay costs to the extent that doing so would cause undue hardship. What this principle allows for is that payment of any substantial sum will cause a measure of hardship to some litigants, particularly individuals. That is to be expected and is considered to be an acceptable consequence of unsuccessfully engaging in litigation …

[19] I accept that meeting a costs award may present some difficulties for Mr Fletcher. However, even putting to one side the submissions advanced on behalf of the defendant, I am not satisfied on the basis of the information that Mr Fletcher himself has provided that a costs award of the quantum proposed would cause undue hardship to him. In any event, there are a number of countervailing factors (identified above) which must also be weighed in assessing an appropriate contribution to costs in the circumstances.

[20] While I would otherwise have concluded that the plaintiff ought to pay a contribution in excess of 66 percent of the defendant's actual and reasonable costs, the defendant concludes its submissions by making it clear that it only seeks an order of $5,000, plus travel costs of $313.76. This is below the sum I would otherwise have ordered.

[21] In the circumstances, and having regard to the position advanced by the defendant, the plaintiff is ordered to pay the defendant the sum of $5,000, together with disbursements of $313.76, which I am satisfied are reasonable and were necessarily incurred in these proceedings.

Christina Inglis
Judge

Judgment signed at 1.30 pm on 8 January 2015