IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 46
CRC 16/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	RUTHERFORD STREET KINDERGARTEN Plaintiff
AND	CATHERINE EMMA CHILTON Defendant

Hearing:	(on the papers by way of submissions dated 26 January and 24 February 2015)
Counsel:	A Sharma, counsel for the plaintiff J Levenbach, counsel for the defendant
Judgment:	10 April 2015

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In my substantive judgment of 19 December 2014,[1] I resolved a challenge to a decision of the Employment Relations Authority (the Authority),[2] which found that a personal grievance of unjustifiable dismissal was raised within 90 days of Ms Chilton's dismissal by Rutherford Street Kindergarten (RSK). The Authority had also directed the parties to attend mediation.

1 *Rutherford Street Kindergarten v Chilton* [2014] NZEmpC 235.
2 *Chilton v Rutherford Street Kindergarten* [2014] NZERA Christchurch 77.

[2] I found that Ms Chilton had raised personal grievances of unjustified disadvantage and unjustified dismissal within the required period of 90 days in each instance. I held that there was therefore no jurisdiction – or need – to make any orders under s 114(3) of the Employment Relations Act 2000.

[3] I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence; these have now been received by the Court for consideration.

[4] It is submitted for Ms Chilton in summary that the way the case has been conducted has resulted in a significant escalation of costs which the Court should take into account when dealing with this costs application. The fee charged by Ms Chilton's lawyer is $12,000 plus GST.

[5] A supporting timesheet is provided, showing attendances which, if charged in full, would produce an invoiced amount of approximately $26,000 plus GST. However, this has been reduced to the figure shown in the invoice. There is also reference is also made to various offers made on a "without prejudice except as to costs" basis (Calderbank offers).[3]

[6] The position for RSK in summary is that it has made what are considered to be reasonable counter-offers to attempt to resolve all issues; that the sum claimed could not be regarded as reasonably incurred; that an indemnity award would be wholly inappropriate in the circumstances; and that other decisions in respect of challenges of a similar type indicate costs awards of $1,500 to $5,500.[4]

Discussion

[7] It is common ground that the Court has a broad discretion when making costs awards; the usual approach is that costs follow the event, generally amounting to 66 per cent of costs actually and reasonably incurred by the successful party,

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3 This is a reference to the cost device recognised in *Calderbank v Calderbank* [1976] Fam 93; (1975) 3 WLR 58; [1975] 3 All ER 333.

4 *Eastern Bay Independent Industrial Workers Union v Norske Skog Tasman Limited* [2012] NZEmpC 126; *Zhou v Lin* [2012] NZEmpC 148; *Webb v Hose* [2013] NZEmpC 115 and *Catering Masters Ltd v Anand* [2013] NZEmpC 166.

although there may be factors which warrant an increase or decrease from that starting point.[5]

[8] The first issue I address is the assessment of reasonable costs. As has been observed previously, this is not an exercise in "second-guessing the reasonableness or otherwise" of the actual legal costs incurred.[6] Rather the Court must make its own assessment of what would have been reasonable costs to conduct a case for the successful party for the purposes of assessing the liability of the other party; but the assessment should commence with a consideration of the actual fees incurred.

[9] Although the recorded time on the timesheet of Ms Chilton's lawyer for the period 29 May 2014 to 19 December 2014 totals 718 units which would result in a fee of approximately $26,000 plus GST, it is necessary to focus on the amount which Ms Chilton was actually charged, that is $12,000 plus GST.

[10] The issue which the Court was required to resolve when considering the challenge was not particularly complicated. Unfortunately, a great deal of extraneous material was placed before the Court by both parties in describing a full background to the relationship problem; that appears to have increased the quantum of Ms Chilton's costs.

[11] I take into account the fact that the matter was able to be dealt with on the papers. Consequently the legal work for Ms Chilton involved attending a timetabling conference, preparing a statement of defence and evidence by way of affidavits in reply to those of RSK, as well as submissions. Her lawyer's timesheet suggests there have been attendances beyond these straightforward tasks, although I recognise that not all the recorded time has been charged.

[12] A cross-check may be obtained by considering what would be awarded under the High Court Rules, by analogy. Assuming costs on a Category 2B basis, the result is $4,179.[7]

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

6 *Kaipara v Carter Holt Harvey Limited* [2012] NZEmpC 92 at [39].

7 High Court Rules, sch 3, items 23 and 24.

[13] Although it is a somewhat rudimentary approach, a further cross-check may be obtained by assuming two days' preparation for every day of the hearing.[8] Had the matter proceeded to a hearing, it would have taken no more than a half day. That would have resulted in preparation (which is what was involved here) of one day. Taking the hourly rate of $365, as charged by the respondent's legal representative, this would equate to $2,920.

[14] I also have regard to the range of costs referred to in the cases cited by counsel for the defendant.

[15] In the end, however, I must consider the matter on the basis of the actual circumstances of this case. Unfortunately, the exchanges between the parties have become difficult, and this has resulted in increased costs. I am prepared to recognise that dynamic, although I do not consider it appropriate to conclude that this factor should be recognised in its entirety.

[16] Standing back, I consider that reasonable costs for the purposes of the challenge which was before the Court is $6,000, 66 per cent of which is $4,000.

[17] The next issue I must consider is the effect of the various Calderbank offers placed before the Court. Those offers relate to attempts to settle the matter in its entirety; there is only one offer which relates to the costs of the challenge before the Court and that offer was not made until after my judgment was issued: a Calderbank offer was made on 19 December 2014 in the sum of $10,000 in respect of Ms Chilton's costs, and was not accepted.

[18] The parties appear to have assumed that the Court would consider Calderbank offers which were made in an attempt to resolve all matters, when the only issue before it was whether grievances were raised in time.

[19] Regulation 68(1) of the Employment Court Regulations 2000 does provide that in exercising its discretion as to costs, the Court may have regard to an offer which is without prejudice except as to costs made "to settle all or some of the matters at issue between the parties".

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[8] *Eastern Bay Independent Industrial Workers Union Inc v Pederson Industries Limited*, ARC 20/08, 10 June 2009, C J Colgan at [9].

[20] While that regulation permits the consideration of Calderbank offers and whether they resolve some or all of the issues between the parties, in the present case I do not consider it appropriate for the Court to assess Calderbank offers made to settle the matter in its entirety. Unless the parties settle the dispute, the Authority will have to determine the relationship problem. It would be inappropriate for the Court to express a view on Calderbank offers in regard to all issues between the parties before those issues are considered at an investigation meeting. For that reason, I neither record the specifics of the offers made, nor do I comment on them.

[21] The only relevant Calderbank offer was made on 23 December 2014 for the purposes of the challenge which is before me. However, I regard the amount claimed in that Calderbank offer as excessive, and I therefore put it to one side.

[22] The next issue I address is the evidence which Ms Chilton placed before the Court regarding the financial pressures she has faced in dealing with costs issues. Whilst there are cases where the financial circumstances of a party who is liable to pay costs may be taken into account, there is no authority which mandates a reverse approach.[9] I therefore place that factor to one side.

[23] Counsel for the defendant suggested that the Court should also fix costs arising from the Authority's investigation. At the conclusion of its determination, the Authority directed the parties to attend mediation, and then stated:[10]

> Costs are reserved. The parties are invited to make the issue of costs a part of their mediation discussions. Ms Chilton would usually be entitled to a reasonable contribution to her costs on the basis of her success in this preliminary determination. … If costs are not agreed and the matter is not resolved at mediation the Authority will deal with costs after the determination of the substantive matter.

[24] The Authority determined in effect that it would resolve all costs issues after the substantive hearing. Both parties will have rights of challenge thereafter. I am not persuaded that it is appropriate to adopt an alternative process at this stage.

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[9] *Snowdon v Radio New Zealand* [2014] NZEmpC 180.

[10] *Chilton v Rutherford Street Kindergarten Committee* [2014] NZERA Christchurch 77 at [53], [54].

Conclusion

[25] It is appropriate to take 66 per cent of reasonable costs as a starting point. I am not persuaded that there should be any increase or decrease in that figure. RSK must pay Ms Chilton the sum of $4,000 in respect of the challenge.

B A Corkill
Judge

Judgment signed at 11.30 am on 10 April 2015