**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2018] NZEmpC 33**
**ARC 98/13**
**ARC 22/14**

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| IN THE MATTER OF | challenges to determinations of the Employment Relations Authority |
| AND IN THE MATTER | of an application for costs on costs |
| BETWEEN | SHABEENA SHAREEN NISHA (NISHA ALIM)<br>Plaintiff |
| AND | LSG SKY CHEFS NEW ZEALAND LIMITED<br>First Defendant |
| AND | CHEUNG, SHORT, VERRY LIMITED (FORMERLY PRI FLIGHT CATERING LIMITED)<br>Second Defendant |
| AND | TERRY WILLIAM HAY ALSO KNOWN AS TERRY HAY<br>Third Defendant |

Hearing: (on the documents filed 2, 16 and 21 March 2018)

Representation: K Wendt, counsel for plaintiff
C Meechan QC and J Douglas, counsel for first defendant
D France, counsel for second defendant
N Scampion, counsel for third defendant
D France, counsel for non-party Mr Nathan

Judgment: 18 April 2018

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## COSTS JUDGMENT (NO 2) OF JUDGE B A CORKILL

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## Introduction

[1] In my first costs judgment, I considered at length the various cost liabilities that arose in this unusual litigation, reserving the question of whether the party that achieved overall success on the issue of costs, LSG Sky Chefs New Zealand Ltd (LSG), should be awarded costs with regard to the advancing of its applications.[1] LSG had applied for such costs but had been unable to particularise these at the time of the hearing. The issue was of some significance, because three days of Court hearing time were devoted to the receipt of complex costs submissions.

[2] Submissions on the outstanding issue have now been received, which I summarise briefly.

[3] For LSG, Ms Meechan QC, submitted in effect that a global assessment should be undertaken in respect of the disputed costs hearings; the evidence is that the total costs were $47,600 plus GST. It was argued that Ms Alim should pay $1,000 of these, Mr Nathan should contribute $4,000, and PRI Flight Catering Ltd (PRI) and Mr Hay should pay the balance on a joint and several basis.

[4] For Ms Alim, Ms Wendt argued that the jurisdiction to make orders of this type may need to be considered. It was also submitted Ms Alim had attempted to resolve matters practically, and she had been largely successful. Ms Wendt argued that no award for costs should therefore be made against Ms Alim in relation to the proceeding in this Court.

[5] With regard to Ms Alim's costs challenge, it was submitted she had succeeded in that the amount directed for payment by the Employment Relations Authority (the Authority)[2] was reduced, from $21,000 to $10,500.[3] Ms Wendt said it followed that no order for costs should be made against Ms Alim in respect of her successful challenge.

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1 *Nisha v LSG Sky Chefs New Zealand Ltd* [2018] NZEmpC 8.
2 *Alim v LSG Sky Chefs New Zealand Ltd* [2013] NZERA Auckland 528.
3 *Nisha v LSG Sky Chefs New Zealand Ltd*, above n 1, at [365] and [386].

[6] For PRI, Mr France submitted it was unreasonable to approach a costs assessment on a global basis, and that the amount sought by LSG in respect of those costs could not be regarded as fair and reasonable. It was also submitted that costs should be apportioned, rather than ordered for payment on a joint and several basis, since PRI had chosen not to make costs applications against any other party, and had played a lesser role at the hearing on 6 and 7 September 2017 than other parties.

[7] For Mr Hay, Mr Scampion argued that costs incurred by LSG were not reasonable when compared with relevant scale costs; nor was there any reason to justify an award in favour of LSG for two counsel.

[8] Mr Scampion submitted that the Court could not apply an uplift simply because it had done that when making previous findings. He also said that there was no relevant Calderbank offer that applied to LSG's cost applications.

[9] Finally, Mr Scampion argued that PRI could not remove itself from liability. If either party was liable, PRI and Mr Hay should be jointly and severally liable.

[10] For Mr Nathan, Mr France submitted that the amount sought was wholly disproportionate and punitive. It was also argued that there was no relevant application for costs on costs against Mr Nathan. His primary position was that costs should lie where they fall, but if the Court was of a mind to award costs against him, they should not be assessed against a non-party on the same basis as might apply to parties. At the most an award of $500 in favour of LSG would be appropriate.

## Applicable principles

[11] Although some parties accepted that the Court has jurisdiction to award costs on costs, as already mentioned Ms Wendt queried whether there was such a jurisdiction, relying on several High Court decisions to which Woodhouse J made reference in *Gibson v The Official Assignee of New Zealand*.[4]

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4 *Gibson v The Official Assignee of New Zealand* [2015] NZHC 3200.

[12] However, what His Honour recorded was that in the High Court there were decisions finding it *inappropriate* in particular circumstances to award costs in respect of a costs application itself, or expressing reservations about doing so.[5] But he also recorded that there are a number of authorities where such orders had been made. He emphasised that costs are a matter of discretion. In that particular case, Woodhouse J was persuaded that costs for the purposes of the costs application should be awarded.[6]

[13] In fact, in the High Court, there are authorities from as long ago as 2001, expressing the view that costs may be awarded on a costs argument to the successful party, in accordance with principles which normally apply to interlocutory applications.[7]

[14] The position in that Court was more recently summarised by Allan J in *Body Corporate Administration Ltd v Mehta* as follows:[8]

> It is now well established that costs may be awarded in respect of an application for costs.[9] An application for costs is to be treated no differently for costs purposes from an ordinary interlocutory application, so costs may be awarded according to scale or on an increased or indemnity basis as appropriate.

[15] On appeal, that approach was approved by the Court of Appeal in *Strata Title Administration Ltd v Body Corporate Administration Ltd*.[10]

[16] In this Court, such an approach has been adopted pursuant to the Court's broad jurisdiction as to costs. In *Snowdon v Radio New Zealand Ltd*, Judge Ford resolved a defendant's application for an award of costs following the dismissal of the plaintiff's claim after a long hearing. The Court was required to consider an elaborate application for costs arising from the many elements of a protracted

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5 At [14].
6 At [14].
7 *Beach Road Preservation Society v Whangarei District Council* (2001) 16 PRNZ 13 (HC) at [15].
8 *Body Corporate Administration Ltd v Mehta (No 4)* [2013] NZHC 213 at [85].
9 See for example *Auckland Regional Council v Arrigato Investments Ltd* (2002) 16 PRNZ 217 (HC).
10 *Strata Title Administration Ltd v Body Corporate Administration Ltd* [2014] NZCA 96 at [14].

claim.[11] The case was obviously complex. So were the costs issues. The successful defendant produced evidence that it had incurred $11,049 in preparing its costs submissions. It sought 66 per cent of those, $7,292.34.[12] Judge Ford awarded $5,000 as a contribution to these attendances.[13]

[17] Subsequently, Judge Inglis, as she then was, considered this topic in *Booth v Big Kahuna Holdings Ltd.*[14] Her Honour observed that it was relatively rare for parties to seek costs on costs in this Court, but that was not to say that they were not available. She referred to the Court's broad discretion as to costs, stating that there was no reason why a party which has been put to the time and expense of pursuing costs ought not to be able to claim a reasonable contribution to them.[15]

[18] I respectfully agree. In a case such as this, where the successful party has had to go to extraordinary lengths to pursue the issue of costs, as is evident from the summary of the various judgments issued by the Court on this topic in the first costs judgment, and where the best part of three days of Court hearing time had to be devoted to receiving costs submissions, it would be contrary to the interests of justice for costs incurred in that process not to be considered, and if appropriate, awarded.

[19] That said, the fixing of those costs must be undertaken on a principled basis. Accordingly, I adopt the general principles to costs that were outlined in the first costs judgment.[16] Costs should follow the event. There should be a reasonable contribution to costs actually and reasonably incurred. In this case it is appropriate to take 66 per cent of costs reasonably incurred as a starting point, and to consider whether there should be any adjustment upwards or downwards having regard to particular circumstances.

[20] It is convenient to deal with a point made by Mr Scampion that there was no relevant Calderbank offer that applied to LSG's costs applications. He said, without

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11 *Snowdon v Radio New Zealand Ltd* [2014] NZEmpC 180.
12 At [12].
13 At [67].
14 *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4.
15 At [46]. For a more recent example, see *Johnston v Fletcher Construction Company Ltd* [2018] NZEmpC 18 at [19].
16 *Nisha v LSG Sky Chefs New Zealand Ltd*, above n 1, at [14] – [19].

providing any reasons in support of his submission, that it would be inappropriate to rely on earlier offers that related to the substantive proceeding.

[21] In my first costs judgment, I explained the legal principles relating to Calderbank offers at some length, and the history of offers made in this case.

[22] It is worth repeating the fact that the final Calderbank offer from LSG to Ms Alim was made on 30 June 2015, when she was offered the sum of $6,611.97 gross for wages, $15,000 compensation for hurt and humiliation, $5,000 plus GST as contribution to her legal fees, and an expression of regret that LSG had been unable to resolve issues relating to Ms Alim's terms and conditions of employment to her satisfaction; LSG also offered a waiver of its entitlement to costs in the Authority. The offer was declined.[17]

[23] I found that this offer significantly exceeded the judgment which Ms Alim ultimately obtained; and that it dealt with the issue of costs. I concluded that the amount of $5,000 plus GST was a fair and reasonable offer in respect of costs in this Court to that point, having regard to the subsequent success which was ultimately achieved.[18] The same is true of the position as to costs in the Authority.

[24] In short, the final Calderbank offer which was unreasonably rejected acknowledged costs in the Court and costs in the Authority.

[25] The declinature may impact on costs, as reg 68 of the Employment Court Regulations 2000 recognises.[19] The declining of the offer meant that the litigation continued to trial and judgment. Then LSG, as it was put by Ms Meechan when presenting LSG's submissions, was placed in the position of having to participate in drawn out and complex costs wrangles following the Court's substantive decision.

[26] Adopting a steely approach, there must be costs consequences for the unreasonable refusal of the Calderbank offer. Those consequences ought to extend not only to the then parties of the litigation, but to the parties who were joined for

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17 At [26] and [27].
18 At [41] and [42].
19 Employment Court Regulations 2000, reg 68(2).

costs purposes subsequently, given their integral involvement in the entire litigation as discussed at length in the first costs judgment. An uplift from 66 per cent to 80 per cent of fair and reasonable costs is therefore appropriate.

## Fair and reasonable costs

[27] As already noted, LSG in effect applied for costs on a global basis. These related to the costs hearings which took place on 6 and 7 September 2017 when all parties were represented. But they also related to the hearings which took place on 25 October 2017. In the morning of that day there was a hearing which involved interlocutory judgments (No 23) and (No 24) which concerned only LSG and Mr Hay. On the afternoon of that day there was a hearing of Ms Alim's challenge in respect of a costs determination of the Authority, involving only her and LSG.

[28] It would be unfair for the parties who were not involved in the hearings which occurred on 25 October 2017 to be faced with costs orders relating to them, which is the effect of LSG's submission.

[29] The invoices which were rendered to LSG for all costs hearings are before the Court. It has been difficult but not impossible to identify attendances pertaining to the September hearings on the one hand, and those pertaining to the October hearings on the other hand.

[30] On the basis of the narrative contained in the LSG invoices, I fix the following amounts, as a starting point, for the respective hearings, all of which are exclusive of GST:

a) <u>6 to 7 September 2017</u>:

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| Douglas Erikson:[20] | | $7,680 |
| Ms Meechan:[21] | | $27,930 |
| | **Total:** | **$35,610** |

[20] I have excluded entries 1 – 2, 16 and 20 – 29 of Invoice 458, since these do not obviously relate to the September hearing.

[21] I have excluded the attendances which do not relate to the September hearing, in Invoice 112.

b) 25 October 2017:

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|---|---|---|
| Douglas Erickson: | | |
| from invoice 458:[22] | | $715 |
| from invoice 500: | | $4,480 |
| Ms Meechan: | | |
| from invoice 112:[23] | | $1,260 |
| from invoice 124: | | $5,250 |
| | **Total:** | **$11,705** |

[31] Having isolated those figures, the Court must consider the question of whether they are fair and reasonable for present purposes. First, it was argued that it would be unfair for an allowance to be made in respect of two counsel. I disagree. Having regard to the complexity of the costs arguments, as is evident from my first costs judgment, it was appropriate for the two lawyers who had been involved in the litigation throughout to appear at that stage.

[32] I have already commented on the charge out rates in my first costs judgment; no discount is warranted on that score.[24]

[33] Mr Scampion invited the Court to fix costs with regard to the Court's scale as to costs, using the steps applicable to an interlocutory application.

[34] As I explained in the first costs judgment, the scale is a guideline only and does not necessarily apply to this case since most of the relevant activity took place before it was introduced.[25] Moreover, the complexity of the costs arguments in this case were such that even had I fixed costs with regard to the scale, there would have been an uplift to reflect complexity and the unreasonable declinature of a Calderbank offer, as already discussed. Moreover, the steps provided in the Court's Costs –

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22 Items 20 to 27.
23 Balance of items in Invoice 112.
24 *Nisha v LSG Sky Chefs New Zealand Ltd*, above n 1, at [174] – [175].
25 At [239].

Guideline scale, for a single interlocutory application do not necessarily apply to hearings where multiple applications have to be considered.

[35] Standing back, I am satisfied that the figures which I have summarised above are a fair and reasonable starting point for assessing a contribution to the costs which LSG incurred for the purposes of the costs hearings.

[36] I turn now to the amount which should be imposed in respect of each party against whom LSG seeks costs. This necessarily involves a separate consideration of first the hearing on 6, 7 September 2017, and second the hearings on 25 October 2017.

## September hearing

*Mr Nathan*

[37] LSG sought an award of $4,000 against Mr Nathan, which it said was just over 10 per cent of the overall award it sought. It submitted this was a "modest and reasonable assessment".

[38] For Mr Nathan, it was argued that there was no formal application for an award of costs on costs against him. It was emphasised that he was not joined as a party to the proceeding. Accordingly, $4,000 would be neither reasonable nor proportionate.

[39] In my view, having regard to the role of Mr Nathan in the costs hearing, it is unsurprising that an application is now made. It has been fully developed; Mr Nathan has had a proper opportunity of responding to it. The absence of formality does not give rise to prejudice, and is not an impediment.[26]

[40] However, I agree that an award of $4,000 would be excessive.

[41] Mr Nathan applied for costs against LSG in relation to three interlocutory matters: the witness summons issued to require his presence during the substantive

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[26] Employment Relations Act 2000, s 219.

hearing; LSG's application for non-party disclosure; and LSG's application for joinder.

[42] LSG successfully resisted each of these applications. Costs should follow that event.

[43] In my view, a realistic assessment of the time taken as that hearing with regard to Mr Nathan's various applications if five per cent. Applying that percentage to LSG's fair and reasonable costs for that hearing, a figure of $1,780.50 is produced. Sixty-six per cent of that is $1,175.13. No uplift is appropriate. Standing back, I consider a fair and reasonable contribution which Mr Nathan should make to LSG's costs should be based on that figure, namely $1,000.

*Ms Alim*

[44] LSG submitted that an appropriate award would see Ms Alim shoulder $1,000 of any costs order which the Court might make, with the balance to be met by Mr Hay and PRI on a joint and several basis.

[45] Ms Wendt submitted that Ms Alim had attempted to settle her portion of costs with LSG which would have reduced that party's preparation and hearing time for costs-related issues. She said that the $10,000 ultimately awarded against Ms Alim was just 3.8 per cent of the overall sum which LSG has sought against her as part of the joint and several costs claim with regard to the Court proceeding.

[46] Ms Alim's position at the hearing was that any liability should be restricted to the sum she had already paid into Court, which could be paid to LSG. Alternatively, her liability should be limited to $10,500. After considering her role in the proceeding as well as her ability to pay, I concluded that a just approach was to order Ms Alim to pay LSG $10,000 as a contribution to LSG's costs, at the rate of $500 per month.

[47] The short point is that Ms Alim's primary submission was not upheld, and she was directed to make a payment over time. Although the Court recognised the

reality of Ms Alim's financial circumstances, she was not completely successful in resisting any liability. Costs should follow that event.

[48] In my assessment, a fair and reasonable proportion of time devoted to Ms Alim's position at the September hearing is 20 per cent. I apply that proportion to LSG's costs, that is $7,122. Had it not been for Ms Alim's inability to pay, I would have fixed costs at 80 per cent of that figure. However, in light of Ms Alim's impecuniosity as outlined in my first costs judgment, I conclude that a fair and reasonable contribution by Ms Alim is $1,000, to be paid monthly after she has paid the sum referred to in my first costs judgment, at the rate of $500 per month.[27]

*PRI*

[49] As a preliminary matter, I note that the Companies Register now records the second defendant's name as being Cheung, Short, and Verry Limited;[28] and that a new company under the name of PRI Flight Catering Limited has been incorporated. For convenience in this judgment, I refer to the second defendant as PRI as has consistently been the case in previous judgments; that is not a reference to the recently incorporated company.

[50] Mr France submitted that orders for costs on costs were normally modest and for relatively small amounts, and that an uplift to 80 per cent would not be appropriate. For reasons I have already discussed, in the most unusual circumstances of this case, I do not agree.

[51] In my assessment, 30 per cent of hearing time was devoted to PRI's position on costs. This proportion should be applied to LSG's fair and reasonable costs, that is $10,683. It is then appropriate to take 80 per cent of that figure which results in a liability attributed to PRI of $8,546.40.

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27 *Nisha v LSG Sky Chefs New Zealand Ltd*, above n 1, at [387](a).

28 The name was first changed to LSG Sky Chits Ltd. Ms Meechan submitted, in a memorandum of 21 July 2017, that this was game playing. It may have been, but the point is irrelevant for present purposes. This company is also in the course of being removed from the Companies Register by the Registrar of Companies.

[52] As already mentioned, Ms Meechan argued that PRI and Mr Hay should be jointly and severally liable for LSG's costs. Whilst that was appropriate for the orders that were made in respect of judgments up to interlocutory judgment (No 22), a different focus is required when considering costs in respect of the costs hearing. In many respects, the case advanced for PRI at the costs hearing was different from the case advanced for Mr Hay. PRI should be liable for the costs incurred in dealing with its position, and Mr Hay should be liable for the costs incurred in dealing with his position. It is not appropriate to make a joint and several order.

*Mr Hay*

[53] Mr Scampion, after referring to quantum issues that I have already considered, focused on a scale assessment arguing that Mr Hay should be liable for costs assessed on the scale on a Category 2, Band B basis, being $12,265 in total for the two costs hearings to which Mr Hay was a party. He also submitted that no uplift would be appropriate for several reasons:

a) He said that Mr Hay had not pursued a speculative or misconceived argument, because his principal argument was that any costs award should be made solely against PRI in light of the Court's earlier findings as to his role as a de facto director so that the corporate veil should apply. In my view, this was a speculative argument; it was plainly contrary to relevant case law.

b) Then he submitted there was no relevant Calderbank offer that applied to LSG's costs applications. I have already considered and rejected this submission.

c) He submitted that Mr Hay's approach to LSG's costs applications did not increase the length of the process or increase its complexity, which would otherwise have justified increased costs. Again, I disagree; the arguments advanced for Mr Hay were the most complex and lengthy of those which the Court had to consider.

d) Finally, it was submitted that the Court should only focus on conduct during the costs phase, rather than the conduct earlier in the proceeding. I agree.

[54] In my assessment, the proportion of time and consideration devoted to Mr Hay's position in respect of the September hearings was 45 per cent. This proportion should be applied to LSG's fair and reasonable costs. It is appropriate that he be liable for 80 per cent of those costs, given my conclusions as to the declinature of LSG's Calderbank offer, that is, a figure of $12,819.60. Rounded, I conclude that Mr Hay should pay LSG $12,800 in respect of that hearing.

## 25 October 2017 hearings

*Hearing regarding interlocutory judgments (No 23) and (No 24): Mr Hay*

[55] I earlier found that LSG's fair and reasonable costs for the hearings that were conducted on 25 October 2017 was $11,705. Half of this should be attributed to the hearing involving interlocutory judgments (No 23) and (No 24): $5,852.50.

[56] Mr Hay's arguments as to costs were unsuccessful, and the present assessment should follow that event.

[57] In my view, 80 per cent of the starting point figure is appropriate, for the reasons already given. I direct Mr Hay to pay LSG the sum of $4,682 in respect of that hearing.

*Ms Alim's cost challenge*

[58] Should Ms Alim make a contribution to the costs which I have found are attributable to the hearing of the costs challenge, $5,852.50?

[59] I accept Ms Wendt's submission that Ms Alim succeeded in part. The order for costs which had originally been made by the Authority of $21,000, was reduced to $10,500. But LSG did succeed to some extent.

[60] Because there was a mixed outcome, costs in respect of this aspect of the matter should lie where they fall.

## Conclusion

[61] For the avoidance of doubt, I record that it is not necessary to allow for GST in the costs awards now made in favour of LSG, as discussed in the first costs judgment.[29]

[62] In respect of the hearing conducted on 6 and 7 September 2017, I direct:

a) Mr Nathan is to pay LSG the sum of $1,000.

b) Ms Alim is to pay LSG the sum of $1,000, which is to be paid monthly after she has paid the sum referred to in my first costs judgment, at the rate of $500 per month.

c) PRI is to pay LSG the sum of $8,546.40.

d) Mr Hay is to pay LSG the sum of $12,800.

[63] In respect of the hearings on 25 October 2017, I direct:

a) Mr Hay is to pay LSG the sum of $4,682.

b) Costs are to lie where they fall in respect of Ms Alim's cost challenge.

B A Corkill
Judge

Judgment signed at 12.05 pm on 18 April 2018

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[29] *Nisha v LSG Sky Chefs New Zealand Ltd*, above n 1, at [244] – [247], noting that it has now been confirmed LSG is registered for GST.