IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 30
CRC 3/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KEITH WILLS Plaintiff
AND	GOODMAN FIELDER NEW ZEALAND LIMITED Defendant

Hearing:	(on the papers by way of submissions filed on 5 and 27 February 2015)
Counsel:	L Ryder, counsel for the plaintiff T Clarke, counsel for the defendant
Judgment:	10 April 2015

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In my substantive judgment of 22 December 2014 I found in favour of the plaintiff in the following terms:[1]

> [149] Mr Wills was constructively dismissed; his personal grievance is accordingly established.
>
> [150] Remedies are awarded as follows:
>
> a) Goodman Fielder is to pay Mr Wills lost wages in the sum of $13,437.15, together with interest at five per cent from 23 January 2012 to the date of payment.
>
> b) Goodman Fielder is to pay Mr Wills $61,907 gross being redundancy compensation entitlements, payable as a lost benefit which Mr Wills might reasonably have expected to obtain if the

[1] *Wills v Goodman Fielder NZ Ltd* [2014] NZEmpC 233.

personal grievance had not arisen, together with interest at five per cent from 23 January 2012 to the date of payment.

c) Goodman Fielder is to pay Mr Wills compensation for humiliation, loss of dignity and injury to feelings in the sum of $12,000.

[2] I indicated that the parties should attempt to resolve the issue of costs directly, and that if not, the Court would do so. Agreement did not prove possible, and the Court has now received submissions and evidence on that issue.

[3] The parties agree that the Court has a broad discretion when making costs awards, and that 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, although there may be factors which warrant an increase or decrease from that starting point.[2]

[4] For the plaintiff, it is submitted that the actual costs of $72,174 plus GST were reasonably incurred. This includes an allowance for second counsel having appeared at the hearing. To support the application, an invoice dated 27 January 2015 and summary of attendances has been provided.

[5] Also produced is a letter sent by the plaintiff's lawyers to the defendant's lawyers on a without prejudice save as to costs basis (the Calderbank letter).[3] For the plaintiff it was proposed that the challenge should be settled on the basis of a cash payment of $15,000, and that the defendant would pay the plaintiff's legal costs of $22,500 plus GST upon receipt of a tax invoice. The offer was made on 29 August 2014 and was not accepted. The plaintiff submits the offer was significantly less than the subsequent award made in his favour. It is accordingly submitted that 66 per cent of actual costs incurred up to the date of the Calderbank offer should be payable in the sum of $7,643 plus GST; and in respect of costs thereafter 85 per cent of actual costs, being $54,703.45 plus GST. This produces a total of $62,346 plus GST.

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2 *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 Elmsley* [2004] 1 ERNZ 172 (CA).

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

[6] It is further submitted that GST should be reimbursed. An order is also sought for the costs incurred in making the costs application, $1,500 plus GST.

[7] For the defendant it is submitted that 66 per cent of the plaintiff's actual costs of $72,000 (excluding GST) is $48,000, and that this starting point should be further reduced having regard to a range of factors.

[8] The first of these is that adopting a cross-check which assumes the broad approach of two days preparation for every day of hearing[4] the plaintiff's costs would amount to $25,200.

[9] Next, it is submitted that there is a lack of detail to the extent that timesheets showing actual attendances have not been provided. The summary placed before the Court proceeds on the basis that all tasks have been charged at a flat rate of $350 per hour, including preparatory work which junior lawyers with lower charge-out rates could or may have performed. Further, a proportion of the preliminary work necessitated for the challenge would have been done in the course of proceedings before the Authority, including the preparation of witness statements and research. No significant changes were required for the purposes of the challenge.

[10] It is further submitted for the defendant, that if the proceedings were categorised as Category 2 under the High Court Rules the plaintiff would be awarded $32,385 having regard to the tasks identified in Sch 3 of those rules.

[11] Counsel also submits that the claim for two counsel at the hearing was not warranted. Nor could it be said the defendant had acted unreasonably in rejecting the plaintiff's Calderbank offer, since it had been wholly successful in the Authority, and the defendant was acting prudently on advice when it rejected the offer. It is contended a GST neutral approach, as pertains in the High Court, should be adopted. Finally, as it is relatively rare for parties to seek costs in relation to the application for costs, it is submitted these should not be awarded in the present case.

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4 *Binnie v Pacific Health*, above n 2, at [16].

[12] The defendant submits in summary that the 66 per cent figure should be reduced by a further $20,000, producing a result of $34,000 exclusive of GST. It is not suggested that there is any difficulty with the disbursements sought.

Discussion

[13] 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.[5] Rather the Court must make its own assessment of what would have been reasonable legal costs to conduct the case for the applicant party for the purposes of assessing the liability of the other party; but the assessment should commence with a consideration of the actual costs incurred.

[14] The invoice provided by the plaintiff, which is before the Court provides no supporting detail; rather that is given in a document entitled "Legal Fees Incurred by the Plaintiff" which is a summary that is presumably based on time records that are not before the Court. That summary suggests that an hourly rate of $350 per hour has been adopted to produce the actual fee. However, as submitted for the plaintiff, in the absence of time records the Court is left to conclude that each task identified in the schedule was charged at $350 per hour, no matter how basic. The schedule refers to such tasks as disclosure, the filing and serving of briefs, the sending of venue notices to witnesses, liaising with witnesses regarding when they would give evidence, preparation of a bundle of documents and so on. A further issue is that a total of 26 hours has been claimed for all attendances with witnesses. I consider this to be high since the previous witness statements as presented to the Authority should have been able to be utilised without significant amendment. Similarly, 25 hours was spent in preparation of cross-examination for five witnesses, eight hours for research and 27 hours for legal submissions, with a further five hours in respect of supplementary submissions; these are all high figures given the circumstances of a rehearing, rather than a first instance hearing.

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5 *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 92 at [39].

[15] Without in any way criticising the makeup of the actual charges rendered to Mr Wills, for the purposes of the costs assessment which the Court must undertake I consider that the foregoing factors require recognition when assessing reasonable costs.

[16] Turning to the issue as to whether the defendant should meet a liability for two counsel; it is to be noted that 20 hours are included in the plaintiff's schedule of costs in respect of several counsel who appeared at the hearing. That is a total of $7,000 plus GST. Judge Couch recently considered this topic; he did so by considering the total hourly rate for representation of the relevant party.[6] Adopting that approach here, the total charge-out rate during the hearing was in effect $700 plus GST for the representation of the plaintiff. I do not consider that to be fair and reasonable for costs purposes. I have no doubt that it was convenient and helpful for there to be two counsel in attendance; and in no way does this analysis challenge the effectiveness of the representation for the plaintiff. However, I do not consider that the complexity of the case was such that it is necessary to conclude the defendant should meet the cost for the plaintiff to have two legal representatives. A further allowance must be made for this factor.

[17] Standing back, and in consideration of these various factors, I conclude a fair and reasonable figure for costs should be $57,000, rather than $72,000.

[18] I must next consider the plaintiff's offer to resolve this matter on a Calderbank basis. Such an offer may be considered when the Court exercises its discretion as to costs. The making of such an offer does not automatically result in a more favourable award of costs. However, the Court of Appeal has made it clear that a "steely" approach is required in this jurisdiction where reasonable settlement proposals have been rejected.[7]

[19] For the defendant it is submitted that in this instance the plaintiff is relying on the Calderbank offer not as a shield to protect his position on costs, but as a sword to

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6 *New Zealand Meatworkers & Related Trade Union Incorporated v Alliance Group Limited* [2015] NZEmpC 16.

7 *Health Waikato v Elmsley*, above n 2, at [53] cited in *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20].

seek increased costs. It is suggested, with reference to the position under the High Court Rules, that the jurisdiction has been developed primarily to allow defendants to have some economic means of limiting their exposure to the risk of costs, but not to allow a plaintiff to increase his claim for costs: *Moore v McNabb*.[8] I do not accept that this is the effect of that decision. What the Court of Appeal said in that case when discussing the applicable principles is:[9]

> … in fairness, defendants must have the means of gaining some protection from costs by making offers to settle by in some way meeting the claim. Plaintiffs should also have protection where defendants decline reasonable settlement offers.

[20] I do not consider that the Court is precluded from considering a Calderbank offer made by a plaintiff. Rule 68(2) of the Employment Court Regulations 2000 makes it clear that when exercising its discretion, the Court may have regard to an offer despite that offer being expressed to be without prejudice except as to costs. The regulation does not stipulate that such an offer has to be one made by a defendant. I proceed on the basis that the Court may have regard to a Calderbank offer whether it is made by a plaintiff or a defendant.

[21] Here, the plaintiff made an offer which would have resulted in a payment that is significantly less than that ultimately awarded by the Court. The offer made was clear in its terms, and it was made in sufficient time prior to the hearing as to permit a careful evaluation by, and for, the defendant. The plaintiff is entitled to increased costs.

[22] However, I do not consider that the rejection justifies an award of indemnity costs or an uplift of as much as 85 per cent. I consider that the correct approach is to award 80 per cent of reasonable costs as from the date when the offer of settlement was rejected, and 66 per cent of reasonable costs prior to that date. On the information before the Court, the proportion of costs incurred prior to the advancement of the offer was 10.589 per cent. The arithmetic result is approximately $44,700, exclusive of GST.

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8 *Moore v McNabb* (2005) 18 PRNZ 127 (CA) at [56]-[58].
9 At [56].

[23] As regards GST, the Court has, on some occasions in the past, considered it appropriate to award GST if the recipient of the order is unable to recover that liability.[10] The alternative is to proceed on the basis that costs between parties must be GST neutral, as the unsuccessful party making a contribution to costs is not paying for a service provided to it by the successful party; this is the position in the High Court.[11] In this Court, it has been held that such an approach is preferable because it provides overall clarity, consistency and certainty of approach; and that any circumstances which might otherwise have justified the inclusion of GST in an assessment of costs can still be ameliorated by the Court through an uplift in its eventual award beyond the standard 66 per cent starting point.[12]

[24] I favour the latter approach which permits the Court to exercise a discretion as may be appropriate in the circumstances. In the present case, I allow a modest increase for this factor since the plaintiff is not GST registered.

[25] The sum of $2,245.04 inclusive of GST is sought for recovery of disbursements – Court filing and hearing fees, and photocopying. There is no dispute that this is payable and I consider the amount to be reasonable.

[26] I do not consider that an award of costs should be made in respect of the application for costs. The plaintiff has not been wholly successful in his application.

Conclusion

[27] I conclude that the total sum which is fair and reasonable for the defendant to pay the plaintiff in this case is $48,000, together with disbursements of $2,245.04.

B A Corkill
Judge

Judgment signed at 11.55 am on 10 April 2015

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10 *Davidson v Christchurch City Council* [1995] 1 ERNZ 523 at 528-529; *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [49]-[52].
11 *Burrowes v Rental* Space Ltd [2001] 15 PRNZ 209 (HC) at 301.
12 *Air New Zealand Ltd v Kerr* [2013] NZEmpC 237 at [36]-[37].