IN THE EMPLOYMENT COURT
WELLINGTON

[2018] NZEmpC 45
EMPC 363/2017
EMPC 65/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	a challenge to a costs determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	PERFORMANCE CLEANERS ALL PROPERTY SERVICES WELLINGTON LIMITED Plaintiff
AND	IOANA CHINAN Defendant

Hearing: (on the papers dated 8 and 22 December 2017, 18 and 26 January, 16 February, 5, 19 and 26 March 2018)

Appearances: B Buckett, counsel for the plaintiff
M Lawlor, counsel for the defendant

Judgment: 11 May 2018

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves two costs issues. First, Performance Cleaners All Property Services Wellington Ltd (Performance Cleaners) challenges a costs determination of the Employment Relations Authority (the Authority).[1]

[1] *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZERA Wellington 112.

[2] Second, Ms Ioana Chinan applies for an order for costs against Performance Cleaners in light of the fact that in this Court she successfully obtained an order striking out Performance Cleaners' claim for want of jurisdiction.

The costs challenge

Summary of the Authority's costs determination

[3] On 16 November 2017, prior to the issuing of the Court's judgment as to jurisdiction,[2] the Authority issued a costs determination.[3] The Authority recorded that all Performance Cleaners' claims had been dismissed in their entirety. It went on to state that Ms Chinan, as the successful party, sought an order for payment of actual costs of $50,124.50 plus GST, which was in effect an award of indemnity costs; alternatively, she sought an uplift to the Authority's daily tariff to $11,000. Disbursements of $2,421.04 were also sought.

[4] The Authority was not persuaded that indemnity costs should be awarded. Whilst it considered that the issue was finely balanced, the Authority concluded that the evidence concerning Mr Barron's conduct at the investigation meeting fell "marginally short of demonstrating misconduct to such a flagrant extent that indemnity costs would be an appropriate consequence".[4]

[5] Then it dealt with an issue as to whether there should be an uplift on the Authority's daily tariff. After reviewing the circumstances which were before it, the Authority referred to concerns it had as to the adequacy of the pleadings, and as to the manner in which Performance Cleaners had provided information, primarily during the investigation meeting. Taking these factors into account, the Authority was satisfied that additional work well beyond that required or expected in the Authority was necessary, and that there should be a significant uplift of the daily tariff to $9,500 plus GST for each of the three days of the investigation.[5]

[6] The Authority was also satisfied that disbursements claimed by Ms Chinan were reasonably incurred.

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2 *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZEmpC 152.
3 *Performance Cleaners All Property Services Wellington Ltd v Chinan*, above n 1.
4 At [15].
5 At [23].

[7] In the result, the Authority ordered Performance Cleaners to pay Ms Chinan $32,775 (GST inclusive) as a contribution to Ms Chinan's costs, and disbursements of $2,276.04.[6]

Jurisdiction

[8] A preliminary issue as to jurisdiction to determine costs arises. Ms Buckett, counsel for Performance Cleaners, submitted that having regard to the Court's conclusions in its judgment of 1 December 2017 to the effect that there was no jurisdiction to consider the plaintiff's claim, the Authority had no jurisdiction to order the plaintiff to pay costs and disbursements. She says the orders made by the Authority are accordingly null and void.

[9] In support of this submission she argued that the description of "lack of jurisdiction", referred to in s 184 of the Employment Relations Act 2000 (the Act), reinforced the proposition that where there is a lack of jurisdiction in the narrow and original sense of that term, the Authority has no entitlement to enter upon the inquiry in question.[7]

[10] Then, Ms Buckett referred to the provision which provides a costs jurisdiction to the Authority, in cl 15 of sch 2 of the Act. It provides:

> **15 Power to award costs**
>
> (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
>
> (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[11] Counsel submitted that while the Act does not define the word "matter", s 161 of the Act establishes the Authority's jurisdiction with regard to "employment relationship problems generally", before providing for specific examples. Ms Buckett said that as this Court had determined that the employment relationship was not a necessary component of the plaintiff's causes of action, the claims which

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6 At [28].

7 Employment Relations Act 2000, s 184(2)(a).

had been before the Authority were not within its exclusive jurisdiction.[8] It followed that there was no basis for the Authority to make any order as to costs.

[12] Counsel for Ms Chinan, Mr Lawlor, submitted that the correct focus had to be on the language of cl 15. He argued that the use of the word "matter", although undefined in the Act, is distinct from the use of the term "employment relationship problem" in s 161 of the Act, and that the meaning of these words could not be conflated.

[13] He submitted that it was useful to consider the term "proceeding" as it applies to an application for costs in the High Court: r 14.1. That rule defines a proceeding as "any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application". The word "matter" in cl 15 should be similarly construed. He went on to submit that the interpretation urged by the plaintiff would result in a legal absurdity. For example, it would follow that if the Authority did not have jurisdiction to award costs as claimed, the Court would not have jurisdiction to consider a challenge to that determination. This could not have been Parliament's intention.

[14] In reply, Ms Buckett emphasised her original submissions, stating that a proper reading of s 161 of the Act confirmed that the Authority's power to award costs related only to employment relationship problems which were within its jurisdiction. She said that if a procedure such as applies to proceedings filed in the High Court was intended, this would be evident in sch 2 of the Act. She also denied there was any legal absurdity. She said that the interpretation urged for by the plaintiff made it clear that the Authority, which was set up to deal with employment relationship problems, could only deal with such a problem.

[15] For several reasons, I conclude that the interpretation of cl 15 which is advocated for the plaintiff is incorrect.

[16] First, the submission effectively means that the phrase in cl 15 "parties to a matter" should be construed as meaning "parties to an employment relationship

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8 *Performance Cleaners All Property Services Wellington Ltd v Chinan*, above n 2, at [92].

problem which is within jurisdiction". That is a substantial gloss on the language which was actually used.

[17] Second, were this to be the correct construction of the clause:

a) The Authority could not make any order as to costs for a successful party where the Authority investigates an issue as to jurisdiction, and determines that there is a want of jurisdiction. That would be a fundamentally unfair outcome.

b) In circumstances where it was determined there was a want of jurisdiction and the Authority made a costs order, it would follow that neither party if aggrieved could bring a challenge to that determination. Such a possibility is also inherently unlikely. Moreover, such a possibility would be contrary to the findings of the full Court in *Sibly v Christchurch City Council*, which observed that a broad approach was to be taken to the interpretation of the word "matter" in s 179(1), the provision which provides for the right of challenge.[9] In my view, the word should be construed consistently unless the context otherwise requires. Interpreting the word broadly in cl 15 would avoid these inequities.

[18] Third, were the interpretation urged by the plaintiff to be adopted in respect of cl 15, it would apply equally to the numerous other procedural provisions in sch 2 referring to "matters which are before the Authority".[10] Again, it is inherently unlikely that Parliament intended that all these procedural provisions would not apply if the Authority determined there was a lack of jurisdiction. Most of these provisions would potentially be referred to before such a conclusion could be reached. Nor could it be the case that orders made under those clauses would no longer be of any effect if the Authority determined, after it had investigated a matter, that it lacked jurisdiction. For instance, it would be nonsensical for a non-publication order which had been properly made during an investigation to

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9 *Sibly v Christchurch City Council* [2002] 1 ERNZ 476 (EmpC).
10 For example, cls 2, 3, 4(a), 5, 9, 10, 12, 12(a), 13, 14.

become null and void upon the finding there was an absence of jurisdiction. This too reinforces the conclusion that Parliament cannot have intended the interpretation for which Performance Cleaners argues.

[19] For completeness, I refer to a provision not mentioned in counsel's submissions, s 165 of the Act, which states:

> ...
>
> The provisions of Schedule 2 have effect in relation to the Authority and matters within its jurisdiction.

[20] The term "jurisdiction" receives a compendious definition in s 161, which provides that the Authority has exclusive jurisdiction to make determinations "about" employment relationship problems generally, including:

> **161 Jurisdiction**
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> ...
>
> (s) determinations under such other powers and functions as are conferred on it by this or any other Act.

[21] Section 165 falls within the definition given in s 161(1); it bestows on the Authority jurisdiction to exercise the procedural powers and functions described in sch 2.

[22] I interpolate that the privative provision, s 184, is not of direct assistance on the present point, since the section focuses on restrictions on review in bodies other than the Authority.[11]

[23] In short, where the Authority has before it an issue which is about a relationship problem, it is properly described as having a matter before it so that it is able to exercise the powers described in sch 2 of the Act; those provisions are all of importance in ensuring that determinations are made according to the substantial merits of the case, and without regard to technicalities: s 157(1) of the Act. That includes the jurisdiction to award costs in a principled way.

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[11] A detailed discussion on the parallel provision relating to the Court, s 198, is found in *Parker v Silver Fern Farms Lt*d [2011] NZCA 564, [2012] 1 NZLR 256, [2011] ERNZ 419.

[24] I conclude that in this case the Authority had jurisdiction to consider the costs issues notwithstanding the subsequent conclusion reached by this Court on the topic of jurisdiction.[12]

My approach to the costs challenge

[25] Ms Buckett referred to the approach which was adopted as to costs in *The Commissioner of Salford School v Campbell*.[13]

[26] For the purposes of that particular case, the Court found that the Authority's costs needed to be reviewed in light of the ultimate outcome reached by the Court, rather than the Authority.

[27] In that instance, an employee had been modestly successful in obtaining remedies following an investigation by the Authority.[14] In her subsequent challenge, the employee was more successful although she did not obtain all the remedies she was seeking.[15] In its costs determination, the Authority had determined that the employer successfully defended most claims; as that was not the outcome in the Court a different approach was required for the purposes of a costs challenge. This meant that the Court had to proceed on the basis the employer was the successful party.

[28] Another issue related to quantum. There was no dispute that the daily tariff would apply; but there was a question as to whether there should be an uplift in light of Calderbank exchanges between the parties prior to the Authority's investigation.

[29] In the present case, different costs issues arise. The outcome in the Court was the same as that in the Authority, but for different reasons: in both instances, it was concluded that the plaintiff's claims could not proceed. A further distinguishing feature is that no Calderbank issues arose during the Authority's investigation.

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[12] Other courts have reached similar conclusions, e.g. *Proust v Blake* (1989) 17 NSWLR 267 (CCA) at 272 per Samuels JA, and *Kowalski v Repatriation Commission* [2009] FCAFC 107, (2009) 259 ALR 444 at [24] - [25].

[13] *The Commissioner of Salford School v Campbell* [2015] NZEmpC 186.

[14] *Campbell v Commissioner of Salford School* [2014] NZERA Christchurch 151.

[15] *Campbell v Commissioner of Salford School* [2015] NZEmpC 122, [2015] ERNZ 844 at [351]-[354].

[30] In my view, the key question which now arises between the parties is whether there should be an uplift above the daily tariff rate in favour of Ms Chinan who was successful in the Authority, and again in the Court.

[31] The de novo challenge as to costs requires this Court to reconsider the appropriate quantum of costs in light of all the information which has been placed before it.[16] This is recorded in the determinations, in the affidavit of Mr Barron filed for Performance Cleaners, and in counsel's submissions. The Court will not proceed as if the costs challenge had been brought on a non de novo basis, which would require consideration of whether the Authority had erred in fact or in law; but it can take into account what the Authority said about the steps taken in the investigation.

Submissions as to quantum of costs

[32] Ms Buckett submitted that a conclusion that there should be an uplift to $9,500 per hearing day was "extreme", and "widely out of step" with the daily tariff figure which the Authority uses as a starting point to determine costs awards. She developed submissions to the effect that this was unjust and unreasonable, in terms of cl 15.

[33] She argued that the Authority had been influenced by irrelevant factors, such as difficulties encountered by Performance Cleaners in organising its financial records for the purposes of the investigation, an alleged failure on the part of the Authority to recognise that those difficulties were undermined by Ms Chinan's possession of key financial documents in breach of her employment agreement; and an incorrect approach to the length of each hearing day, since the tariff was a daily tariff, and not one that was confined to a particular number of hours for each such day.

[34] Ms Buckett also submitted that the Authority had disregarded appropriate principles for making the cost assessment, and in particular had not recognised that this Court has stated that costs awards in the Authority should be modest, and were

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[16] *Metallic Sweeping (1998) Ltd v Ford* [2010] NZEmpC 129, [2010] ERNZ 433 at [14].

not to be used as a punishment or an expression of disapproval of an unsuccessful party's conduct: *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz*.[17]

[35] She said the case was important, because Performance Cleaners had serious concerns over financial matters which it had no choice but to pursue.

[36] It was also submitted that the issue of jurisdiction, as raised by Ms Chinan in this Court, had not been raised in the Authority. She argued that if Ms Chinan had raised this issue by way of an appropriate interlocutory application in the Authority and it had determined there was no jurisdiction, costs for both parties would have been substantially lower.

[37] It was submitted that the Authority's uplift was an expression of disapproval, or amounted to the imposition of a punishment because of the way documents had been introduced at the investigation meeting.

[38] For his part, Mr Lawlor emphasised the particular concerns that were alluded to by the Authority in its costs determination.

[39] He also suggested that the investigation meeting was unnecessarily prolonged by Mr Barron's discourteous and disruptive behaviour throughout the investigation meeting.

[40] Mr Lawlor submitted that the costs determination was reasonable and in accordance with established principles. He said that the daily tariff increased to $9,500 should be upheld or adopted by the Court.

[41] In reply, Ms Buckett emphasised that the Authority's costs determination was not reasonable, and not determined in accordance with established principles. She said that whilst issues had been raised as to Mr Barron's conduct, the size of the costs award was disproportionate to those matters. She disputed assertions of misconduct that had been made in Mr Lawlor's submissions, and stated that in any

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[17] *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

event there was no evidence that such issues had impacted on the extent of counsel's costs.

Legal principles

[42] In *PBO Ltd*, a full Court approved the basic tenets which are appropriate for the Authority to apply when considering an application for costs in the Authority; and these must also guide the Court on a costs challenge. These include:[18]

- There is a discretion as to whether costs would be awarded and in what amount.
- The discretion is to be exercised in accordance with principle and not arbitrarily.
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- Costs generally follow the event.
- Without prejudice offers can be taken into account.
- Awards will be modest.

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[18] At [44].

- Frequently costs are judged against notional daily rates.

- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[43] Subsequently, a full Court confirmed that these principles remain appropriate: *Fagotti v Acme & Co Ltd*.[19]

[44] It is frequently the case that costs are judged against a notional daily rate. This has been commented on by this Court in many judgments. It will suffice to mention the observations of the full Court in *Fagotti v Acme & Co Ltd* when it stated:[20]

> As to the question of the utility and value of a "notional daily rate" for costs, we agree that there is significant value in a commonly applied and well-publicised notional daily rate for costs in the Authority. This enables parties and their representatives to assess more accurately from the outset what may be a very important element of the litigation (costs) when undertaking the regular economic analyses that parties and their representatives should undertake during that process.

[45] A practice note as to costs in the Authority issued by the Chief of the Authority on 30 June 2016 is also relevant. Normally it will be appropriate to conclude that costs should follow the event; and often the notional daily rate, as fixed by the Authority, will then apply.[21] Such an outcome promotes certainty as to costs. However, in the end, the discretion bestowed by cl 15 must be exercised in a judicial and principled way.

Discussion

[46] There are several preliminary matters which should be commented on at the outset.

[47] First, whilst Ms Chinan sought indemnity costs in the Authority, she does not do so now. The sole issue, as far as she is concerned, is whether there should be an

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19 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, [2015] ERNZ 919 at [114].
20 At [108].
21 Practice Note 2, Costs in the Employment Relations Authority, 30 June 2016.

uplift on the normal daily tariff which would otherwise apply: from $3,500 to $9,500 plus GST per hearing day.

[48] Second, as already mentioned, Mr Lawlor made reference to Mr Barron's behaviour during the hearing, suggesting that it led to the hearing being protracted. No evidence was filed in support of this submission. Accordingly, there is not an appropriate basis from which the Court can conclude that the various assertions as to Mr Barron's conduct impacted on the attendances of counsel, and therefore costs. That is all I am concerned with at this stage. Accordingly, I do not regard this assertion as being relevant.

[49] Third, I do not accept that Ms Chinan should be penalised in costs because a jurisdiction argument was not raised in the Authority. It was for Performance Cleaners to take the responsibility to bring claims which were within jurisdiction; not for Ms Chinan to take responsibility for arguing that they were not.

[50] Fourthly, as already explained, this is a de novo challenge. The Authority's conclusions are not central to any review.

[51] I turn to the merits. Performance Cleaners claims were dismissed. Obviously, Ms Chinan was the successful party and costs should follow that event.

[52] The key question which this Court must consider is whether, having regard to the applicable principles applying to this particular investigation in the Authority, there is justification for an uplift from the normal daily rate.

[53] In my view, there are two factors which suggest an increase is appropriate.

[54] The first relates to complexity. It is apparent from both the substantive determination and the costs determination, that the Authority was required to consider a lengthy history of interactions between Ms Chinan on the one hand, and the director of Performance Cleaners, Mr Barron, on the other. That required a consideration of some of their personal interactions, including a contracting-out agreement under the Property (Relationships) Act 1976, correspondence and

multiple bank statements. This material was relevant to a wide range of causes of action, where in summary a claim for $311,080.48 plus interest was sought by the company from Ms Chinan on the basis that she had made unauthorised wage and holiday payments to herself and her mother, reimbursed fictitious expenses, altered accounting records and misappropriated company funds.

[55] From my review of the matter, I am satisfied that the case was complex and involved a very substantial claim; these factors justify an uplift from the daily tariff.

[56] The second matter which is important relates to procedural aspects of the investigation. The following passage from the costs determination summarises these issues:[22]

> [20] First, [Performance Cleaners'] initial statement of problem contained allegations (equating to approximately $150,000) that were time-barred. I note also that the statement of problem made no reference at all to the domestic relationship between Mr Barron and Ms Chinan Counsel for Ms Chinan was required to respond to those matters.
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> [21] There were also considerable difficulties throughout the Authority's investigation with [Performance Cleaners'] provision of information as follows:
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> - The statement of problem also alleged Ms Chinan had characterised personal or fictitious expenses and had [Performance Cleaners] reimburse her the cost of those items. The Authority requested [Performance Cleaners] amend its statement of problem and quantify the claim. An amended statement of problem was furnished but the claim not quantified. Counsel then sought directions to have [Performance Cleaners] particularise the claim including the sum sought, provide MYOB records identifying the expenses that were of concern, and evidence of expenses reimbursed.
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> - [Performance Cleaners'] second amended statement of problem calculated the claim at $72,180.05 but did not comply with the Authority's directions to provide MYOB records and/or evidence of reimbursement of expenses.
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> - In the absence of that information Ms Chinan was required to produce a volume of personal financial information including bank and credit card statements and cross reference individual transactions against [Performance Cleaners'] records (which appear to have contained all of [Performance Cleaners'] consumable and business related expenses incurred over an 18 month period) to establish the expenses were legitimate. [Performance Cleaners'] failure to provide the information specifying what expenses were at

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22 *Performance Cleaners All Property Services Wellington Ltd v Chinan*, above n 1.

issue or any evidence of inappropriate reimbursement substantially increased Ms Chinan's preparation costs.

- The timetabling for the exchange of evidence five months prior to the investigation meeting and was largely complied with. Part-way through the morning of the first day of the investigation [Performance Cleaners] sought to produce further documentation. I requested both parties to hand up any additional written material it wished to rely on. [Performance Cleaners] produced 14 more documents. Approximately half of those documents did not advance [Performance Cleaners'] claim and were not admitted. None of these documents concerned MYOB data and I do not accept [Performance Cleaners'] submission on the matter. I note [Performance Cleaners], purportedly to assist the Authority with document management, placed the inadmissible material into a supplementary bundle containing the admissible evidence the following day.

- On no less than 5 occasions over days 2 and 3, [Performance Cleaners] sought to produce further documentation not previously furnished. No explanation was given as to why this material was not declared at the time of my request. The purpose of having parties exchange information prior to an investigation meeting is so that the Authority member and each party is able to review and consider the material before the testing of evidence begins. It is not acceptable for a party to hold back documents and seek to introduce these during cross-examination.

- The Authority's meeting was scheduled for 3 days. The second and third days were each incrementally extended with earlier start and later finish times. Overall the investigation meeting required a further 4.5 hours (in total) than generally allocated to a 3 day investigation meeting. The extended time required to conclude the investigation was a direct result [of] [Performance Cleaners'] persistently disruptive methods to introduce evidence ... and unnecessarily increased Ms Chinan's costs.

- In final submissions [Performance Cleaners] expanded two claims beyond that set out in the second amended statement of problem which counsel was required to respond to.

- A further 27 pages of documents not seen by the Authority were attached to [Performance Cleaners'] final submissions as evidence. Counsel for Ms Chinan objected to that material.

[22] [Performance Cleaners] appears to accept there was increased complexity to this matter but attributes that as "*mostly*" due to the accounting records created by Ms Chinan during her employment. [Performance Cleaners] misrepresents the Authority's findings on that issue, and the submission understates or ignores the nature and volume of claims, the factual complexities of this case and the sums of money at stake. [Performance Cleaners'] conduct regarding the provision of information and evidence over the entire course of the Authority's investigation was unacceptable.

(footnotes omitted)

[57] This passage focuses on three topics which, in my view, establish that additional costs were incurred by Ms Chinan in defending the claims brought against her.

[58] The first of these arises from the fact that the original statement of problem contained a claim for approximately $150,000, which was time-barred. The Authority stated that counsel for Ms Chinan was required to respond to this claim; I accept that would have been the case given the quantum involved; it is unsurprising there were relevant attendances.

[59] Second, reference was made to the way in which information was introduced to the Authority. It was the Authority's opinion that these matters extended the time required to conclude the investigation by 4.5 hours. This was on the premise that a normal hearing day in the Authority spans 7.5 hours, and that the actual hearing time on each of the three days was longer. Ms Buckett submitted in effect that the hearing notice did not define the sitting hours, only the days on which the Authority would sit. The Court, however, is entitled to take notice of the Authority's clear statement which was to the effect that a normal sitting day would be for 7.5 hours. Also relevant to the costs involved in dealing with documents, is the fact that 27 pages of documents were attached to the plaintiff's closing submissions, to which an objection was understandably filed.

[60] Third, the Member recorded that Performance Cleaners had expanded two of its claims beyond that set out in the second amended statement of problem, to which a response needed to be given. This too, is a factor which is relevant to the consideration of an uplift.

[61] In summary, I consider there was a range of unusual factors that led to additional attendances by counsel.

[62] For the purposes of considering the extent of any uplift, I am assisted by the information which is available from the invoices which were rendered to Ms Chinan; these allow a cross-check to be undertaken as to the extent of attendances.

[63] The legal attendances, net of disbursements, office expenses and GST, totalled $50,164.

[64] The final invoice, of September 2016, which covered the period July to September which included immediate pre-hearing preparation, attendances at the three-day investigation meeting, and the filing of post-hearing submissions, resulted in legal fees of $33,298 being charged (again net of GST, disbursements and office expenses).

[65] Actual hearing time for the period 3 to 5 August 2016 is recorded as totalling 29.7 hours, producing a charged figure of $11,731; but counsel also undertook additional attendances during the hearing, recorded as totalling four hours, producing an invoiced figure of $1,580.

[66] I find that the recorded attendances of counsel were well over and above the range of attendances which could normally be expected in respect of a case to which the notional daily rate of $3,500 per hearing day would apply. Standing back, the preparation and attendances at the hearing, for a three-day hearing, resulted in Ms Chinan being invoiced in effect $16,721 plus GST per hearing day.

[67] Although proceedings in the Authority are normally intended to be low level, cost effective, readily accessible and non-technical,[23] in my view, this is a case where it is appropriate for the successful party to recoup a greater contribution to costs, than would be represented by the figure of $3,500 per hearing day. Having regard to the factors I have discussed, I find that this is an appropriate case for double the normal rate to apply, that is, a figure of $7,000 per hearing day. This is still well below the costs which Ms Chinan incurred, but I remind myself that the correct approach is to provide a contribution to legal costs, not an outright reimbursement.

[68] There appears to be no dispute that Ms Chinan is not GST registered, and I find that for the purposes of this case there should be an additional allowance for GST. The appropriate figure for costs is therefore $24,150.

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[23] *Stephens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, [2015] ERNZ 224 at [94].

Disbursements

[69] Performance Cleaners also challenges the disbursements which were awarded to Ms Chinan. The relevant invoices evidence the following amounts:

Witness expenses (M Nevin)	$20.00
Service fee (M Nevin)	$125.00
Photocopying (inhouse)	249.31
Flights (counsel)	$376.00
Taxis	$229.00
Flights (defendant and Ms I Chinan)	$645.92
Accommodation (counsel)	$254.40
Accommodation for defendant (three nights required due to late finish on third day and flight being missed)	$521.38
TOTAL	**$2,421.04**

[70] Reimbursement of disbursements may be recovered if they are necessary to the conduct of the proceeding, and reasonable.[24]

[71] The challenge relates to each of the above items apart from the first two; that is, no dispute was raised with regard to witness' expenses and disbursements.

[72] I deal with the remaining items sequentially.

[73] As regards photocopying, the sum which is sought is based on amounts included in each of several invoices under the description of "office services including photocopying, postage, tolls and facsimiles", totalling $249.31. It is generally the case that "office expenses" as such are not recoverable, unless over and above a uniform service charge, if necessary and specific to the litigation.

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[24] *Baker v St John Central Regional Trust Board* [2013] NZEmpC 109 at [43].

[74] Mr Lawlor submitted that the photocopying required in this case warranted special consideration, because it went well beyond what would be considered normal. The difficulty with this submission is that, as Ms Buckett submitted, there is no evidence on the topic. The one caveat to that observation is that there is a single entry, shortly before the hearing started, relating to the preparation of a bundle of additional documents. Relying on that entry, I allow $50 for this item.

[75] The next issue relates to the travel costs of counsel, flights and taxis. A question arises as to whether it is reasonable for Performance Cleaners to contribute to the costs of counsel who had to travel. Ms Buckett argued that Performance Cleaners should not have to contribute to disbursements arising from a decision to retain out-of-town counsel.

[76] The situation in this case is different from circumstances which have often been considered in the past, where a party resides in the place where the proceeding is heard, but chooses to engage a lawyer who practices elsewhere.[25]

[77] In the present case, the evidence is that Ms Chinan resided in Auckland and wished to retain counsel who had advised on previous matters involving herself and Performance Cleaners/Mr Barron; her counsel was aware of the history of the litigation between the parties. Given the extent of the claim and the nature of the issues it raised, I find that this was a reasonable decision. There is no evidence that the amount claimed for air travel and taxis was unreasonable.[26] These items totalling $605 are accordingly allowed.

[78] Next, I consider the air travel for Ms Chinan and Mrs Iustina Chinan, the defendant's mother who was called as a witness. Ms Buckett submitted that Ms Iustina Chinan's costs were unreasonably incurred, in that she was not called under a witness summons, and that her attendance at the investigation meeting was brief and with her contribution to the investigation being minimal. The quantum of the claim that directly concerned her was $8,332.26. Although it was a relatively small proportion of the overall claim, it was nonetheless part of it, and one which the

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[25] As in *Fox v Hereworth School Trust Board* [2016] NZEmpC 39; *Banks v Hockey Manawatu Inc* [2016] NZEmpC 97 and *The Commissioner of Salford School v Campbell* [2015] NZEmpC 186.

[26] Which appear to relate to counsel and to Ms Chinan.

Authority had to investigate.[27] The claim involved an allegation that Ms Chinan employed and paid her mother wages without the company's authority; that is, a misappropriation of funds. Specific findings were made on the basis of Mrs Iustina Chinan's evidence which was obviously considered relevant.[28] It was not unreasonable for the defendant to call her.

[79] There appears to be no objection to the travel costs for Ms Chinan herself; since those costs would not have been incurred but for the hearing of the claim, I find that Mrs Chinan's costs were also reasonably incurred. I accordingly allow $645.92 for these travel costs.

[80] Finally, I deal with accommodation. Having concluded that it was reasonable for out-of-town counsel to be retained, I allow $254.40 for her accommodation, based on the relevant invoice. The balance, $521.38, is more problematic. A booking was initially made for two nights ($318.40) and then extended (a further $202.98), after the investigation had concluded. Moreover, the hotel invoice refers to a booking for "three adults". I allow a contribution to the cost of two persons for two nights; doing the best on limited information available, I allow $200.

[81] In the result, the total allowance for disbursements is $1, 900.32.

[82] Ms Chinan seeks costs in the event of the challenge being resisted successfully, which is the case apart from some issues as to the claimed disbursements. Costs should follow that event. The nature of the issues are such that these costs should be fixed under Category 1, Band A of the Court's Guidelines as to Costs (the Guideline), which produces a figure of $2,960.[29] Allowing for the modest success Performance Cleaners achieved with regard to disbursements, I order the company to pay $2,300 to Ms Chinan as a contribution to her costs on the challenge.

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27 *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZERA Wellington 15 at [65]-[73].

28 At [72].

29 Items 2 and 30.

Costs for the Court proceeding

[83] Mr Lawlor sought costs for Ms Chinan in respect of her success in obtaining a strikeout order on a Category 2, Band B basis, under the Guidelines.

[84] Ms Buckett's submissions in summary assert:

a) Ms Chinan's application does not take account of the fact that at an early point in the proceedings the Court declined to call for a good faith report from the Authority following a request from Ms Chinan to do so. Moreover, a Calderbank offer was unreasonably declined.

b) Costs in favour of Performance Cleaners should be awarded to it to reflect the success it achieved on this point, namely $13,380.

c) Alternatively, the Court should consider whether the appropriate outcome is that costs should lie where they fall.

d) An order for costs on costs in favour of Performance Cleaners should be made, in the sum of $1,000.

Relevant principles

[85] The Guideline scale is not intended to replace the Court's ultimate discretion under the legislation as to whether to make an award of costs and, if so, against whom and how much. It is a factor in the exercise of the Court's discretion.

[86] Clause 19 of sch 3 of the Act describes the Court's broad jurisdiction as to costs; additionally, reg 68 of the Employment Court Regulations 2000 provides that in the exercise of that discretion, the Court may have regard to "any conduct of the parties intending to increase or contain costs".

[87] The primary principle is of course that costs follow the event;[30] where there is mixed success, it can be appropriate to order that costs lie where they fall.[31]

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30 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
31 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA), at [35]-[39].

[88] I accept Ms Buckett's submission that the Court of Appeal in *Blue Star Print Group (NZ) Ltd v Mitchell* provides a helpful description of the applicable principles when considering Calderbank offers.[32] In short, such an offer should not be unreasonably rejected, and a "steely approach" is required when assessing any offer which was made to settle issues between the parties.[33]

Discussion

[89] I begin with a consideration of the amount claimed by Ms Chinan. With reference to the Guideline, the total time allocation is 5.7 days, which multiplied by the appropriate daily recovery rate of $2,230 produces the claimed amount of $12,711.[34] I find that this figure is a fair and reasonable starting point for present purposes.

[90] However, as already mentioned, Ms Buckett has submitted that the claimed sum fails to take account of the unsuccessful application which Ms Chinan made for a good faith report; and that a Calderbank offer was unreasonably declined.

[91] Performance Cleaners also submits, effectively by way of a cross-application for costs, that it should be awarded $13,380 in respect of the unsuccessful application for a good faith report.

[92] This claim is made on the basis that according to the Guidelines, the amount which it is entitled for the work involved in resisting the application for a good faith report, totalled $8,920.[35] Ms Buckett then argued that this figure should be increased because of the unreasonable refusal of a Calderbank offer which was advanced by Performance Cleaners. She submitted that a multiplier of 1.5 should be applied to the starting figure of $8,920, which results in the claimed sum of $13,380.

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32 *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

33 At [18] and [20].

34 Reliance is placed on Items 2, 9, 11, 12, 13, 28, 30 and 35 of the Guidelines Scale and in respect of a notice requesting further and better particulars, 0.8 of a day, by analogy with Items 20 or 22.

35 This was derived from Items 11, 12, 13, 30 and 51 of the Guidelines Scale, providing a multiplier to the daily recovery rate of $2,230 of four.

[93] Before dealing with these issues, it is appropriate to set out the procedural steps which provide the context within which the good faith application was made, and the Calderbank offer was advanced.

[94] On 29 March 2017, Performance Cleaners filed a statement of claim. On 9 May 2017, Ms Chinan filed a protest against jurisdiction and on 18 May 2017 a statement of defence.

[95] Prior to a telephone directions conference which I held with counsel on 6 June 2017, both parties filed memoranda as to appropriate directions. As it is relevant to the Calderbank issue, I mention that brief reference was made in Performance Cleaners' memorandum of its intention to resist an anticipated application for a good faith report; at the date of the telephone directions conference that had yet to be filed.

[96] On 4 July 2017, Ms Chinan filed her applications for a good faith report and a strikeout order. On 20 July 2017, Performance Cleaners filed notices of opposition to both applications, together with an affidavit from the director of Performance Cleaners, Mr Barron – the affidavit contained evidence which was read by the Court for the purposes of both applications.

[97] Pursuant to a timetable which I established at the telephone directions conference, submissions were filed: Ms Chinan's on 10 August 2017, and Performance Cleaners' on 18 August 2017.

[98] On 21 August 2017, Ms Buckett sent a Calderbank offer on behalf of Performance Cleaners to Mr Lawlor. I will discuss the terms of that offer shortly. It was declined, with Ms Chinan advancing a counter-offer on 5 September 2017; it too was declined.

The application for a good faith report

[99] On 25 August 2017, I issued a minute resolving the question of whether the Court should call for a good faith report from the Authority. In that minute, I made the point that whether the Court should exercise its discretion had to be resolved on

the basis of the Authority's determination. I said that the Court could not consider perceptions which were contained in affidavit evidence of the parties and in their submissions as to the manner in which the parties had conducted themselves in the course of the Authority's investigation.

[100] I went on to consider five particular points which had been raised on behalf of Ms Chinan as to the way in which Performance Cleaners had run its case before the Authority, it being asserted that the plaintiff's actions may have obstructed the Authority's investigation. I was not satisfied that the threshold was cleared to the point where it could be concluded that the Authority had become unable to investigate the claims before it.[36]

[101] I also concluded that even if the particular matters relied on by Ms Chinan had met the statutory threshold, I would not have been prepared to exercise my discretion to order the obtaining of a good faith report, given the existence of the strikeout application. I considered that this application would provide a more adequate opportunity to assess on the basis of the pleaded issues whether the challenge should be permitted to proceed. I also noted that a good faith report could not be obtained for the purposes of a strikeout application, since s 181 of the Act does not allow for such a possibility.

[102] Accordingly, I dismissed the application seeking a good faith report and reserved costs.

[103] Mr Lawlor submitted that in considering this costs issue, the Court should have regard to the fact that the proceeding was ultimately struck out; he said that costs with regard to the application for a good faith report should follow that event.

[104] I disagree. The application was a discrete step in the proceeding, for which Performance Cleaners is entitled to credit.

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[36] Relying on dicta in *Weston v Warwick Henderson Gallery Ltd* (2003) 7 NZELC 97,286 (EmpC) at [7] and *North Harbour Windows and Doors (1999) Ltd t/a Nu-Look (North Shore) v Henman* [2003] 1 ERNZ 48 (EmpC).

[105] In assessing the extent of the credit, I begin by assessing the amount which has been claimed for the company in respect of this step, with reference to the Guideline scale as follows:

Item	Description	Allocated Days or Part Days (Band B)
11	Preparation for first directions conference	0.4
12	Filing memorandum for first or subsequent directions conference	0.4
13	Appearance at first or subsequent directions conference	0.2
51	Filing notice of opposition and supporting affidavits in respect of an originating application (by analogy)	2
30	Preparation of written submissions one	1
	TOTAL TIME ALLOCATION:	4 days

[106] Using the daily recovery rate of $2,230, a figure of $8,920 is produced.

[107] However, I do not consider that a full award for Items 11, 12 and 13 should be approved. By the time of the initial telephone directions conference, the application for a good faith report had yet to be filed, although it was known that this would occur. It occupied a small proportion of Performance Cleaners' memorandum for the conference and of discussion time at that conference. I allow 0.4 for those attendances.

[108] I also consider that two days for the filing of a notice of opposition and a supporting affidavit is too high in the circumstances. I allow 0.5.

[109] Finally, the scale amount of one day for preparing written submissions is also excessive; I allow 0.5. The resultant figure is $3,122.

Calderbank offers

[110] As mentioned, shortly after counsel filed submissions with regard to the application for a good faith report, Ms Buckett advanced an offer which was without prejudice save as to costs. Its terms were that Performance Cleaners would discontinue its proceedings if Ms Chinan forewent any costs award by the Authority, and in connection with the Employment Court proceeding. As already indicated, the offer was declined. Ms Chinan counter-offered, also on a Calderbank basis. In essence, it was proposed Performance Cleaners pay $25,000 towards Ms Chinan's costs in the Authority and the Court to date, and that an agreement to do so would constitute a full and final settlement of all claims between the parties and their related interests. This offer was also declined.

[111] The offer made for Performance Cleaners was not quantified. However, the Court is assisted by the factors considered earlier for the costs challenge, the result of which is that Performance Cleaners should pay Ms Chinan costs of $24,150 and disbursements of $1,900.32, a total of $26,050.32.

[112] The Court has not been provided with any accurate information as to the costs incurred by either party in the Court, which would also have been of assistance in assessing whether it was unreasonable to decline the Performance Cleaners offer. However, guidance can be taken from the figure already determined in respect of costs regarding the application for a good faith report, $3,122. A notional allowance should also be made for the filing of the statement of defence and notices of opposition.

[113] Doing the best that I can on the basis of this information, a reasonable allowance for Ms Chinan's costs in the Court at the time of the offer was $5,000, which together with the amount ordered for payment by the Authority totals approximately $30,000. Ms Chinan was being asked to forego that sum, in consideration of the Court proceedings being discontinued.

[114] Although acceptance of Performance Cleaners' offer would have achieved the same outcome as was ordered by the Court when it struck the proceeding out, there was clearly a significant difference as to costs. The offer required Ms Chinan to

waive that element. Given the amount involved, it was not unreasonable for Performance Cleaners' offer to be declined.

[115] The result is that Ms Chinan is entitled to her claimed scale costs of $12,711, offset by the amount which Performance Cleaners is entitled in respect of the application for the good faith report, $3,122, leaving a balance of $9,589. GST on that sum is not sought.

Conclusion

[116] Performance Cleaners' costs challenge is largely unsuccessful, although I have allowed a modest modification of the claim for disbursements. The result is that Performance Cleaners must pay Ms Chinan $24,150 as a contribution to her costs in the Authority, and disbursements of $1,900.32; Ms Chinan is also to be paid costs in respect of the costs challenge of $2,300.

[117] This judgment replaces the Authority's costs determination.

[118] With regard to the proceeding in this Court, Performance Cleaners is to pay Ms Chinan the sum of $9,589.

[119] Both parties seek an order for costs on costs in relation to Ms Chinan's application for costs. Given the mixed outcome, I decline to make such an order.

B A Corkill
Judge

Judgment signed at 2.40 pm on 11 May 2018