IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 13
EMPC 307/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	TITIIMAEA EUGENE ELISARA Plaintiff
AND	ALLIANZ NEW ZEALAND LIMITED Defendant

Hearing: On the papers

Appearances: S Worthy and HG King, counsel for plaintiff
H Waalkens QC and J MacGibbon, counsel for defendant

Judgment: 26 February 2020

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

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[1] Mr Elisara claimed that he had been unjustifiably dismissed from his position as Chief Executive Officer of the defendant's New Zealand branch. The Employment Relations Authority dismissed his claim and he filed a challenge in the Court.[1] The Authority subsequently ordered $15,000 in costs against the plaintiff.[2] The parties agreed that that amount would be held in a trust account pending the outcome of the challenge. I dismissed the challenge for reasons set out in a judgment dated 6 September 2019.[3] There is no dispute that the defendant is entitled to a contribution to its costs on the plaintiff's unsuccessful challenge and to its costs in the Authority. The parties part company on how much the contribution should be. Because they have

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1 *Elisara v Allianz New Zealand Ltd* [2017] NZERA Auckland 290.
2 *Elisara v Allianz New Zealand Ltd* [2017] NZERA Auckland 366.
3 *Elisara v Allianz New Zealand Ltd* [2019] NZEmpC 123.

been unable to agree costs, they have filed memoranda and material in support of their respective positions.

Costs in the Employment Court

[2] I deal with costs in the Court first. The proceedings were provisionally assigned Category 2B for costs purposes under the Court's Practice Direction Guideline Scale for costs.[4] That is the appropriate categorisation overall, and I do not understand either party to contend otherwise.

[3] The parties arrive at different figures applying the Guideline Scale. This largely reflects differences in approach to interlocutory applications and whether provision should be made for the attendances of second counsel. I accept the defendant's submission that an allowance for second counsel is appropriate. I also agree that an allowance should be made in favour of the defendant in relation to the application for non-publication orders, which was in material respects actively opposed by the plaintiff. My assessment applying the Scale to each relevant step is as follows:

Step	**Proceeding**	**Allocated Days**
2	Commencement of defence to challenge by defendant	1.5
11	Preparation for first directions conference	0.4
13	Appearance at first or subsequent directions conference	0.2
23	List of documents on disclosure	2.0
27	Inspection of documents	1.0
15	Filing memorandum for subsequent directions conference – 15 November 2018	0.2
36	Defendant's preparation of briefs	2.0

[4] Employment Court Practice Directions at 18 <www.employmentcourt.govt.nz/legislation-and-rules.

38	Preparation of list of issues, agreed facts, authorities and common bundle	1.0
39	Preparation for hearing	2.0
40 + 41	Appearance at hearing with second representation for three days	4.5
30	Preparation of written submissions for name suppression	1.0
Total		
At $2,230 per day = 15.8	**$35,234**	

[4] As the company acknowledges, the plaintiff pursued successful interlocutory applications. Costs were reserved on each occasion. Applying the steps relating to interlocutory applications provided for in the Guideline Scale, to my assessment of an appropriate time allocation for each step, leads to the following:

Step	**Proceeding**	**Allocated Days**
28	Filing interlocutory application (for further and better disclosure)	0.6
30	Preparation of written submissions	1.0
32	Appearance at hearing of defended application	0.5 (being the time occupied by the hearing measured in quarter days)
28	Filing interlocutory application (for supplementary affidavit)	0.6
30	Preparation of written submissions	1.0
29	Filing opposition to interlocutory application (for AVL evidence)	0.6
30	Preparation of submissions (by way of memorandum)	0.2
Total		
At $2,230 per day = 4.5	**$10,035**	

[5] The company's legal costs in the proceedings were well in excess of the amount which would be arrived at applying Scale costs, although there is an issue as to whether its costs were reasonable (a point I return to below).

[6] The company seeks an uplift to Scale costs based on Calderbank offers made to Mr Elisara prior to the hearing. Two were made shortly after the Authority's investigation meeting and prior to the substantive determination being issued, namely on 12 July 2017 and on 19 July 2017; a further two were made after the statement of claim had been filed in the Court and well before the hearing (namely on 26 November 2018 and 19 December 2018). The company says that, while it does not seek increased costs from the July 2017 dates, the first two offers may be considered in the Court's assessment of an increase in Scale costs from 26 November 2018. I accept that is so as a matter of principle, for the reasons set out in *Stevens v Hapag-Lloyd (NZ) Ltd*.[5]

[7] The November offer was for a payment of $100,000, with $40,000 of that sum being paid by way of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Relevantly, the offer included a statement to be used by Mr Elisara that recorded that no finding of deliberate misconduct had been made. A further offer was made in the same terms, although uplifting the payment from $100,000 to $110,000, just over three weeks later. Mr Elisara did not respond to either offer.

[8] The short point made by the company is that Mr Elisara unreasonably declined to accept the offer of 26 November and the subsequent offer of 19 December, and this should be reflected in an uplift in costs from the amount which might otherwise be awarded applying the Scale.

[9] The Court has a wide discretion when dealing with costs.[6] The discretion is to be exercised judicially and according to principle. In considering costs, the Court can have regard to an offer made without prejudice except as to costs.[7] What has been described as a "steely approach" may generally be expected to be applied in circumstances where a party has unreasonably refused to accept such an offer.[8] That

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5 *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137, [2015] ERNZ 1080 at [17]–[30].
6 Employment Relations Act 2000, sch 3, cl 19.
7 Employment Court Regulations, reg 68.
8 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].

is not, however, an immutable rule, as the wording of reg 68 of the Employment Court Regulations 2000 itself makes clear. Much will depend on the particular circumstances of the case.

[10] While it is accepted that Mr Elisara declined offers to settle, which would have been beneficial to him having regard to the outcome of the litigation process, it is submitted that they should be put to one side because they were uncertain in their terms, were limited in scope, and did not address vindication.

[11] There will be circumstances in which it is reasonable to decline a Calderbank offer on the basis that its terms are not sufficiently certain. In *Health Waikato Ltd v Van der Sluis* (a judgment referred to by the plaintiff) the Court of Appeal held that where something is not explicitly said to be included in the offer, it can be concluded that it is not included.[9] What made it reasonable to reject the offer in that case was that, without the inclusion of pre-offer costs, the offer was simply insufficient.[10] It is difficult to reach the same conclusion in this case.

[12] It may also be true, as the plaintiff argues, that the offer did not include the elements of vindication that Mr Elisara was hoping to obtain, and its terms only ensured that his claims against the company would be concluded, not necessarily the company's claims against him. However, such omissions must be put in context. The offer was to settle Mr Elisara's claims against the company. Even if he had succeeded at trial, future claims by the company against him would not have been extinguished. Equally, Mr Elisara's dismissal was found to be substantively justified; an offer that did not include vindication was reasonable. In any event, the company's offer did go some way in terms of vindication, agreeing in its terms that Mr Elisara's misconduct was not deliberate and in offering a sizeable amount by way of compensation. In *Bluestar Print Group (NZ) Ltd v Mitchell*, the Court of Appeal observed that an offer of substantial monetary compensation may be "regarded as conveying a distinct element of vindication" in itself.[11]

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9 *Health Waikato Ltd v Van der Sluis* [1997] ERNZ 236 (CA) at 244.
10 At 245.
11 See *Bluestar Print Group (NZ) Ltd v Mitchell*, above n 5, at [19].

[13] It is also said on Mr Elisara's behalf that the Court should nevertheless exercise its equity and good conscience jurisdiction to reduce costs because of financial hardship. Authority for that proposition (although not in the context of a rejected settlement offer) can be found in *Shepherd v Scan Audio New Zealand Ltd*[12] and *IHC New Zealand Inc v Fitzgerald*,[13] where it was said that:

> … it would be unconscionable to make an award of costs in the light of the defendant's financial hardship in the certain knowledge that she would be unable to meet those costs.

[14] I do not understand these cases to reflect a bright line approach to the exercise of the Court's discretion in respect of financial capacity. Rather, I interpret them as recognising that there may be circumstances arising in a particular case which warrant a departure from the usual approach. As was observed in *Scarborough v Micron Security Products Ltd*:[14]

> [38] There may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

[15] In summary, an unsuccessful party's financial position may be relevant to a determination of costs in the Court, but it needs to be weighed against other relevant factors, including the interests of the defendant, the broader public interest, and the aggravating way in which the losing party has pursued their claim.[15]

[16] In the present case I do not accept that Mr Elisara's financial position warrants a reduction in the costs I would otherwise order against him. He was CEO of the New Zealand office for a period of around two years, with an annual salary of over

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12 *Shepherd v Scan Audio New Zealand Ltd* [1999] 2 ERNZ 374 (EmpC) at 379–380.

13 *IHC New Zealand Inc v Fitzgerald* EmpC Wellington WC7/07, 28 February 2007 at [11].

14 *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 812. A similar point was made in *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2, [2015] ERNZ 196. See too the discussion in *Emmanuel v Waikato District Health Board* [2019] NZEmpC 125 at [14].

15 *Scarborough* at [36].

$325,000, plus discretionary bonuses and other entitlements. He had held similar senior positions for a number of years prior to that time. He has sworn an affidavit which confirms that he had put aside life savings of around $400,000 but a significant amount has been spent on living costs since his dismissal. He now appears to have just less than $20,000 in a bank account; his wife has $120,000 in savings (from the sale of a house in Australia). There is also evidence of substantial investments, said to be in funds to which he has no "current" access.

[17] I note in passing that Mr Elisara's financial position stands in stark contrast to that of many other litigants coming before the employment institutions. For example, the Authority had this to say about Mr Temara, the unsuccessful claimant employee in *Temara v Ministry of Social Development*:[16]

> [21] This applicant has $50,675.56 debt. His income is $186 benefit per week. He has recently had his car repossessed. It is clear on the evidence before me that the applicant would be unable to meet more than a nominal award of costs (if any).

[18] Circumstances as dire as Mr Temara's do not reflect a threshold for consideration to be given to financial hardship. The point is, that while I do not discount the possibility that meeting the award of costs may present a degree of discomfort for Mr Elisara, I am not persuaded that his financial position warrants a reduction in the costs I would otherwise order, and I decline to do so.

[19] I do, however, accept the submission advanced on Mr Elisara's behalf that the company unnecessarily increased costs, particularly in respect of interlocutory issues relating to disclosure. I make an upwards adjustment to Scale costs of $1,500 in Mr Elisara's favour accordingly.

[20] At this point I return to the November and December 2018 Calderbank offers. The offers were reasonable in the circumstances and Mr Elisara unreasonably declined to accept them. The company is entitled to an uplift on Scale costs for steps taken since 26

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16 *Temara v Ministry of Social Development* [2014] NZERA Auckland 217 at [21]. While the Authority reduced costs, it still ordered costs of $2,333 against Mr Temara, to be paid at a rate of $10.00 per week. Note that an application for leave to extend time to pursue a challenge against the Authority's orders was granted by the Court. In the event the proceeding did not progress to a hearing.

November 2018. I agree with Mr Worthy's submission that the actual costs said to have been incurred by the company since the date on which the November Calderbank offer was effectively declined (namely $175,724.33) are not reasonable. In the circumstances I propose to increase Scale costs to 100 per cent of assumed reasonable costs (Scale costs being set at 66 per cent of assumed reasonable costs).[17] This means I allow costs for those steps of $35,477.27 for the steps taken after 26 November.

[21] This leads to a total sum for costs to be paid of $35,761.27, being Scale costs to 26 November 2018 ($11,819) and increased costs from that date ($35,477.27), minus the costs assessed as reasonable on Mr Elisara's interlocutory applications ($10,035 plus an uplift of $1,500 to reflect unnecessary costs incurred = $11,535). Mr Elisara is accordingly ordered to pay to the company the sum of $35,750 (rounded down) by way of costs on his unsuccessful challenge. Unless agreed otherwise between the parties, those costs are to be paid within 28 days of the date of this judgment.

[22] The company has claimed over $5,000 by way of disbursements in the Court. The Court needs to be satisfied that claimed disbursements were both necessary and reasonable.[18] Counsel for the plaintiff raised a number of issues in respect of the basis on which a number of disbursements were sought. This led to the defendant withdrawing several claims. They can be put to one side. In relation to the remaining items, I am satisfied that the costs associated with five nights' accommodation for two witnesses are appropriate, including because the hearing concluded late on the last day and they were travelling from and to Australia. Costs associated with a flight from Auckland to Queenstown for one of the witnesses are not sought, but it is appropriate that the costs of return travel to Australia be reimbursed. Disbursements are ordered accordingly.

Costs in the Authority

[23] I now turn to deal with costs in the Authority. The investigation meeting took one day. Applying the usual notional daily rate would lead to a costs order of $4,500.[19]

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17 See *Xtreme Dining Ltd T/A Think Steel v Dewar* [2017] NZEmpC 10, [2017] ERNZ 26 at [32].

18 High Court Rules 2016, r 14.12.

19 The usual notional daily rate applied in the Authority is $4,500 for the first day of the investigation meeting and $3,500 for each subsequent day: *Elisara v Allianz New Zealand Ltd* [2017] NZERA Auckland 366, above n 1, at [3].

The Authority applied the daily rate as a starting point for increased costs. It ordered costs of $15,000, said to reflect three considerations – first, pursuit of an interlocutory application; second the "belts and braces" approach adopted by then-counsel for Mr Elisara in the Authority; and third, an uplift of $7,000 to recognise the "thorough preparation of its case by Allianz which was of significant assistance."[20]

[24] Counsel for the company submits that unless it can be shown that the Authority member erred in setting costs, the costs determination should not be disturbed. I do not agree that this is the correct approach. Mr Elisara filed a challenge and subsequently amended his statement of claim to incorporate the Authority's costs determination. He pleaded that if his challenge succeeded, the costs determination should be set aside and costs ordered in his favour; if his substantive challenge did not succeed the Authority's costs determination should be set aside and costs calculated in accordance with the usual daily rate should be ordered against him. Mr Elisara elected to pursue his challenge, which incorporated a challenge to the Authority's costs determination, on a de novo basis. That means that it is up to the Court to consider costs in the Authority and reach its own conclusions as to an appropriate order. If I am wrong about that, I would have concluded that the Authority did err in its approach to costs, for reasons which will become apparent.

What is the correct approach to assessing costs in the Authority?

[25] In putting myself in the shoes of the Authority, and in assessing costs in that forum, I think it is useful to return to the basics. Costs in the Authority are discretionary. While the discretion is broad, it must be exercised according with principle and consistently with the scheme and purpose of the Act.

[26] As the Act makes plain, Parliament intended the Authority to be an accessible forum for parties (of varying financial means; capabilities; and resources) to bring their employment issues to it for speedy, non-technical, pragmatic resolution.[21] While there will be some cases where a process more akin to the adversarial processes of the Court might be appropriate, with their associated (often costly) bells and whistles, many cases in the Authority do not require this sort of approach. The fundamental

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[20] *Elisara v Allianz New Zealand Ltd* [2017] NZERA Auckland 366 at [30].

[21] *McConnell v Board of Trustees of Mt Roskill Grammar School* [2013] NZEmpC 150, [2013] ERNZ 310 at [35]. See Employment Relations Act 2000, ss 143 and 157(1).

point is that the Authority was designed as a new model for dispute resolution in this jurisdiction, with the Authority member taking on an inquisitorial role and effectively driving the investigative process.[22]

[27] While application of an assumed daily rate has the advantage of bringing a degree of certainty to the costs aspect of litigation, factors supporting the Authority's unique role remain pivotal to a principled assessment of costs in a particular case. The full Court judgment in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* emphasised the point. While the Court held that there was "nothing wrong in principle with the Authority's tariff based approach", it made it crystal clear that this was subject to the proviso that it was not to be rigidly applied without regard to the particular characteristics of the case.

[28] In listing 11 basic tenets for assessing costs (described as appropriate and consistent with the Authority's functions and powers), the full Court emphasised the breadth of the Authority's discretion, including as to whether to award costs at all; and if so in what amount. The full Court also made it clear that equity and good conscience had a key role to play in determining costs in the Authority and that this factor was to be considered on a case-by-case basis. Importantly, the full Court emphasised that costs in the Authority "**will** be modest" and drew a distinction between the approach to costs in the Court, where factors increasing costs "beyond what could reasonably be labelled 'modest'" may be taken into account. Relevantly, a subsequent full Court in *Fagotti v Acme & Co Ltd* said:[23]

> We have not been persuaded that the broad principles stated by the full Court in *Da Cruz* should now be departed from or even altered, either in general or in this case in particular.

[29] The full Court's observation that costs in the Authority will be modest should not be overlooked. It appears to be underpinned by two key points. First, the unique attributes of the Authority and the way in which it is designed by Parliament to operate, including with the Authority member shouldering much of the burden which would otherwise

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22 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].
23 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, [2015] ERNZ 919 at [108].

be expected to fall on the parties and their representatives.[24] Second, the clear Parliamentary intention to preserve access to the Authority for the resolution of employment disputes. It goes without saying that access is impeded, particularly for low or no income workers, when costs awards become an off-putting spectre for litigants, or would-be litigants. What might be regarded as a modest cost for one person will be a crushing burden for someone else. Accordingly, it might be said to follow that the notional daily rate of $4,500 should not be assumed to be universally "modest" and applied as if it was.

[30] In this regard it is particularly important not to lose sight of the realities faced by many of the litigants who access, or who would like to access, the first instance dispute resolution services of the Authority. A worker on the minimum wage earns $17.70 per hour (which equates to after tax take-home pay of around $15 per hour, assuming no KiwiSaver or student loan or liable parent contribution). That worker would have to work for 304 hours; 38 working days or 7.6 weeks to meet the cost burden applying the notional daily rate for the first day of an Authority investigation. They would also have to avoid incurring any other expenses whatsoever (such as rent, food, transport, childcare, medical, clothing costs) during that 7.6-week period in order to meet such an award out of their earnings. It goes without saying that a dismissed worker who had failed to find alternative work but who wished to pursue a claim against their previous employer for unjustified dismissal and reinstatement would be in an even more difficult position.

[31] All of this simply underscores the general point that the full Courts in *Da Cruz* and *Fagotti* made very clear, namely that the particular circumstances of the particular case, which include the unsuccessful litigant's particular circumstances, need to be considered in arriving at a just award.

[32] For completeness, I do not read the Court's judgments as endorsing a blanket approach to the daily rate, while acknowledging that in some cases it may provide a useful rule of thumb. Nor do I read the judgments as supporting an approach which would effectively, although perhaps unwittingly, punish an unsuccessful party for

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[24] See the discussion of the Authority's role, and its relevance to cost-setting, in *Fagotti v ACME and Co Ltd*, above n 23, at [105]–[107].

seeking to assert their rights under the Act to access the Authority. If it were otherwise, it would seriously risk undermining clear legislative intent and deter less well-resourced litigants from accessing the Authority to air their employment issues at first instance, before an objective decision-maker, for fear of the financial burden that might be imposed in the event that they do not succeed.

[33] I approach the setting of costs in the Authority in this case applying these broad principles.

[34] I do not regard this case as requiring a bells and whistles approach in the Authority and I do not consider it appropriate to increase the costs I would otherwise order by having regard to the effort the company went to in presenting its case in that forum. I agree with Mr Worthy's submission that the fact that the company adopted a thorough approach which may have been of assistance to the Authority Member does not mean that it should automatically receive an increased contribution towards costs. Such an approach to costs would likely have a distorting beneficial impact on well-resourced litigants coming before the Authority (usually, but not always, employers) and a distorting detrimental impact on less well-resourced litigants (including those without the financial resources to engage competent representation). Nor do I propose to have regard to the "belts and braces" approach adopted in the Authority by then-counsel for Mr Elisara. Wasted costs may relevantly be taken into account, but I am not satisfied that it is appropriate to do so in the present case.

[35] I also agree with Mr Worthy that if the daily rate is to be applied (as it was by the Authority in the present case), care needs to be taken not to duplicate allowances for preparation time. That is because preparation time is plainly built into the Authority's notional daily rate. If it were not, the per hour rate for appearing at an investigation meeting in the Authority would vastly exceed that which is allowed for in this Court under the Court's Scale Guidelines. In this regard it is notable that the per day allowance for appearances on a mid-range case in this Court (and in the High Court) in terms of complexity was $2,230 at the relevant time (it has now increased).[25] The Authority's notional daily rate is twice that amount, namely $4,500 for the first day; $3,500 for each subsequent day.

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[25] High Court Amendment Rules 2019.

[36] It is up to parties to decide how much time and effort they wish to apply to a particular matter, and there will be a range of underlying factors informing such a decision. They cannot expect that the costs associated with their decisions will automatically be visited on the unsuccessful party. Costs do not operate in this way in the Court, and there is even less reason why they would operate this way in the Authority, particularly where the investigative process is intended to be driven by the Authority member, rather than the parties themselves.

[37] I accept the submission advanced on behalf of Mr Elisara that an order of $4,500 costs in the Authority is appropriate in the particular circumstances, including having regard to Mr Elisara's financial circumstances. The Authority's costs determination is accordingly set aside. Mr Elisara is ordered to pay a contribution towards the defendant's costs in the Authority of $4,500. Unless agreed otherwise between the parties, those costs are to be paid within 28 days of the date of this judgment.

[38] I record for completeness that no costs have been sought by the company on its application for costs and none are ordered.

Christina Inglis
Chief Judge

Judgment signed at 11.15 am on 26 February 2020