Employment Litigation Costs

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Introduction

I have been asked to talk about costs and, in particular, the new costs Guidelines that have recently been introduced on a trial basis in the Employment Court. It occurs to me that the trial, which will be subject to review, provides an opportunity for the employment bar to reflect on a broader issue – namely the way in which costs have traditionally been approached by the employment institutions in New Zealand and whether consideration might usefully be given to alternative models.

What has prompted this line of thought?

It is not unusual to see decisions in both the Authority and the Court where the relief awarded has, in purely economic terms, been exceeded by the cost of the litigation process itself. Some litigants (on both sides of the fence) may well be left wondering whether it was all worth it.

A number of practitioners and commentators have suggested that the issue might best be addressed by increasing compensatory awards. While such a proposal might have some immediate attraction, it would likely give rise to concerns about the collateral use of remedies to address a deeper issue about the affordability and accessibility of employment litigation.[2] Even putting concerns of this sort to one side, it would offer no relief to the unsuccessful litigant (who would face precisely the same costs liability) and would accordingly be of limited utility.

Further, it is apparent that the cost of securing legal services has fallen out of reach for some, a point that is routinely raised by litigants during the initial telephone

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[1] The views expressed in this paper are the author's own personal views.

[2] See the discussion in *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [13]. Compare *Cliff v Air New Zealand Ltd* AC 47A/06 EmpC Auckland, 17 November 2006 at [23].

conference with a Judge.[3] Legal aid is available for employment litigation but experience suggests that few legally-aided litigants progress to the Employment Court.

Litigants may, of course, seek to reduce their costs by appearing in person. This appears to be an increasingly appealing option for many. Self-represented litigants face a number of challenges in pursuing litigation, which tend to be keenly felt not only by them but also by the Court and the opposing party.

In a recent paper Kós J identified significant problems for what he described as the "have nots" in the civil justice system.[4] The focus of his paper was on the increasing number of self-represented litigants coming before the courts, which he perceived as largely driven by financial pressures.

Relevantly his suggested approach for delivering improved civil justice has much in common with the way in which the Employment Relations Authority was originally designed to operate, with the Authority actively investigating a claim rather than an adversarial model of adjudication. It may be assumed that a traditional adversarial model of litigation is generally more costly for the parties than a model in which the decision-maker actively manages the proceedings, identifies the issues for determination, the evidence and information s/he considers relevant, and takes a lead role in examining witnesses. Justice Kós also advocates for “pleadings aid” (which has synergies with the pro bono pleadings scheme offered by the ADLS through the Auckland Employment Court, which has had minimal uptake) and “limited representation” or “unbundled legal services” involving a lawyer providing restricted legal assistance to litigants.

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3 For a discussion of the costs of advocacy services for an employee on the minimum wage, see S Robson “Case Comment: *Fagotti v Acme & Co Ltd*” [2016] ELB 39.

4 Stephen Kós, Judge of the Court of Appeal “Civil Justice: Haves, Have-nots and What to Do About Them” (address to the Arbitrators' & Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, 3 March 2016).

Disproportionate impact?

In this jurisdiction the impact of costs can be significant, particularly (but not exclusively) for employees. The issue may be seen to be of fundamental relevance, given the underlying objectives of the Employment Relations Act 2000 and the special nature of the employment relationship.

The point can be illustrated by posing, and answering, the following question:

> **Question:** How many hours does an employee on the minimum wage have to work to pay for one day in the Employment Relations Authority, based on the Authority's generally applied daily tariff of $4,500?[5]
>
> **Answer:** 350 hours, 44 working days or 8.5 weeks.

The point can be extrapolated out in relation to hearings in the Court. The average costs award in substantive claims since the beginning of 2016 is approximately $45,000. This equates to nearly a year's gross income for a worker on the average annual wage.[6] Filing and hearing fees (which currently sit, respectively, at $204.44 and $250.44 per half day after the first day) add an additional layer of cost.[7]

The impact of GST on costs in employment litigation has received little attention. However it may be said that the historic reluctance of employment practitioners to raise, and the Authority and the Court to take into account, the GST status of the parties in setting costs has generally had the effect of making employment litigation 15 per cent more costly for employees rather than employers. I recently attempted to explain the negative implications of this for employees (who, unlike employers,

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[5] An employee on the minimum wage earns $15.25/hr, which (according to www.paye.net.nz) comes to an after-tax take home pay of $12.84/hr, assuming no KiwiSaver or student loan contribution. The Employment Relations Authority recently increased its daily tariff to $4,500 for the first day of any matter and $3,500 for any subsequent day of the same matter. See James Crichton "Practice Note 2: Costs in the Employment Relations Authority" (30 June 2016).

[6] Statistics New Zealand "New Zealand Income Survey: June 2015 quarter" (2 October 2015) <www.stats.govt.nz>.

[7] Note there is currently no power to waive fees, although such a power will be conferred on the Registrar if and when the Judicature Modernisation Bill comes in to force (around March 2017).

generally have no ability to recover the GST component of costs) in *Ritchies Transport Ltd v Merennage*.[8]

All of this may be said to neatly illustrate the effect of the current costs regimes in both the Authority and the Court, particularly on low income workers. If it does, it also raises a concern about the extent to which cost may be acting as an inhibiter on potential claims. While I am not aware of any empirical evidence that this is so, it may be a logical inference based on reasonable assumptions about rational decision-making.

It is well accepted that ready access to the courts for genuine litigants is important not only for individuals but also for broader public policy reasons. In the employment jurisdiction the point is particularly acute given the focus is relational rather than purely economic, as the short title of the Employment Relations Act makes clear. The extent to which the traditional model meets this underlying objective lends itself to further analysis and reflection.

Out of or in step? And does it matter?

Interestingly the approach to employment litigation costs in New Zealand can be contrasted to the approach adopted elsewhere. For example, in the United Kingdom each party generally bears their own costs, absent vexatious, improper or otherwise unreasonable conduct.[9] This contrasts with the approach to costs in general civil cases in that jurisdiction.[10] In Australia the starting point in employment litigation is that costs lie where they fall, absent aggravating factors.[11] And it is perhaps notable that the Fair Work Commission (formerly Fair Work Australia) may order costs against lawyers and paid agents personally in appropriate employment cases.[12]

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[8] *Ritchies Transport Holdings Ltd v Merennage* [2016] NZEmpC 22 at [30]-[41]. Compare *Wills v Goodman Fielder New Zealand Ltd* [2015] NZEmpC 30.

[9] See, for example, rr 34, 34A of the Employment Appeal Tribunal Rules 1993 (UK); r 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (UK).

[10] Gavin Mansfield (ed) *Blackstone's Employment Law Practice* (8th ed, Oxford, 2014) at 12.01. See Civil Procedure Rules (UK), r 44.2(2)(a).

[11] Fair Work Act 2009 (Cth), s 611.

[12] See s 401.

A similar costs-lie-where-they-fall approach is adopted in particular categories of proceedings in the Family Court (and High Court on appeal) in New Zealand, in part recognising the importance of the relational nature of much of that Court's work.

Both the Authority and the Court have a broad discretion as to costs, a fact that is regularly emphasised in the cases. Each has developed their own practice, as they are entitled to do within the scope of their discretionary powers. While the practices differ the general starting point is the same – namely that costs follow the event.[13] That is consistent with the approach for general civil litigation in both the High and District Courts. However it contrasts with the approach that has been developed for special categories of litigation identified above, and other claims such as public interest litigation and claims involving alleged breaches of the New Zealand Bill of Rights Act 1990. In respect of the latter category of case, it is well accepted that the obligation on the judiciary to affirm, protect and promote the provisions of that Act is not discharged by applying the usual costs rules, which should not be applied so as to discourage litigants from bringing such claims.[14]

And it is perhaps notable that the Authority is one of the few authorities or tribunals in New Zealand which has elected, under its broad discretion as to costs, to adopt a regime based on a starting point that costs follow the event. The genesis for this approach remains unclear.

There are other interesting features of the current approach to costs in the employment sphere, including that a different model is applied at each stage of the litigation cycle, in the Authority, the Court, and the Court of Appeal. At stage 3, the Court of Appeal may, in its discretion, make any orders that seem just concerning the whole or any part of costs and disbursements.[15] The Rules set out a number of principles relating to costs awards, and the sort of factors that might lead to a reduction or refusal of costs (none of which expressly relate to a party's financial

[13] Endorsed as a general principle in *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [47] and [48]; *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

[14] Matthew Casey (ed) *New Zealand Procedure Manual: High Court* (3rd ed, LexisNexis, Wellington, 2015) at 529.

[15] Refer Court of Appeal (Civil) Rules 2005, r 53, and the principles applying to costs set out in r 53A.

position).[16] A perusal of appeal cases reflects that it is very rare for an unsuccessful party's financial position to be taken into account, and that scale costs are the norm. It is perhaps also notable that the daily recovery rate for complex appeals is currently set at $3,300,[17] markedly less than that which applies at stage 1 of the litigation process in the Authority.

Financial circumstances

The Court has been receptive to arguments that the financial position of the unsuccessful party ought to be taken in to account in assessing whether an award of costs should be made at all. This has continued to raise difficult issues which are not readily reconciled with other factors. So, for example:

- Do the interests of justice weigh more heavily in favour of an unsuccessful party who has limited financial resources or a successful party who has made an unreasonably declined Calderbank offer well in advance of hearing?
- In what circumstances should a successful employer with limited financial capacity bear the full cost of defending an unmeritorious claim brought by an employee with limited financial capacity, whose conduct of the litigation has caused unnecessary expense and delay?
- To what extent should increased costs caused by a self-represented litigant as opposed to a legally represented party be taken into account in fixing costs?

One inventive lawyer has recently mounted an argument that the relative financial position of the parties ought to be taken into account in assessing the quantum of

[16] Rule 53F.
[17] See r 53C.

costs to be ordered in favour of a successful employee. As one overseas commentator has observed:[18]

> Consistent with an unsuccessful party's impecuniosity being largely irrelevant to the exercise of the costs discretion, simply because a successful party is financially well resourced relative to the losing party is no ground for it to bear its own costs. The parties' relative financial positions are therefore irrelevant to an inquiry into whether the usual costs rule should be displaced.

However, while this is the general rule there are exceptions. The Family Law Act 1975 Australia provides that where the court is of the opinion that there are circumstances justifying it to depart from the usual approach of the parties bearing their own costs a number of factors will be relevant, including "the financial circumstances of each of the parties to the proceedings."[19]

Such an approach, namely taking into account both parties' respective financial positions in determining an appropriate costs order, might be said to be aligned with distinctive features of employment law, including the statutory objective of addressing the power imbalance between parties to the employment relationship[20] and the requirement that both the Authority and the Court exercise their respective jurisdictions consistently with equity and good conscience.[21] If that is so, might the comparative value of a costs award in favour of a particular party be relevant?

Conclusion

There is room for argument that two policy objectives are of particular relevance in the employment sphere:

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[18] GE Dal Pont *Law of Costs* (3rd ed, LexisNexis Butterworths, Chatswood (NSW), 2013) at 8.32. See also *Ritchies Transport Holdings Ltd v Merennage*, above n 8 at [22]-[23].

[19] Family Law Act 1975 (Cth), s 117(2A)(a).

[20] Employment Relations Act 2000, s 3(a)(ii).

[21] See ss 157(3) and 189(1).

- the desirability of not deterring access to the employment institutions for the orderly ventilation of grievances and disputes for fear of an intolerable costs burden (while not encouraging improperly motivated claims); and
- the desirability of ensuring that the level of conflict between employee and employer is not exacerbated by costs.

The pilot scheme, and its ultimate review, may provide a platform for employment law practitioners, academics and commentators to give some thought to the way in which costs might best be approached in this specialist jurisdiction.[22] In particular, has the calibration been set at an optimal level having regard to the particular nature of the employment relationship, the overarching statutory objectives, and the desirability of securing the just, cost effective and expeditious disposition of employment disputes?

The answer is not immediately apparent, but the importance of the issue is. That is why it seems to me that it is a discussion worth having.

The new costs Guidelines

The Guidelines were introduced by way of a pilot scheme following consultation with practitioners, many of whom expressed relatively strong views about the proposal. The pilot applies to proceedings filed after 31 December 2015. It is due to run for 12 months.

The Guidelines essentially follow the High Court costs scale, both in terms of the three categories of proceeding and steps in the litigation process. They have however been modified to reflect particular features of employment litigation.

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[22] For a discussion about the correct approach to costs in cases involving tax, and the extent to which there ought to be a departure from the approach adopted in relation to civil appeals generally, see *Auckland Gas Co Ltd v Commissioner of Inland Revenue* [1999] 2 NZLR 409.

The Guidelines were designed to assist parties in considering settlement at an early stage by identifying and weighing their potential costs' liability. They were also designed to promote discussion and agreement as to costs following a substantive judgment, thereby reducing the need to formally apply for orders. If costs cannot be agreed between the parties the Guidelines will likely assist the Court in deciding an appropriate contribution to costs in the particular case. As at today's date no such judgments have issued.

Proceedings filed after 31 December 2015 will receive a categorisation:

> Category 1 – proceedings of a straightforward nature able to be conducted by a representative considered junior in the Employment Court;
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> Category 2 – proceedings of average complexity requiring a representative of skill and experience considered average in the Employment Court;
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> Category 3 – proceedings that, because of their complexity or significance, require a representative to have special skill or experience in the Employment Court.

Provisional categorisation will be assigned following discussion at the initial directions conference. That means that it is important to have a working knowledge of the case, and an understanding of the degree of expertise required to conduct it, at an early stage. The Judge conducting the conference will expect counsel to have an informed discussion about where the proceeding sits and why.

Notably the focus is on the nature of the proceeding, and the level of skill and experience required to conduct it. The focus is *not* on the attributes of the particular practitioner and whether they regard themselves as warranting category 3 status.

Categorisation may change as the case progresses, if the Judge considers it appropriate.

The scale allocates time bands for each anticipated step in the litigation process:

Band A – if a comparatively small amount of time is considered reasonable for the step;

Band B – if a normal amount of time is considered reasonable for a step;

Band C – if a comparatively large amount of time is considered reasonable for a step.

It is anticipated that the Guidelines will take a period to bed-down, particularly for practitioners who are unfamiliar with the High Court Rules. While the Guidelines do not have retrospective effect, some Judges are referring to them in pre-1 January 2016 cases to assist in an analysis of reasonable costs.

As the Chief Judge's Practice Direction emphasises, the Guidelines are just that – guidelines.[23] They do not comprise a straight-jacket. In this regard the Practice Direction notes that:

> Principles applying to awards of increased and indemnity costs; the refusal of, or reduction in, costs; and the effect of the making of a written offer without prejudice except as to costs (a "Calderbank offer") will continue to be applied by the Judges in appropriate cases.

Practitioners will accordingly need to remain attuned to the existence, scope and potential application of such principles.

There are a number of pre-Guideline issues which may remain live, including:

- The way in which factors such as the unsuccessful party's *financial capacity* is to be weighed against factors which might generally act to

[23] Chief Judge GL Colgan "Practice Direction: Costs: Guideline Scale" (Employment Court, October 2015).

increase costs, and the extent to which an order for costs might be made notwithstanding financial hardship.[24]

- Whether, and if so how, the *issue of GST* is affected. Note that the Court of Appeal has recently addressed the point in respect of High Court litigation[25] observing that:

  > The Court has an overriding discretion in making costs awards. That includes a power to order increased costs. In so ordering, the Court uplifts from scale, rather than awarding a percentage of actual costs incurred; but it may take into account the costs actually incurred by the successful party, including, where applicable, the GST component of those costs.

  If a party is wishing to have their GST position taken into account by the Court they should draw this to the Court's attention, and put sufficient information forward to enable the point to be considered.[26]

- The extent to which *"time payment" regimes* may be imposed on the unsuccessful party, to ameliorate the immediate effect of a costs order.[27]

- How costs in relation to *disputes as to the interpretation of Collective Employment Agreements* are to be dealt with, and whether the general rule is that costs lie where they fall in such cases.[28]

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[24] See, for example, the discussion in *Vince Roberts Electrical Ltd v Carroll* [2015] NZEmpC 161 at [12]; *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [21]. See too cases such as *Prime Range Meats Ltd v McNaught* [2014] NZEmpC 179, declining to make any award of costs on the basis that it would be oppressive and unduly harsh (at [14]).

[25] *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282 at [11]. And see *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [112] leaving the question open.

[26] See *New Zealand Venue and Event Management Ltd,* above n 25 at [12].

[27] *Fox v Hereworth School Trust Board* [2016] NZEmpC 39 at [57]-[80]. Compare *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137.

[28] See the recent discussion of the authorities in *Tertiary Education Union v Vice Chancellor, University of Auckland* [2016] NZEmpC 6.

- The *impact of settlement offers* made in advance of an Authority investigation but not renewed in the Court.[29]

- The relevance or otherwise of the costs associated with *attendances at mediation and JSCs*.[30]

- The extent to which the Court may make an *order of costs against counsel and/or a representative*.[31]

- *Costs on costs*. The Guidelines make no express provision for awards of costs on an application for costs although they do provide for interlocutory applications. A review of the cases reflects that costs are not routinely ordered on costs but there have been an increasing number of cases where the Court has been willing to do so. It would be wise for practitioners wishing to seek a contribution to costs on costs to make that clear, together with the basis for any such claim.[32]

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29 See, for example, *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 185 at [12]-[28]; *O'Connor v University of Auckland Students' Assoc Inc* [2014] NZEmpC 185 at [19(d)]. Compare *Stevens v Hapag Lloyd*, above n 27 at [18]-[21].

30 See, for example, *Jinkinson v Oceana Gold (NZ) Ltd* [2011] NZEmpC 2; *Naturex Ltd v Rogers* [2011] NZEmpC 9, (2011) 8 NZELR 251; *RHB Chartered Accountants Ltd v Rawcliffe* [2012] NZEmpC 31, [2012] ERNZ 51; *Fagotti v Acme & Co Ltd*, above n 25 at [113].

31 See, for example *Aarts v Barnardos New Zealand* [2013] NZEmpC 145. Compare the High Court's inherent jurisdiction to make such orders.

32 See, for example, *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105; *Wellington Free Ambulance Service Inc v Austing* [2015] NZEmpC 220 at [15]; *Sealord Group Ltd v Pickering* [2015] NZEmpC 158 at [40]. For a discussion of the differing lines of approach adopted in the High Court, see D Bullock and J Long "Costs of Costs Applications" [2014] NZLJ 348.