NEW ZEALAND LAW SOCIETY
NZLS EST 1869

Law Society Building, 26 Waring Taylor Street, Wellington,
DX SP20202, Wellington or PO Box 5041, Lambton Quay,
Wellington 6145, New Zealand

TEL +64 4 472 7837 • FAX +64 4 473 7909
E inquiries@lawsociety.org.nz
www.lawsociety.org.nz • my.lawsociety.org.nz

14 August 2013

Chief Judge Colgan
Chief Judge's Chambers
Employment Court
DX CX10086
Auckland

Sent via email: judge.colgan@courts.govt.nz

Dear Judge Colgan

Thank you for your letter of 4 June regarding costs in the Employment Court. The New Zealand Law Society sought feedback from members through our national Employment Law Committee and Branches, and through the *Law Points* weekly e-bulletin. We received a significant number of responses, as outlined in the attachments.

It is evident from the responses that there is no clear consensus as to whether the Employment Court should move towards a scale to decide costs, similar to that found in the High Court Rules 2008, or alternatively amend or retain the current practice where Judges decide costs on criteria set out in case law. The NZLS Employment Law Committee considered and discussed your letter and members' responses, and committee members themselves expressed a variety of views. There is general consensus that practitioners would support a more expeditious way of dealing with costs. Some practitioners believe the approach taken in the High Court Rules on this issue results in unfairness in particular circumstances, while others believe it provides some certainty to a matter that should be quickly resolved. On balance therefore NZLS supports consideration being given to the use generally of a tariff or scale with the Court having the flexibility in appropriate cases to deal with individual matters on a basis that ensures justice is done between the parties.

If the Court is to pursue this matter and an appropriate way forward was to set up a working party to explore and develop an appropriate mechanism to address the matter further, NZLS would be willing to provide the services of one or more of its members to serve on that working party.

Please let me know if the Law Society can assist further on this matter.

Yours sincerely

Chris Moore
President

Encl (2)

A SUMMARY OF PRACTITIONERS' FEEDBACK

In response to the invitation from the Chief Judge I have a suggestion though I am sure it is not original. Why not have a published tariff (per diem) costs amount which the parties can accept as a default position thereby not requiring costs memoranda and additional time and expense. If either party does not consider the tariff adequately/properly addresses the issue of costs in the circumstances of a particular case they have 14 days from judgement (or such further time as may be granted on application) to file a memorandum. In the absence of a memorandum or application for further time within 14 days the tariff rate would apply.

While I agree with the impulse of Chief Judge Colgan to reduce wasted time and provide certainty for practitioners and parties, regard should be had for the complete disaster that is the Schedules of Costs in the High and District Courts. These in no way provide for a scale of 2/3rds of actual and reasonable costs. Successful parties are lucky to get 20%, and that is in a small town, where legal fees are relatively low. It is at the stage where I advise defendants that the litigation risk regards costs is not a deterrent, and even a spurious defence is worth mounting due to the costs to the plaintiff of taking the matter to hearing.

A very poor standard of advocacy is the result of the current costs regime.

I write further to your request for feedback on His Honour Chief Judge Colgan's letter concerning costs.

In my view the wide discretion surrounding the Employment Court costs regime creates unnecessary uncertainty and expense. There are insufficient guidelines as to what the Court is likely to do, making it harder for parties to settle the issue of costs post event, even where both parties are reasonably well motivated to do so. This is in marked contrast to the situation in the Authority, or in other forums (such as the District Court).

Accordingly I would strongly support the Employment Court adopting a scale regime similar to that used in the High Court and District Court.

In a number of cases I believe the parties will be able to simply agree on scale costs. The appropriate category/band would presumably be either agreed or set as part of the pre-trial preparations/conferences, or set by the Judge when giving the decision. Aside from a category, costs should then depend on the steps taken and the actual trial length, with a 2:1 allowance for preparation (1 day of hearing equals equates to 2 days of preparation).

The rules would obviously need to accommodate factors/principles which might lead to an increased or reduced costs award, such as *Calderbanks* or unreasonable behaviour. Again, these can be addressed in a similar manner to the High Court/District Court regimes. In my view having the principles clearly set out will aid negotiation or (if a hearing or costs decision is necessary) at least serve to narrow the issues in dispute.

I acknowledge that the Employment Court tends to take an employee's circumstances into account to a greater degree than would be the case in civil litigation. Again, I think this principle could be built in to a new cost regime. That said, the human and financial cost of lengthy litigation to all parties is simply enormous (see for example the tragic costs decision in *Walker v ProCare Health*). I recognise there is a very difficult balancing act here. However I tend to the view that allowing employees to run these cases and then awarding very limited costs against them when they lose actually encourages (or sufficiently discourages) destructive litigation. I agree there are real benefits to the Court's current approach. However I am not at all sure that these outweigh the value in being able to say to a client (who is hell bent on taking a case) that they will

almost certainly be liable to pay costs in the range of $x to $y, should they lose. I know many won't, but some litigants will listen to these sorts of cold hard numbers, and will think again.

I would like to add a point about a related aspect - which if I have correct is, in my view, the source of the greatest potential unfairness in this area.

It concerns the situation where a party succeeds in the Authority (and would therefore be entitled to scale costs) but a challenge is filed. In that case costs are generally held over until the completion of the Court proceeding, at which time the Judge considers all issues of costs.

The first unfairness, in my view, is that a party which succeeds in the first instance, but fails in the second, gets no recognition at the first stage, and has to pay all costs of the successful party at the second stage. Not only does this mean that the party misses out on what it would have otherwise received at first stage, but the tariff is abandoned at second stage, and a global award made.

There are so many things wrong with this - at least in my view - it is hard to know where to begin. But for present purposes I think the Authority stage should be regarded as an interlocutory step, justifying immediate payment according to scale, and limiting the Court's jurisdiction to the proceeding before it.

A practice note from the Court as they suggest would clarify expectations of counsel.
I also agree that the current regime generally works well and I do not favour adopting the HC Rules process.

The only matter I disagree with Bell Gully on – is the approach they propose on service charges.
I believe only actual disbursements should apply.

I don't favour the tariff "ERA style" as I believe this would be too simplistic and will not really provide any better clarity for the more complex matters that tend to take place in the Court.

Canterbury Practitioners
Issues with the current regime
There is currently inconsistency between the costs awarded in the Authority when compared with those obtained in the Court, and internal inconsistencies in decisions issued by both these judicial bodies.

The current discretionary basis on which costs are awarded in the Employment Relations Authority under clause 15 of Schedule 2 to the ERA 2000 leads to the following issues:

- The current daily tariff of $3,000-$5,000 bears no relation to actual costs incurred.
- The approach taken by the Authority to apply the daily tariff is inconsistent with the fundamental principle adopted by other courts that costs should be a reasonable contribution to reflect costs actually and reasonably incurred.
- It encourages some lawyers and advocates to simply try to secure a quick settlement or work on a "no fee- no win" basis and discourages the aggrieved from pursuing cases as the costs are high and there is no prospect of recovering actual costs.

The current discretionary basis on which costs are awarded in the Employment Court under clause 19 of Schedule 2 to the ERA 2000 is different again. The current two step approach in Binnie v Pacific Health Ltd [2002] 1 ERNZ suggests a determination of what costs reasonably incurred and then a reasonable starting point to contribute to a successful party's costs being 66%. A general rule of two days to every day of hearing being used as a guide. The current costs regime used by the Court leads to the following issues:

- The difference between the approaches used by the Employment Relations Authority and the Court is unhelpful as it leads to inconsistencies.
- The current amounts awarded impact on the representation available to litigants.
- A costs assessment which is not referenced to any independent scale leads to discrepancies between parties based solely on their choice of representation as the hourly rate of solicitors is vastly different across New Zealand.
- There is no guidance in the current regime given as to the appropriateness of charging for junior counsel or for the engagement of Senior Counsel If one party elects to engage senior counsel because of the perceived difficulties of the case there is uncertainty about recovery of his/her fees.
- A party who has elected to engage Senior Counsel or a solicitor who is on considerably higher hourly rates than opposing counsel has a higher base starting point for recovery where costs are calculated on 66% of actual costs. A scale would place all practitioners on an even footing regardless of location.

Suggested amendment to Employment Court costs regime

Canterbury practitioners submit that a single costs regime should be adopted which makes reference to a sliding scale similar to that used by the High Court. The scale could provide for both a band and category to set the level of difficulty and amount of time. A scale would be of assistance to litigants and practitioners alike and provide the following benefits:

- It imparts simplicity and certainty into litigation.
- It removes the discrepancies in charge out rates across the country. This is particularly relevant to Canterbury practitioners whose charge-out rates are significantly less than those in Wellington and Auckland.
- In principle, a scale could be applied by both the Authority and the Court with amendments made to the Authority scale to reflect the more informal nature of an investigation. In this way the scale costs regime used by the Authority (versus that used by the Court) would mirror the differences between District and High Court scale costs.
- A scale would give certainty and remove the need for prolonged submissions on costs. If parties could not reach agreement using the scale, the issue could be determined on the papers – removing the need for argued hearings over costs and the associated (unrecoverable) expense of a costs argument.
- A scale can be easily amended each year to reflect inflation.
- Provision could be made for indemnity costs. While it is acknowledged that indemnity costs are currently possible, a scale could formalise the categories of costs referred to in Bradbury v Westbank Banking Corp [2009] 3 NZLR 400 for indemnity costs.
- It might assist the Law Society in determining any complaints made about fees charged for services rendered by employment practitioners.

And see Bell Gully memo dated 10.7.13, attached

MEMORANDUM

BELL GULLY

TO **Jason Cooper**
OF NZLS Employment Law Committee

FROM **Tim Clarke / Rob Towner**

BY EMAIL jason.cooper@lawsociety.org.nz

MATTER NO. 02-285-8354
DATE 10 July 2013

Costs awards in the Employment Court

Introduction and Summary

1. The Chief Judge of the Employment Court is seeking practitioners' views on how costs can be more efficiently dealt with in the Employment Court. This memorandum deals with the following:

   (a) Possible methods of assessing costs.

   (b) The costs regime in the High Court.

   (c) The existing practice in the Employment Court.

   (d) Our comments.

2. In summary, our views are that the Employment Court's existing approach provides sufficient flexibility while ensuring that justice is done between the parties. In addition, we consider that the existing practice could be improved by:

   (a) recognising actual market rates incurred by legal practitioners;

   (b) making a more realistic allowance for preparation;

   (c) being prepared to make more adjustment up and down of costs awards, to take into account the success and delay caused by various interlocutory procedures; and

   (d) allowing claims for service charges.

3. We would recommend that the Employment Court issues a Practice Note to create greater certainty about the Court's approach to the assessment of costs. A Practice Note could clarify the Employment Court's policy; the applicable principles; what is required in terms of a memorandum on costs and supporting evidence; and the consequences of failing to provide sufficient information.

Concerns about costs orders

4. In His Honour's letter dated 4 June 2013, the Chief Judge expressed the Judges' concerns that too much time is being taken up in determining issues of costs. His Honour also noted that there are a significant number of applications for costs which are not adequately supported or presented, which adds to the time for dealing with them.[1]

5. His Honour recognised that scale costs may not be appropriate for many Employment Court cases, but wished to consider whether there might be a more expeditious way of dealing with costs that allowed for flexibility while ensuring that justice is done between the parties.

6. The Chief Judge's comments recognise the desirability of maintaining a "proportion of costs" model for inter-party costs, rather than a "no costs" or "full costs" model. In other words, costs awarded should be a proportion of actual and reasonable costs, but subject to an overriding discretion to determine otherwise.

Possible methods of assessment

7. In considering the possible methods of assessing costs, it is helpful to consider the reform to the costs regime in the High Court Rules.

8. In 1997, the High Court Rules Committee proposed amendments to the High Court Rules governing inter-party costs.[2] The Rules Committee had received submissions from the New Zealand Law Society, the New Zealand Bar Association and practitioners. The Rules Committee also considered Australian and English reform on costs. By that stage, costs were effectively based on a default rate that a percentage of the sum in dispute was payable. This was tempered by judicial discretion, which was applied inconsistently, so that the law was inherently uncertain.[3]

9. The Rules Committee considered four possible methods of assessment:

   (a) Traditional taxation (now known as "costs assessment" in the United Kingdom): a system whereby a Registrar reviews actual solicitor-client costs, item by item, with deductions where claims could not be justified.

   (b) Robust judicial assessment of reasonable costs: a system by which the Court would stipulate a global sum designed to reflect the costs which a reasonably efficient practitioner would have charged in the case in question.

   (c) Robust judicial review of costs actually incurred: a system by which the Court would stipulate a global sum based on actual solicitor-client costs, after allowing for unnecessary or excessive charges.

   (d) Scale costs: costs determined by reference to a preconceived formula or schedule prescribed in the rules.

---

[1] See also: *Eastern Bay Independent Industrial Workers Union Inc v Pedersen Industries Ltd (No 2)* (EC Auckland AC11B/09, 10 June 2009); *Merchant v Department of Corrections* [2009] ERNZ 108; *Taylor v Milburn Lime Ltd* [2012] NZEmpC 27.
[2] Justice Fisher, "Rules Committee Invitation for Comment on High Court Costs Proposals" dated 2 September 1997. See also Fisher and Chambers, "Costs: Changes to the High Court Rules" (paper presented to ADLS Seminar, 22 November 1999).
[3] *Glaister v Amalgamated Dairies Ltd* (CA 99/03, 1 March 2004), at [9] to [13].

10. The Rules Committee considered that taxation would be unacceptable because it is time-consuming and expensive. The Committee also noted that options (b) and (c) would involve the exercise of judicial discretion in every case, which might involve time, expense, uncertainty and arbitrariness. Therefore, the Rules Committee favoured the determination of costs by reference to a scale, provided that:

    (a) Adequate flexibility could be maintained. The Rules Committee proposed that the starting point was an assumption that "costs follow the event", and according to scale, but that position may be departed from where appropriate (for instance, a Court may award an uplift by making increased or indemnity costs orders, or make reductions in costs orders).

    (b) Any scale must be kept up to date. The Committee envisaged that the daily rate would be two-thirds of that which would be reasonable for a typical legal practitioner of average experience attending to litigation of average complexity, importance and magnitude.

High Court costs regime

11. The new High Court costs regime came into effect on 1 January 2000, and has survived intact in the new High Court Rules 2008. The objective of the costs regime in the High Court is that costs must be predictable, expeditious, flexible, fair and efficient. The underlying principle of the costs regime is that a successful litigant should recover approximately two-thirds of his or her actual and reasonable costs (HCR 14.2(d)).

12. The advantage of the scale lies mainly in its greater certainty, because the calculation of scale costs is reasonably predictable and simple. This is, in fact, one of the general principles applying to determination of costs in the High Court (HCR 14.2(g)).

13. However, one of the major criticisms of scale costs (both under the old High Court Rules 1985, and the new High Court Rules 2008) is that the appropriate daily recovery rates in Schedule 2 of the Rules do not reflect two-thirds of the market rate, and therefore the scale bears little resemblance to legal fees actually being incurred. In relation to the 1985 Rules, the commentary in *McGechan on Procedure* noted:

> The [daily recovery rates] do not reflect costs actually being charged throughout much of New Zealand. For litigation, particularly commercial litigation, conducted in the larger cities, the problem has become acute.

    The same concern has continued, despite the fact that the Rules Committee is meant to fix the rates in consultation with the New Zealand Law Society, the New Zealand Bar Association and the Legal Services Agency annually.

14. The other major criticism is that the reasonable time required for a particular step, under the various time bands, does not reflect the actual amount of time required.

Existing practice in the Employment Court

15. In the Employment Court, clause 19(1) of Schedule 3 to the Employment Relations Act 2000 confers on the Court a broad discretion to make orders as to costs. The Court's practice is to adopt two-thirds of actual and reasonable costs as the starting point. The relevant principles are well settled.[4] In *Health Waikato Ltd v Elmsly*,[5] the Court of Appeal stated:

---

[4] *Victoria University of Wellington v Alton-Lee* [2001] 1 ERNZ 305, *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438, and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.
[5] [2004] 1 ERNZ 172 (CA).

> While it would be open to the Employment Court, if it chose, to adopt the High Court approach to costs, it has not done so and it is, indeed, perfectly entitled to follow its existing practice, in terms of which costs actually and reasonably incurred are the relevant starting point.

16. The principal difference between the two practices is that in the Employment Court, the assessment of costs is a two-step inquiry: first, were the costs actually incurred by the successful party reasonable; and, secondly, at what level is it reasonable for the unsuccessful party to contribute to the successful party's costs (see *Binnie* at [8] and [14]). In contrast, the High Court has no regard to actual costs and uses a preconceived formula to calculate costs awards.

17. The other point of difference is that as part of maintaining effective case management, the High Court also makes use of costs as a tool to encourage efficiency in the conduct of litigation. In the High Court, costs on interlocutory applications will normally be fixed and payable immediately, regardless of the outcome of the main proceeding (HCR 14.8). Procedural intransigence and non-cooperation are also discouraged in awarding increased or indemnity costs (HCR 14.6). Successful parties also face the possible refusal or reduction in costs for failing on an issue which significantly increased costs, or taking or pursuing unnecessary steps or arguments (HCR 14.7).

18. Apart from these two principal differences, the Employment Court's existing practice largely mirrors or is consistent with many of the principles contained in the High Court Rules. For instance, the Employment Court may adjust the two-thirds starting-point up or down according to the circumstances of the case and the manner in which it was conducted: *Merchant v Chief Executive of the Department of Corrections* (AC26/09, 25 June 2009). Further, the Court is willing to reduce costs based on the conduct of parties before and during a hearing, and any conduct that unnecessarily added to the costs incurred: *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38.

Our comments

19. If the Judges' concerns are principally about the time required to determine costs, then we consider that "scale costs" would be the most appropriate method of assessment.

20. However, we consider that the Employment Court should maintain its existing approach for a number of reasons.

    (a) The policy has been followed for many years and provides sufficient flexibility while ensuring that justice is done between the parties. There is no ostensible reason to change the Employment Court's existing practice.

    (b) Parties who are successful in the Employment Relations Authority receive a minimal contribution towards their costs based on a daily tariff. There is always a substantial amount of irrecoverable costs that have been incurred by a successful party in proceedings before the Authority.

    However, we consider that the existing practice could be improved in a number of respects.

21. We acknowledge that typically, the Employment Court's method of assessing costs is more likely to result in a more generous award than would be the case pursuant to the High Court scale. However, it is important to note that the primary purpose of a costs award is to recompense a party who has been successful in litigation – and the focus is not on the effect on the unsuccessful party. Under the High Court Rules, the effect of a costs award on the unsuccessful party is not a relevant consideration. Also, higher costs awards would not act as a barrier to access to justice because in the employment jurisdiction, the filing fee for starting proceedings in the Authority is low; and parties also have access to free mediation services.

22. We consider that the actual market rates should be recognised by the Court. Otherwise, a successful litigant will be penalised or disadvantaged simply because they choose to engage one of the larger law firms instead of a lawyer who charges lower rates. For instance, in *Penney v Fonterra Co-Operative Group Limited*[6] the Court noted that an hourly rate of $590 plus GST was unreasonable "per se", despite the fact that the charge out rate is well within the range of market rates. In this respect, we note that a substantial amount of work is undertaken by specialist employment lawyers in the large corporate law firms in Auckland. Those firms charge market rates for their employment work, and those rates should be accepted by the Court when deciding costs.

23. We do not accept that it is reasonable to combine the Employment Court's existing practice with the costs regime contained in the High Court Rules. These are two, entirely separate systems based on different philosophies. While the general principles to be applied are substantially the same, the Rules Committee made a deliberate decision to propose the adoption of a scale, which is a formula that applies the daily recovery rate to the time required for each step in the proceeding.

24. Specifically, the Employment Court should not use the "appropriate daily recovery rate" as a cross-check as that may tend to distort the Employment Court's policy of awarding two-thirds of actual and reasonable costs, and it may tend to complicate and delay the process of assessing costs. We do not consider that it is appropriate for the Employment Court to have regard to the appropriate daily recovery rate contained in the High Court Rules for the following reasons:

    (a) Despite best intentions, the appropriate daily recovery rate in the High Court Rules does not reflect two-thirds of the market rate.

    (b) The daily recovery rate is part of a specific costs regime which together represents a complete system. It is not a valid comparison to contrast a practitioner's charge out rate against the "appropriate daily recovery rate", which already has a one-third discount applied and may simply not represent the market rate.

    (c) If the "appropriate daily recovery rate" is used, then that rate already represents two-thirds of a reasonable rate (HCR 14.2(d)). Therefore, the Employment Court would need to guard against the risk that a further reduction is made to the daily recovery rate, which would have the unintended consequence of doubling-up on the two-thirds multiplier.

25. With respect, we do not consider that the Court's comment in *Binnie* (namely, that the general approach of two days of preparation for each day of hearing) continues to be a useful "rough and ready" guide. While it might be appropriate to use this as a guide for final trial preparation, it does not take into account the overall costs of a proceeding which runs over many years and which involves numerous interlocutory stages – a more appropriate guide over the entire proceedings would be in the range of three to five days for each day of hearing.

26. We think the Employment Court should be prepared to fix costs on interlocutory applications and make them payable immediately, rather than reserving costs and dealing with them in the wash-up after judgment (c.f. HCR 14.8). Some cases involve a large number of interlocutory hearings, and the Court could be more proactive in case managing proceedings by using the award of costs to discourage interlocutory applications which lack merit; reflect an applicant's non-cooperative approach or put the successful party to unnecessary trouble, expense and delay.

[6] [2012] NZEmpC 67.

27. Finally, we suggest that the Court should reconsider a policy of allowing claims for service charges.[7] A service charge is a charge for general office services, including photocopying, facsimiles, telephone communications, deliveries, routine on-line searches and inquiries and similar. These are charged at a standard rate equal to say, 2.5% of fees. In the High Court, the objection to these charges is that they do not fall within the definition of a "disbursement" under the High Court Rules, and do not specifically identify individual charges. However, we consider that the High Court's approach has failed to keep up with market practice, and that a service charge actually represents a saving because it means that a firm does not need to go to the trouble and expense of recording each individual disbursement. Clients who engage firms that do not track individual disbursements for general office services should not be punished if that system actually results in a saving to them, which saving is then passed on to the unsuccessful party under a costs order.

28. In order to create greater certainty about the Court's approach to the assessment of costs, the Employment Court could issue a Practice Note dealing with the issue of costs. A Practice Note could clarify the Employment Court's policy; the relevant principles to be applied; what is required in terms of a memorandum on costs and supporting evidence; and the consequences of failing to provide sufficient information (i.e. the successful party runs the risk that the Court may decline to make an award).

29. For instance, a Practice Note might require counsel to file a memorandum on costs:

    (a) Attaching copies of invoices showing actual costs incurred, together with a detailed narrative showing a breakdown of the time and tasks carried out for each step of the proceeding.

    (b) Addressing other relevant factors, including:

        (i) the reasonableness of charge out rates;

        (ii) the complexity and significance of the case requiring counsel of a certain skill and experience;

        (iii) the urgency, complexity or novelty of the case;

        (iv) the conduct of the parties; and

        (v) whether the other side has contributed unnecessarily to the time or expense of the proceeding.

30. We would be happy to answer any questions concerning the above.

Bell Gully

[7] See, for instance: *Affco New Zealand Ltd v Anzco Foods Waitara Ltd (No.2)* (2005) 17 PRNZ 676; *Sax and Grace as trustees of the Peter Sax No.2 Trust v Dempsey Wood Civil Ltd* [2013] NZHC 1126.